The World Heritage Treaty: A Means To Federally Regulate Private Property for the Preservation of Cultural and Natural Heritage

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> Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.[1]

The United States is currently a party to a multilateral treaty[2] entitled Convention for the Protection of the World Cultural and Natural Heritage (World Heritage Treaty).[3] The treaty parties,[4] noting the grave threat posed by increasing population and development,[5] have

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1. M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819). *See* W. COWLES, TREATIES AND CONSTITUTIONAL LAW: PROPERTY INTERFERENCES AND DUE PROCESS OF LAW, § 10, at 10 (1941) for a discussion of this scope/depth distinction made by Chief Justice Marshall.

In the context of the Convention for the Protection of the World Cultural and Natural Heritage (World Heritage Treaty), November 23, 1972, 27 U.S.T. 37, T.I.A.S. No. 8226, the end sought is the preservation of cultural and natural heritage. This Note presents the argument that the federal treaty power encompasses the power to promulgate protective regulations for non-federally owned properties and that such regulations are therefore within the scope of the federal authority under the Constitution. See text & notes 13-129 *infra*. Once federal authority is established, however, there remains the issue of whether that authority has been constitutionally exercised. Accordingly, this Note further contends that generally applicable land use regulations are an appropriate and reasonable means to effectuate the World Heritage Treaty objectives. See text & notes 158-235 *infra*.

2. A treaty has been defined as "a compact between two or more individual nations with a view to the public welfare . . . entered into for the common advancement of their interests and the interests of civilization." United States v. Samples, 258 F. 479, 482 (W.D. Mo. 1919). A treaty is multilateral if more than two nations are party to it.

3. November 23, 1972, 27 U.S.T. 37, T.I.A.S. No. 8226. The treaty was drawn in Paris on November 23, 1972, and became effective in the United States on December 17, 1975. On March 1, 1976, President Gerald R. Ford issued a proclamation giving notice of the treaty to citizens of the United States. The treaty's text has been drawn in five languages: Arabic, English, French, Russian, and Spanish. *Id.* at 48.

4. As of January 1, 1980, the following States were parties to the treaty: Afghanistan, Algeria, Australia, Bolivia, Brazil, Bulgaria, Canada, Costa Rica, Cyprus, Denmark, Ecuador, Egypt, Ethiopia, France, Ghana, Guinea, Guyana, India, Iran, Iraq, Italy, Jordon, Libya, Mali, Morocco, Nepal, Niger, Nigeria, Norway, Panama, Pakistan, Poland, Saudi Arabia, Senegal, Sudan, Switzerland, Syrian Arab Republic, Tanzania, Tunisia, United States, Yugoslavia, Zaire. DEPARTMENT OF STATE, TREATIES IN FORCE 378 (January 1, 1980).

5. Preamble to World Heritage Treaty, 27 U.S.T. at 40, T.I.A.S. No. 8226. *See also* People

pledged international cooperation to preserve properties of universal cultural and natural value.[6] Toward this end, the treaty establishes what is known as the World Heritage List.[7] Relevant properties are identified according to criteria established by the World Heritage Committee[8] and then nominated by participating countries for inclusion in the list.[9] Although the United States has thus far nominated only federally-owned properties, it is currently considering the nomination of privately-owned lands which meet the list criteria.[10] If such nominations are made, private owners may be restricted to land uses that preserve their property's natural or cultural qualities. It is questionable whether such restrictions could be judicially enforced, however, since no implementing legislation has yet been passed to effectuate the treaty's purpose—even as to federally-owned lands.

This Note will first examine whether the World Heritage Treaty, and any federal legislation aiding its implementation, is within the constitutional scope of the treaty power. Reservation of state powers under the tenth amendment will be considered as a limitation on the nation's treaty-making authority. The Note will next consider whether the

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ex rel. Younger v. County of El Dorado, 5 Cal. 3d 480, 485-86, 487 P.2d 1193, 1195, 96 Cal. Rptr. 553, 555 (1971).

6. World Heritage Treaty, 27 U.S.T. at 40-41, T.I.A.S. No. 8226. Article 1 of the World Heritage Treaty defines cultural heritage as:

> [M]onuments: architectural works, works of monumental sculpture and painting, elements or structures of an archeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science;
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> [G]roups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science;
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> [S]ites: works of man or the combined works of nature and of man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological points of view.

Id. Article 2 of the World Heritage Treaty defines "natural heritage" as:

> [N]atural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view;
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> [G]eological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation;
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> [N]atural sites or precisely delineated areas of outstanding universal value from the point of view of science, conservation or natural beauty.

Id. at 41.

7. *Id.* at 43. The List forms an inventory of properties forming part of the cultural and natural heritage and is to be updated at least every two years. A List of World Heritage in Danger, a current compilation of properties on the World Heritage List that require international financial assistance for major conservation or restoration operations, will also be kept. *Id.* at 43.

8. *Id.* at 42-43. The Committee is comprised of 21 elected members representing the various cultures and regions of the world. *Id.* at 42. The Committee shall adopt rules of procedure, *id.* at 43, as well as criteria for inclusion of properties in the World Heritage List and the List of World Heritage in Danger. *Id.* These criteria may be found at 46 Fed. Reg. 3073, 3075 (1981).

9. *See* World Heritage Treaty, 27 U.S.T. at 43, T.I.A.S. No. 8226.

10. 46 Fed. Reg. 3073, 3074-75 (1981). Private property may, of course, be nominated with the written consent of the owner. *Id.* The issue as to general regulation of such properties, however, remains.

treaty is enforceable as domestic law in the United States. To be enforceable with regard to private individuals, implementing legislation must be passed by Congress unless the treaty's provisions are self-executing.[11] The treaty's provisions will therefore be examined to determine whether they are self-executing, and thus, whether implementing legislation need be passed by Congress. Furthermore, both treaty provisions and implementing legislation may be held invalid as domestic law if they do not meet constitutional due process requirements.[12] Consequently, treaty provisions and possible effectuating regulations will be analyzed in the light of due process standards.

SCOPE OF THE TREATY POWER

The power to make treaties is delegated to the federal government by the states under the United States Constitution.[13] Once signed and ratified by the Senate, treaties become the supreme law of the land by virtue of the supremacy clause.[14] If further action is necessary to implement treaty objectives, Congress is granted the power to take such action pursuant to the necessary and proper clause of the Constitution.[15]

The principal argument advanced against federal regulation under the treaty power has been based upon the tenth amendment to the Constitution. The tenth amendment reserves to the individual states those powers not delegated to the federal government.[16] Historically, land use regulation has been recognized as within those powers reserved to the states.[17] It is argued that since the treaty power must operate within

11. Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1824); Sei Fujii v. California, 38 Cal. 2d 718, 721, 242 P.2d 617, 622 (1952); *see* text & notes 134-36 *infra*. Such implementing legislation is authorized by the necessary and proper clause, U.S. CONST. art. I, § 8, cl. 18.

12. See text & note 170 *infra*.

13. U.S. CONST. art. II, § 2, cl. 2, providing that 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; . . . "

14. *Id.* art. VI, cl. 2. This clause states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or laws of any State to the Contrary notwithstanding.

15. *Id.* art. I, § 8, cl. 18. This clause states that the Congress shall have the power "to make all Laws which shall be necessary and proper for carrying into Execution . . . all . . . powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." *See* United States v. Belmont, 301 U.S. 324, 331-32 (1937) ("Within the field of its powers, whatever the United States rightfully undertakes, it necessarily has warrant to consummate"); Missouri v. Holland, 252 U.S. 416, 432 (1920) (any act of Congress which provides a reasonable means of effectuating a valid treaty of the United States is itself valid).

16. U.S. CONST. amend. X, providing, "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."

17. *See* Hauenstein v. Lynham, 100 U.S. 483, 484 (1880) (authority with regard to property rights resides primarily in state in which property is situated); United States v. Rockefeller, 260 F.

constitutional limitations, a treaty or congressional act effectuating it must comply with the Constitution in the same manner as a non-treaty statute.[18]

In *Missouri v. Holland*,[19] the Supreme Court rejected this argument.[20] This case involved the Migratory Bird Treaty,[21] ratified by the United States and Great Britian in 1916,[22] and its implementing legislation. The treaty's purpose was to preserve and protect certain species of birds that migrated annually between the United States and Canada.[23] Protective regulations effectuating the treaty were enacted by Congress in 1918. This legislation, known as the Migratory Bird Treaty Act,[24] was virtually identical to a statute passed by Congress prior to the treaty which had attempted to regulate the destruction of these birds in the United States.[25] This earlier statute was held an unconstitutional interference with police powers reserved to the states under the tenth amendment.[26] Missouri argued that the tenth amendment should apply "with equal force" to invalidate the Migratory Bird Treaty Act.[27]

The Supreme Court held that the division of legislative powers between the federal and state governments did not apply to the treaty power.[28] The Court reasoned that qualifications to the treaty power

346, 347 (D. Mont. 1919) (power to control inheritance of real property reserved to state); Hynning, *International Law: Unification of Private Property Laws*, 42 A.B.A.J. 1135, 1183 (1956).

18. Missouri v. Holland, 252 U.S. 416, 417-23, 429-30, 432 (1920).

19. 252 U.S. 416 (1920).

20. *Id.* at 433. The Court recognized a distinction in the supremacy clause, U.S. CONST. art. VI, cl. 2, between acts of Congress and treaties. 252 U.S. at 433. See note 14 *supra* for the text of this constitutional provision. Congressional acts are the supreme law of the land if made pursuant to the Constitution. 252 U.S. at 433. Treaties, on the other hand, are declared to be the supreme law of the land when made "under the authority of the United States." *Id.* It is not clear whether the phrase "under the authority of the United States" requires a treaty to be consistent with the Constitution. McLaughlin, *The Scope of the Treaty Power In the United States I*, 42 MINN. L. REV. 709, 740 (1958); *see* 252 U.S. at 433. The treaty power, however, is generally considered to derive from the Constitution. McLaughlin, *supra*, at 711-20; *see* 252 U.S. at 432. *But see* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 317-18 (1936) (treaty power is attribute of sovereignty and not dependent on constitutional delegation). The Constitution "governs the disposition of all powers" it grants. McLaughlin, *supra*, at 753; *see* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176-77 (1803); McLaughlin, *supra*, at 732. Consequently, the treaty power may not be validly exercised in a manner repugnant to the Constitution. *Id.* at 753.

21. August 16, 1916, 39 Stat. 1702, T.S. No. 628.

22. 252 U.S. at 431.

23. *Id.*; Migratory Bird Treaty, Preamble, August 16, 1916, 39 Stat. at 1702, T.S. No. 628.

24. 252 U.S. at 431; Migratory Bird Treaty Act, ch. 128, 40 Stat. 755 (1918).

25. 252 U.S. at 432.

26. *Id.*

27. *Id.*

28. *Id.* at 432-33; *accord*, Chae Chan Ping v. United States, 130 U.S. 581, 604 (1889) (federal-state government distinction exists for local affairs, but not where foreign relations are involved); United States v. Thompson, 258 F. 257, 260 (1919) ("Divided within, we present without, the exterior of undivided sovereignty"); McLaughlin, *supra* note 20, at 741 (with regard to subject matter, legislative power divided horizontally between nation and states, but treaty power not constitutionally divided this way and thus "includes a vertical cross-section of the subjects which are horizontally divided for legislative purposes").

must be determined by a different standard which more readily assumes a power in the federal government to act in matters of national concern where "the States individually are incompetent to act."[29] Although the Court held that the treaty power is not limited by the tenth amendment,[30] it intimated that the treaty power is nevertheless subject to other constitutional restraints.[31]

This tenth amendment exception to Constitutional restraints on the treaty power is justified, and perhaps clarified, via an alternative line of reasoning.[32] In actuality, the tenth amendment is not excepted, but rather is simply incapable of violation by a treaty. Areas of concern which normally fall within the jurisdiction of the individual states are not reserved to the states when made the subject of a treaty because they are necessarily included in the states' prior express delegation of the treaty power to the federal government. The next section will more closely examine the nature of this delegation.

State Delegation of Powers

The treaty power under the Constitution is not only both general in terms and without any express limitation, but is accompanied by an absolute prohibition of treaty power to the states.[33] States have therefore conferred the whole of their treaty power to the federal government.[34] This delegation must necessarily include police powers to regulate internal affairs of the states; otherwise, there would be areas of concern where neither the federal government nor the states would have authority to act.[35]

Where the Constitution grants the federal government powers of legislation or treaty, that power is "superior to state constitutions and

29. 252 U.S. at 433.

30. *Id.* at 433-35.

31. *Id.* at 433. After noting that it did not mean to imply that the treaty power was unqualified, the Court specifically held that the Migratory Bird Treaty and its implementing act did not violate any express prohibitions found in the Constitution. *Id.* Although no treaty has ever been found to be unconstitutional, McLaughlin, *supra* note 20, at 754-55; *see* United States v. Thompson, 258 F. 257, 260 (E.D. Ark. 1919); K. HOLLOWAY, MODERN TRENDS IN TREATY LAW 304 n.99 (1967), courts have generally agreed that constitutional restraints apply. *See* text & note 49 *infra*.

32. The inspiration for this line of reasoning is found in the *Holland* opinion itself. 252 U.S. at 432 ("not enough to refer to the 10th Amendment, reserving the powers not delegated to the United States, because . . . the power to make treaties is delegated expressly").

33. U.S. CONST. art. I, § 10, cl. 1 states: "No State shall enter into any Treaty, Alliance, or Confederation. . . ." *See* Baldwin v. Franks, 120 U.S. 678 (1887) (upholding treaty that allowed Congress to enact legislation normally in province of states to aid Chinese subjects in the United States). The *Baldwin* Court stated, "That the treaty-making power has been surrendered by the states and given to the United States is unquestionable." *Id.* at 682.

34. United States v. Thompson, 258 F. 257, 259 (E.D. Ark. 1919), *citing* Attorney General Cushing in Droit D'Aubaine, 8 OP. ATT'Y. GEN. 411, 415 (1857); *see* United States v. Selkirk, 258 F. 775, 776 (S.D. Tex. 1919).

35. Hauenstein v. Lynham, 100 U.S. 483, 490 (1880); United States v. Thompson, 258 F. 257, 259, 263 (E.D. Ark. 1919).

state laws, and to all other powers, including police powers, ordinarily belonging to the states."[36] Delegation of police powers to the federal government under the Constitution, however, does not give the federal government exclusive jurisdiction over the area.[37] States may still fully exercise these powers in any manner that is not inconsistent with federal legislation or treaties.[38]

On many occasions the federal government has exercised a police power similar to that traditionally reserved to the states. The Supreme Court has upheld such regulatory practices pursuant to the commerce power,[39] the war power,[40] the taxing power,[41] the treaty power,[42] the power to improve navigation,[43] and the federal power conferred by the property clause.[44] In such cases, all the federal government need estab-

36. United States v. Samples, 258 F. 479, 482 (W.D. Mo. 1919). This result is a logical extension of the idea that when an agent is granted the authority to act for a principal, the agent's acts are binding on the principal who delegated the authority. *See* United States v. Thompson, 258 F. 258, 260 (E.D. Ark. 1919) (treaty binding on states which delegated authority for its making); United States v. Selkirk, 258 F. 775, 776 (S.D. Tex. 1919) (federal government is an agent for all the states in making treaties).

37. *See* Blythe v. Hinckley, 180 U.S. 333, 340-42 (1901); United States v. Rockefeller, 260 F. 346, 348 (D. Mont. 1919); *cf.* Henkin, *The Treaty Makers and the Law Makers: The Law of the Land and Foreign Relations*, 107 U. PA. L. REV. 903, 909 (1959) (police power rights are "defeasibly" vested in the states subject to federal preemption). *See also* text & notes 111-12 *infra* (premise holds true on state vs. municipality level as well).

38. *See* authority cited in note 37 *supra*.

39. U.S. CONST. art. I, § 8, cl. 3. *See* Douglas v. Sea Coast Products, Inc., 431 U.S. 265, 284 (1977) (supremacy clause held to invalidate Virginia laws preventing federally licensed foreign-owned fishing vessels from fishing in Virginia's waters). United States v. Thompson, 258 F. 257, 264 (E.D. Ark. 1919), cites a list of regulatory acts of Congress that have been sustained under the commerce clause.

40. U.S. CONST. art. I, § 8, cls. 11, 12, 13, and 14; *see* McKinley v. United States, 249 U.S. 397, 398-99 (1919) (upholding the prohibition of private whorehouses within a certain distance of military camps).

41. U.S. CONST. art. I, § 8, cl. 1; *see* United States v. Thompson, 258 F. 257, 264 (E.D. Ark. 1919) (citing Supreme Court cases in which congressional acts interfering with state powers have been sustained under the taxing power).

42. U.S. CONST. art. II, § 2, cl. 2; *see* Asakura v. City of Seattle, 265 U.S. 332, 341 (1924) (city ordinance which confined ownership of pawnbroking business to U.S. citizens held invalid as applied to Japanese citizen, since treaty with Japan promised equal rights).

43. This power arises out of the power to regulate commerce, U.S. CONST. art. I, § 8, cl. 3. Gilman v. Philadelphia, 70 U.S. (3 Wall.) 713 (1866). *See* Arizona v. California, 283 U.S. 423, 458 (1931) (U.S. has power to construct dam across Colorado River to improve navigation without conforming to requirements of plan approval by the state in which dam is located). The Court noted that the "possible abuse of the power to regulate navigation is not an argument against its existence." *Id.* at 457. The Court therefore declined to invalidate the exercise of federal authority on the grounds that purposes other than navigation were being served. *Id.* at 456. Noting that the Colorado River was the subject of several treaties between the United States and Mexico, *id.* at 458 n.10, the Court mentioned the possibility of upholding the federal action as a means of performing international obligations. *Id.* at 457-58. Thus, the Court recognized the validity of the proposition that federal authority for regulation of non-federal lands can be constitutionally conferred under the treaty power. *Id.*

44. U.S. CONST. art. IV, § 3, cl. 2 provides: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting . . . Property belonging to the United States. . . ." *See* Kleppe v. New Mexico, 426 U.S. 529 (1976) (Wild Free-Roaming Horses and Burros Act, 16 U.S.C. §§ 1331-1340, held to be a valid exercise of federal power under the property clause). The Court held that the power conferred with respect to public lands was unlimited and therefore included the power to regulate and protect wildlife inhabiting the lands. 426 U.S. at 539-41. In rejecting the argument that the Act invaded states rights under the tenth amendment,

lish is the grant of the power to the federal government and its legitimate exercise.[45] In addition, the tenth amendment has been consistently construed as not restricting the federal government's authority to utilize all reasonable and appropriate means to accomplish the full exercise of its delegated power.[46] Having delegated all authority to make treaties and to enact legislation necessary to their effectuation, the states have retained no powers in this area that are capable of tenth amendment protection.[47]

Does this mean that the treaty power is unlimited in its scope? It is clear that the terms of the constitutional grant contain no express limitations.[48] Nevertheless, courts have generally held that the treaty power does not extend "so far as to authorize what the Constitution forbids."[49] In addition, some authorities suggest that use of the treaty

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the Court invoked the supremacy clause. Under that provision, federal legislation authorized by the property clause necessarily invalidates any conflicting state laws. *Id.* at 543. *See* United States v. Alford, 274 U.S. 264, 267 (1927) (property clause prohibited conduct on private lands which endangered public forests); Camfield v. United States, 167 U.S. 518, 528 (1897) (property clause prohibited posting of fences on private property which enclosed federal land).

45. United States v. Samples, 258 F. 479, 482 (W.D. Mo. 1919). Federal courts have acknowledged that the conflict of jurisdiction between federal and state powers in a treaty situation is no different from the conflict encountered whenever any power constitutionally conferred to the federal government is exercised. *Id.*; United States v. Rockefeller, 260 F. 346, 347 (D. Mont. 1919). The states have agreed to this federal preemption by ratification of the Constitution. *Id.*

46. United States v. Darby, 312 U.S. 100, 124 (1941); *see, e.g.*, United States v. Sprague, 282 U.S. 716, 733 (1931); Gordon v. United States, 117 U.S. 697, 705 (1864); M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405-06 (1819). In *Darby*, the Supreme Court stated:

> The [tenth] amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments *as it had been established by the Constitution before the amendment* or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.

312 U.S. at 124-25 (emphasis added).

47. *See* note 46 *supra*. *See also* text & notes 32-35 *supra*.

48. See note 13 *supra*, for text of the constitutional grant of the treaty power; note 14 *supra*, for text of the supremacy clause; and note 20 *supra*, for discussion concerning interpretation of the language used in these provisions.

49. Geofroy v. Riggs, 133 U.S. 258, 267 (1890); *see* Reid v. Covert, 354 U.S. 1 (1957), where treaty-implementing legislation providing military trials for civilian dependents of overseas servicemen was held invalid as denying a military wife who had murdered her husband the constitutional protections of article III and the fifth and sixth amendments. *Id.* at 5-6, 18-19. The *Reid* Court stated that "no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution." *Id.* at 16. The Court noted that its decision was in harmony with *Missouri v. Holland*, since the implementing legislation involved in that case was not inconsistent with any specific provision of the Constitution. *Id.* at 18; *see* text & note 31 *supra*.

Earlier cases in which the Supreme Court has suggested that there are constitutional restraints on the treaty power include Missouri v. Holland, 252 U.S. 416 (1920); Geofroy v. Riggs, 133 U.S. 258 (1890); Hauenstein v. Lynham, 100 U.S. 483 (1880). *But see* United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936), in which the Supreme Court suggested in dictum that the treaty power is an attribute of sovereignty and therefore not dependent on a constitutional delegation. *Id.* at 317-18. If such were the case, even the Constitution would impose no limits on the power. The *Curtiss-Wright* dictum has, however, been highly criticized. *See, e.g.*, Deutsch, *The Need for a Treaty Amendment: A Restatement and a Reply*, 38 A.B.A.J. 735, 735 & n.4 (1952); Goebel, *Constitutional History and Constitutional Law*, 38 COLUM. L. REV. 555, 571-73 (1938); Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467, 493-97 (1946); McLaughlin, *supra* note 20, at 717. Furthermore, this notion of powers

power is, or should be, impliedly limited to certain classes of subject matter.[50] The next section considers the proposed subject matter restrictions and analyzes the effect of each on the validity of the World Heritage Treaty.

Proper Treaty Subjects

The Supreme Court has held that the treaty-making power embraces all subjects which may be properly negotiated between the United States and other nations.[51] The scope of the phrase "proper subjects of negotiation between nations," however, has been heavily debated. The issue is whether the phrase may be drawn narrowly enough to constitute some sort of implied limitation on the treaty power.[52]

Various tests defining proper treaty subjects have been proposed. The most widely accepted tests originated in *Missouri v. Holland*.[53] In upholding the Migratory Bird Treaty and its implementing act, the Supreme Court pointed out that preservation of migratory birds was a

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inherent in the federal government was clearly rejected by the Supreme Court in Reid v. Covert, 354 U.S. 1 (1957). "The United States is entirely a creature of the Constitution. Its power and authority have no other source." *Id.* at 5-6.

50. *See, e.g.*, authorities and suggestions referred to in text & notes 57, 61, and 69 *infra*.

51. Ross v. McIntyre, 140 U.S. 453, 463 (1891); Geofroy v. Riggs, 133 U.S. 258, 267 (1890).

52. *See, e.g.*, F. ALLEN, THE TREATY AS AN INSTRUMENT OF LEGISLATION 41-46 (1952) (subject matter must be of international concern); Deutsch, *International Covenants on Human Rights and Our Constitutional Policy*, 54 A.B.A.J. 238 (1968) (national or domestic matters outside scope of proper treaty subjects); Raymond, *Don't Ratify the Human Rights Conventions*, 54 A.B.A.J. 141 (1968) (proper treaty subjects limited to those that secure action by foreign governments in manner advantageous to U.S.). *But see, e.g.*, United States v. Samples, 258 F. 479, 483 (W.D. Mo. 1919) (attempt to further narrow or define phrase is senseless); Bitker, *Genocide Revisited*, 56 A.B.A.J. 71, 73 (1970) (human rights is proper treaty subject—not only domestic but international concern); Deutsch, *The Treaty-Making Clause: A Decision for the People of America*, 37 A.B.A.J. 659, 713 (1951) (attempt at definition of treaty subjects unwise; author suggests constitutional amendment); Henkin, *"International Concern" and the Treaty Power of the United States*, 63 AM. J. OF INT'L L. 272 (1969) (international concern requirement may not exist; in any event, it has been exaggerated and misapplied).

53. 252 U.S. 416 (1920). *See* text accompanying notes 19-32 *supra*, for a discussion of this case. In actuality, the "international concern," "reciprocal benefits," and "inadequate protection" tests may be traced to lower federal cases preceding Missouri v. Holland which dealt with the same issues. *See* United States v. Rockefeller, 260 F. 346 (D. Mont. 1919); United States v. Samples, 258 F. 479 (W. D. Mo. 1919).

Slight variations on these three tests have been suggested. *See, e.g.*, F. ALLEN, *supra* note 52, at 105 ("direct and substantial" versus "indirect and incidental" interference with domestic jurisdiction test discussed in note 61 *infra*); Raymond, *supra* note 52 (treaty must secure foreign action advantageous to United States); *The Making of Treaties and Executive Agreements*, 28 STATE DEPT. BULL. 591, 591-92 (statement of Secretary of State John Foster Dulles) (1953) (treaties designed to effectuate internal changes unacceptable because not within traditional limits), *cited in* McLaughlin, *The Scope of the Treaty Power in the United States II*, 43 MINN. L. REV. 651, 667 (1959).

In addition, it is possible that other tests exist. *See, e.g.*, Reid v. Covert, 354 U.S. 1, 18-19 (1957) (treaty subject that violates constitutional rights of individuals not proper); Geofroy v. Riggs, 133 U.S. 258, 267 (1890) (cessation of portion of territory without its consent or change in character of federal or state government not proper treaty subject); Holden v. Joy, 84 U.S. (17 Wall.) 211, 243 (1872) (proper treaty subjects must be consistent "with the nature of our government and the relation between the states and the United States").

"national interest of very nearly the first magnitude . . .,"[54] that the treaty provided mutual benefits and restrictions for both Canada and the United States,[55] and that the only means of protection was by "national action in concert with that of another power."[56] These tests will be individually evaluated and applied to the World Heritage Treaty.

a. Matters of International Concern vs. Matters of Purely Local Concern

It has been suggested that the subject matter of a treaty must be of "international concern."[57] The underlying rationale for this theory is that since both federal and state legislatures are authorized to enact laws relating to domestic matters, a treaty is unnecessary and therefore inappropriate.[58] The theory was first contemplated in a 1929 address by Charles Evans Hughes, former Chief Justice of the United States Supreme Court.[59] It was later seized upon and strongly advocated in the 1950's and 60's with regard to the United Nations Charter and the International Covenants on Human Rights.[60] Lending further authority to this contention, the Restatement on the Foreign Relations Law of the United States declares that "[a]n international agreement of the United States must relate to the external concerns of the nation as distinguished from matters of a purely internal nature."[61]

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54. 252 U.S. at 435.
55. *Id.* at 431.
56. *Id.* at 435.
57. *See, e.g.*, F. ALLEN, *supra* note 52, at 41-46; Deutsch, *International Covenants*, *supra* note 52, at 241; Raymond, *supra* note 52, at 142-43.
58. Raymond, *supra* note 52, at 142, *citing A Report of the American Bar Association's Standing Committee on Peace and Law Through U.N.*, 1 INT'L LAW. 600-29 (1967).
59. "The [treaty-making] power is to deal with foreign nations with regard to matters of international concern." AM. SOC'Y OF INT'L L. PROCEEDINGS 194 (1929).
60. In the early 1950's a great debate raged over ratification of the United Nations Charter, June 26, 1945, 59 STAT. 1031, T.S. No. 993, and other United Nations Conventions designed to set international standards with regard to human rights. *See generally* articles cited in note 52 *supra*. The concern of many was that such treaties would allow other nations to affect our domestic affairs and tamper with our constitutional freedoms. As one fearful commentator warned, "[P]ut these, or similar pronouncements, in treaty form, ratified by the Senate, and you have by a few pages of treaty language transformed the Government of the United States into a socialistic state." Holman, *Treaty Law-Making: A Blank Check for Writing a New Constitution*, 36 A.B.A.J. 707, 788 (1950). *See* note 132 *infra* (inadequacy of requirements for ratification). *But see* notes 132 & 134 *infra* (present safeguards limiting effect of treaty power).

The apprehension became so great that a constitutional amendment which would have explicitly overruled *Missouri v. Holland* was introduced in Congress in 1952. Dickson, *The Segregation Cases: Equal Justice Under Law for All Citizens*, 42 A.B.A.J. 730, 730-31 (1956). Known as the Bricker Amendment, it contained the following sections: "1. A provision of a treaty which conflicts with this Constitution shall not be of any force or effect. 2. A treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of a treaty." Hatch, *The Treaty-Making Power: An Extraordinary Power Liable to Abuse*, 39 A.B.A.J. 808, 808 (1953). After nationwide debate, the proposed amendment was defeated in 1954. Dickson, *supra* at 730-31. Such defeat signals congressional approval of the doctrine in *Missouri v. Holland*, thereby strengthening its authority.
61. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 117(1)(a) (1965). The Restatement recognizes, however, that "[m]atters of international concern

Some opponents of the "international concern" requirement point out that the subject of every treaty, by virtue of being the subject of an agreement with a foreign power, becomes a matter of "international concern."[62] Whether a matter is of international concern, argue others, is an evolving concept and must be decided in the light of present circumstances.[63] The courts, however, have never required that a treaty's subject matter be "wholly foreign," "international," or "external."[64] Treaties dealing with such domestic affairs of the states as debts, land titles, and escheat have long been upheld by the Supreme Court.[65] In fact, real property concerns, normally considered to be within the states' jurisdiction, were among the first treaty subjects of the United States as a new nation.[66] Over the years, many treaties have regulated activities of United States citizens within the United States.[67] The Supreme Court has acknowledged that a treaty may override state power regarding a "great body of private relations" usually falling within state control.[68] One federal court, although agreeing with these concepts, has added, however, that a treaty's subject matter must not be

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are not confined to matters exclusively concerned with foreign relations; usually matters of international concern have both international and domestic effects and the existence of the latter does not remove a matter from international concern." *Id.*

Agreeing with this concept, one commentator had proposed a constitutional amendment testing "international concern" before treaty ratification. If a treaty "directly and substantially interferes with the domestic jurisdiction [it] is invalid except where the subject matter presents a truly international problem which requires international action to handle it." F. ALLEN, *supra* note 52, at 105. An "indirect and incidental interference" with internal affairs, however, would not invalidate a treaty otherwise dealing with international subjects. *Id.* at 44.

62. Deutsch, *International Covenants*, *supra* note 52, at 242; Henkin, *supra* note 52, at 272. *See also* Fellom v. Redevelopment Agency, 157 Cal. App. 2d 243, 247, 320 P.2d 884, 887 (1958) (mere fact of state legislation shows sufficient statewide purpose to avoid constitutional conflict with home rule provisions); note 103 *infra* (compact between two states is proof of regional subject matter).

63. O. SCHACHTER, TOWARD WIDER ACCEPTANCE OF U.N. TREATIES 112-13 (1971); Henkin, *supra* note 37, at 910, 913; *see* F. ALLEN, *supra* note 52, at 41-42 (acknowledging recent expansion of areas of international concern).

64. Bitker, *supra* note 52, at 73. *See, e.g.*, Asakura v. Seattle, 265 U.S. 332 (1924) (conduct of pawnbroking business by alien); Hauenstein v. Lynham, 100 U.S. 483 (1880) (right of aliens to inherit real estate); Chirac v. Chirac, 15 U.S. (2 Wheat.) 259 (1817) (right of aliens to purchase and hold land); Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796) (debts).

65. *See* note 64 *supra*.

66. Hynning, *supra* note 17, at 1183-84. The first treaties of the United States were the French Treaty of 1778 and the 1783 Treaty of Peace with Great Britian after the Revolutionary War. *Id.* The French Treaty provisions securing property rights for French nationals in the United States were upheld in Chirac v. Chirac, 15 U.S. (2 Wheat.) 259 (1817). The 1783 British Treaty and the Jay Treaty of 1794 protected property rights for British citizens in the United States and provided for payment of private debts to British property holders. These treaties were held superior to Virginia's sequestration laws even though they were made prior to the adoption of the Federal Constitution. The Supreme Court in Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796) held that the supremacy clause applied retrospectively with regard to treaties.

67. Bitker, *supra* note 52, at 73. A partial list of these treaties is found in *Hearings on the Slavery Treaty Before a Subcomm. of the Senate Comm. on Foreign Relations*, 90th Cong., 1st Sess. 89 (1967).

68. Missouri v. Holland, 252 U.S. 416, 434 (1920).

"arbitrary, disconnected and remote from international discourse."[69]

There can be little doubt that property of unique natural or cultural value is a matter of international concern. Treaty provisions explicitly state that such heritage belongs to mankind as a whole[70] and that harm to even a small portion of it harms "the heritage of all."[71] Furthermore, federal interference with state and local property laws is not direct and substantial, but merely incidental to effectuation of the international end.[72] Thus, even if the courts of this country adopt the "international concern" test, it would operate to validate the World Heritage Treaty as a legitimate exercise of the treaty power.

b. *Mutuality and the Reciprocal Benefits Test*

A second test inferred in *Missouri v. Holland*[73] as defining proper treaty subjects is the reciprocal benefits test. The test may have actually originated in *United States v. Samples*.[74] In *Samples*, a federal court considered the same Migratory Bird Treaty[75] and implementing act later upheld in *Missouri v. Holland*.[76] The court concluded that the "controlling consideration" in determining the propriety of a treaty subject is its effect upon the interests of the treaty parties.[77] If all parties to the treaty receive "mutual and reciprocal advantages," then the subject is properly within the treaty power.[78]

The United States government has stated that the purpose of a treaty is to obtain action by a foreign government in a way that promotes or is advantageous to federal interests.[79] Presumably, the treaty-producing motives of other nations are similar. It is thus arguable that United States courts could validate a treaty under the reciprocal benefits test simply by finding that the treaty was beneficial to the United States.

Regardless of the scope of inquiry required, it is clear that the subject matter of the World Heritage Treaty is proper under the reciprocal benefits test since the preservation of world heritage is advantageous to

69. United States v. Samples, 258 F. 479, 481-82 (W.D. Mo. 1919) (protection of migratory birds is proper treaty subject).

70. World Heritage Treaty, Preamble, November 23, 1972, 27 U.S.T. at 40, T.I.A.S. No. 8226.

71. *Id.*

72. *See* note 61 *supra*.

73. 252 U.S. 416 (1920).

74. 258 F. 479 (W.D. Mo. 1919).

75. August 16, 1916, 39 Stat. 1702, T.S. No. 628; see text & notes 21-34 *supra*.

76. 252 U.S. 416 (1920); see text & notes 19-32 *supra*.

77. 258 F. at 484. The court added that the reciprocal benefits attained must be "tangible and proximate." *Id.*

78. *Id.*

79. Deutsch, *International Covenants*, *supra* note 52, at 241, *citing* DEP'T OF STATE CIRCULAR No. 175 (December 13, 1955); Raymond, *supra* note 52, at 141, *citing* FOREIGN SERVICE MANUAL § 311.

all nations concerned.[80] The people of the United States gain by securing the promise of other nations to prevent destruction of world heritage located within their boundaries. Other nations party to the treaty obtain a similar benefit.

c. *Inadequate Protection in the Absence of a Treaty*

In *Missouri v. Holland*,[81] the Court noted that destruction of migratory birds was a problem extending across national borders which required international cooperation to resolve.[82] Reliance on state powers of action would be fruitless, stated the Court, adding that, "[b]ut for the treaty and statute there soon might be no birds for any powers to deal with."[83] The situation concerning the preservation of world cultural heritage is strikingly similar.[84] In the preamble to the World Heritage Treaty, it is noted that the properties sought to be protected are "unique and irreplaceable," and that "in view of the magnitude and gravity of the new [social and economic] dangers threatening them, it is incumbent on the international community as a whole to participate in [their] protection. . . ."[85]

In the absence of a treaty, the federal government may, under the powers of eminent domain, acquire private property in order to insure its protection. In so doing, however, the government must pay just compensation to the owners of the property.[86] Because the number of properties in need of protection greatly exceeds the nation's acquisition funds, eminent domain powers do not provide satisfactory protection

80. *See* United States v. Rockefeller, 260 F. 346, 347-48 (D. Mont. 1919) (destruction caused by one constitutes harm to all, protection by all constitutes benefit for all); World Heritage Treaty, Preamble, November 23, 1972, 27 U.S.T. at 40, T.I.A.S. No. 8226; *cf.* note 84 *infra* (same premise but on interstate, rather than international, scale).

81. 252 U.S. 416 (1920).

82. *Id.* at 435.

83. *Id.*

84. There is one distinction that should be noted, however. Objects of cultural and natural heritage, unlike birds, are stationary. The Court in *Missouri v. Holland* seemed to emphasize the transitory nature of birds as indicative of the state's inability to protect them. *Id.* at 434-35. There are other reasons, however, why state and local authorities have provided inadequate heritage protection. In certain instances, the heritage to be protected extends across the boundaries of several states or municipalities, *i.e.*, San Francisco Bay or Lake Tahoe. *See* text & notes 103-05 *infra*. In most cases, however, the problem is simply that states and localities are reluctant to put their preservation interests ahead of their interest in economic growth. *See* People *ex. rel.* Younger v. County of El Dorado, 5 Cal. 3d 480, 494 n.16, 487 P.2d 1193, 1201 n.16, 96 Cal. Rptr. 553, 561 n.16 (1971) (inadequate protection of Lake Tahoe by surrounding communities in two states). If cultural and natural assets may eventually be destroyed by others, regardless of a state's action, the state will have no motive to regulate. In fact, there will be disincentive to act since by so doing the state would be losing its share of the more immediate economic benefits to be gained through non-regulation with little or no corresponding benefit. By regional or national regulation, the states would each give up a smaller measure of economic gain and all would reap the benefits of preservation. *See id.*

85. World Heritage Treaty, Preamble, November 23, 1972, 27 U.S.T. at 40, T.I.A.S. No. 8226.

86. U.S. CONST. amend. V.

of natural and cultural heritage in this country.[87] Furthermore, reliance on protection by the police powers of the individual states has proven to be inadequate because political and economic pressures upon states and their elected representatives concerning growth, industry, and development are great and often outweigh the less tangible preservation interests.[88]

Two California cases provide an illustration of the preceding concepts on an interstate, as opposed to an international, scale. The cases involve state delegation of police powers to effect a broader regional protection of endangered natural heritage. At issue in *People ex rel. Younger v. County of El Dorado*[89] was an interstate compact entered into by California and Nevada for the purpose of providing regional environmental protection and regulations for the development of the Lake Tahoe Basin.[90] The compact and the issues decided by the California Supreme Court are parallel in many respects to the World Heritage Treaty and the arguments presented here for the validity of federal land use regulation under the treaty.

In 1968, California and Nevada, recognizing the need for interstate cooperation to preserve the irreplaceable ecology of Lake Tahoe,[91] entered into the Tahoe Regional Planning Compact.[92] As required by the United States Constitution,[93] the compact was passed by both the California and Nevada legislatures and ratified by the United States Congress.[94] The compact established the Tahoe Regional Planning Agency[95] and endowed it with broad powers to formulate and enforce a regional plan for environmental conservation and resource

87. *See* World Heritage Treaty, Preamble, November 23, 1972, 27 U.S.T. at 40, T.I.A.S. No. 8226 (insufficiency of financial resources as cause of inadequate protection by individual countries considered in adopting treaty); Pennsylvania Cent. Transp. Co. v. New York City, 438 U.S. 104, 109 n.6 (1978) (widespread concensus that public ownership of historic urban landmarks "neither feasible nor wise" because it reduces tax base, burdens the public budget, and results in property use as "museum" rather than "economically productive" city feature); Costonis, *"Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies*, 75 COLUM. L. REV. 1021, 1022 (1975) (eminent domain is "fiscally impracticable and too drastic for the modest regulatory purposes at hand"); Note, *The New York City Landmarks Law*, 11 U. S.F.L. REV. 722, 733 (1977). *See also* note 117 *infra*.

88. *See* note 84 *supra*; text & notes 103-05 *infra*.

89. 5 Cal. 3d 480, 487 P.2d 1193, 96 Cal. Rptr. 553 (1971).

90. *Id.* at 487, 487 P.2d at 1195-96, 96 Cal. Rptr. at 555-56.

91. *See id.* at 487 n.6, 487 P.2d at 1195-96 n.6, 96 Cal. Rptr. at 555-56 n.6.

92. CAL. GOV'T CODE § 66801 (West 1968).

93. U.S. CONST. art. I, § 10, cl. 3 states in relevant part: "No state shall, without the consent of Congress, . . . enter into any agreement or compact with another state. . . ."

94. 5 Cal. 3d at 487, 487 P.2d at 1195-96, 96 Cal. Rptr. at 555-56; *see* CAL. GOV'T CODE § 66800 (West 1968).

95. 5 Cal. 3d at 487, 487 P.2d at 1196, 96 Cal. Rptr. at 556; CAL. GOV'T CODE § 66801, art. III(a) (West 1968). The agency's ten-member governing body is composed of representatives from counties of California and Nevada, with an equal number from each state. 5 Cal. 3d at 488, 487 P.2d at 1197, 96 Cal. Rptr. at 557. Compare the composition of this agency with the World Heritage Committee. *See* World Heritage Treaty, art. 8, November 23, 1972, 27 U.S.T. at 42, T.I.A.S. No. 8226.

development.[96] The agency was "given the power to 'adopt all necessary ordinances, rules, regulations and policies to effectuate the adopted regional . . .' plan."[97]

Counties and municipalities in California objected that the compact provisions and agency regulations were an unconstitutional interference with the local police power granted them by the home-rule provisions[98] of the California Constitution.[99] The California Supreme Court held that the compact and agency regulations were constitutional since the "subject matter of the compact was regional in nature" and "beyond the scope of the home-rule powers."[100] In determining the subject matter of the compact, the court deferred to the declarations of purpose contained in the compact itself,[101] stating that "such findings

96. 5 Cal. 3d at 487, 487 P.2d at 1196, 96 Cal. Rptr. at 556.

97. *Id.* at 488, 487 P.2d at 1196, 96 Cal. Rptr. at 556; CAL. GOV'T CODE § 66801, art. VI(a) (West 1968). *Compare* this provision *with* the necessary and proper clause, U.S. CONST. art. I, § 8, cl. 18. See note 15 *supra*, for the text of this constitutional provision.

98. CAL. CONST. art. 11, § 11 formerly provided, "Any county, city, town or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with the general laws." Article 11, section 11 was repealed June 2, 1970. CAL. CONST. art. 11, § 7, added June 2, 1970, restates the contents of former article 11, section 11 "without change in meaning." People *ex rel.* Younger v. County of El Dorado, 5 Cal. 3d at 494 n.17, 487 P.2d at 1201 n.17, 96 Cal. Rptr. at 561 n.17. *Compare* CAL. CONST. art. 11 *with* U.S. CONST. amend. X, text & note 20 *supra*.

99. 5 Cal. 3d at 494, 487 P.2d at 1201, 96 Cal. Rptr. at 561. Individual landowners, who were denied certain forms of development, also filed suits alleging that the agency's regulations were unconstitutional under the fifth amendment as a taking of their property without compensation. J. BANTA, F. BOSSELMAN & D. CALLIES, THE TAKING ISSUE 40 (1973). *See also* Candlestick Properties, Inc. v. San Francisco Bay Conservation & Dev. Comm'n, 11 Cal. App. 3d 557, 570-72, 89 Cal. Rptr. 897, 904-06 (1970) (fifth amendment "taking" argument pleaded and lost under similar circumstances).

100. J. BANTA, F. BOSSELMAN & D. CALLIES, *supra* note 99, at 227, *citing* 5 Cal. 3d at 493, 487 P.2d at 1200, 96 Cal. Rptr. at 560-61. Although the "planning and zoning" powers conferred upon the agency under the Interstate Compact were the same types of powers formerly delegated to municipalities under the state constitution, the California Supreme Court held that the powers granted the Agency were not the same powers already possessed by the counties. *Id.* at 497, 487 P.2d at 1204, 96 Cal. Rptr. at 563. The court found the distinction to be that each county's reserved power to regulate land use was local in nature, while the agency's power to regulate land use was regional. *Id.* Local planning and zoning was still reserved to the municipality, although the exercise of the agency's power might affect the locality. *Id.* Since the *Younger* court found the documents to be consistent with home-rule powers, the court found it unnecessary to decide whether, under the supremacy clause of the United States Constitution, the compact provisions would prevail over the California Constitution. *Id.* at 492 n.13, 487 P.2d at 1200 n.13, 96 Cal. Rptr. at 560 n.13.

Following the rationale of the *Younger* court, it may be argued that federal police powers used to regulate land under the World Heritage Treaty are different from state police powers reserved under the tenth amendment, since they are for national rather than state purposes. Thus, the tenth amendment reservation of powers is not violated.

Note that in the absence of a treaty, this rationale would not authorize the federal government to regulate land use for "national purposes." In order for the rationale to operate, two separate governmental bodies must hold a similar type of power. It may also be significant that in both the *Younger* and World Heritage Treaty situations, the solutions to problems extending across political boundaries could not be solved by police powers already held by the states (under the tenth amendment) or localities (under home-rule provisions of enabling acts). See text & notes 82-88 *supra*.

101. 5 Cal. 3d at 493, 487 P.2d at 1200, 96 Cal. Rptr. at 560. The declarations of purpose contained in the preamble to the World Heritage Treaty should be similarly weighted. November 23, 1972, 27 U.S.T. at 40, T.I.A.S. No. 8226.

and declarations of policy are entitled to great weight."[102] The court also noted that the "explosive development" threatening the area could not be checked by any of the local governments in the Tahoe Basin.[103] Restrictions on private enterprise developed by the agency were necessary because of the general unwillingness of individual counties to put the common interest in preserving a national asset ahead of their own economic interests in rapid growth and development.[104] Furthermore, local regulatory efforts proved incapable of insuring an environmentally protective pattern of development because of the large number of separate governmental authorities charged with regulatory responsibility for the area.[105]

Just as the Court in *Missouri v. Holland*[106] recognized that the concept of reserved powers under the tenth amendment must be interpreted in accordance with the country's changing needs and circumstances,[107] the California Supreme Court in *Younger*[108] noted that the "constitutional concept of municipal affairs" is a flexible one.[109] The California court held that local interference was permissible to achieve objectives that were more than "purely local"[110] and pointed out that the police powers granted localities to regulate municipal affairs had not been divested.[111] Localities could continue to enact their own ordinances and regulations so long as they were not inconsistent with the agency's general plan.[112]

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102. 5 Cal. 3d at 493, 487 P.2d at 1200, 96 Cal. Rptr. at 560.

103. *Id.* at 493-94, 487 P.2d at 1201, 96 Cal. Rptr. at 561. The court stated,

> Only an agency transcending local boundaries can devise, adopt and put into operation solutions for the problems besetting the region as a whole. Indeed, the fact that the Compact is the product of the cooperative efforts and mutual agreement of two states is impressive proof than its subject matter and objectives are of regional rather than local concern.

Id. at 494, 487 P.2d at 1201, 96 Cal. Rptr. at 561. Similar reasoning supports the necessity of legislation implementing the World Heritage Treaty. See text & notes 84-88 *supra*.

104. 5 Cal. 3d at 494 n.16, 487 P.2d at 1201 n.16, 96 Cal. Rptr. at 561 n.16; Comment, *Lake Tahoe: The Future of a National Asset—Land Use, Water, and Pollution*, 52 CAL. L. REV. 563, 618-19 (1964). For a discussion of possible reasons for such existing priorities and the probability of similar problems with state behavior under the World Heritage Treaty, see note 84 *supra*.

105. 5 Cal. 3d at 493 n.15, 487 P.2d at 1200 n.15, 96 Cal. Rptr. at 560 n.15; Comment, *supra* note 104, at 565-72; Note, *Regional Government for Lake Tahoe*, 22 HASTINGS L.J. 705, 707 (1971).

106. 252 U.S. 416 (1920).

107. *Id.* at 433.

108. 5 Cal. 3d 480, 487 P.2d 1193, 96 Cal. Rptr. 553 (1971).

109. *Id.* at 498, 487 P.2d at 1204, 96 Cal. Rptr. at 564; *see* Candlestick Properties, Inc. v. San Francisco Bay Conservation & Dev. Comm'n, 11 Cal. App. 3d 557, 571, 89 Cal. Rptr. 897, 905 (1970) (expansion of police power parallels political, social, and economic development); Comment, *San Francisco Bay: Regional Regulation for Its Protection and Development*, 55 CAL. L. REV. 728, 766 (1967); text & note 176 *infra*.

110. 5 Cal. 3d at 501, 487 P.2d at 1206, 96 Cal. Rptr. at 566. "Any restriction upon local improvements is merely incidental to the execution of the Agency's regional duties." *Id.* See text & notes 61, 72 *supra*, for a similar argument regarding treaties.

111. 5 Cal. 3d at 497, 501, 487 P.2d at 1203, 1206, 96 Cal. Rptr. at 563, 566. See text & notes 37-38 *supra*, for a similar argument regarding treaties.

112. 5 Cal. 3d at 497, 501, 487 P.2d at 1203, 1206, 96 Cal. Rptr. at 563, 566.

In *Candlestick Properties, Inc. v. San Francisco Bay Conservation & Development Commission*,[113] the appellant owned a piece of land submerged at high tide by the waters of San Francisco Bay.[114] The company had acquired the property for the purpose of depositing fill from its various construction projects and asserted that the property had no value except as a site for this use.[115] Shortly after appellant's purchase, the California legislature determined that regional control was necessary to preserve the diminishing bay.[116] Concluding that its powers of eminent domain were impractical because of a lack of adequate funds,[117] the legislature established the San Francisco Bay Conservation and Development Commission (BCDC).[118] The legislature clothed the special regional commission with broad authority to formulate comprehensive and enforceable regulation for the bay, including the power to approve or deny requests for filling or dredging operations.[119] After an application for permission to fill its property was denied, appellant filed suit, claiming, among other things, that the regulations were invalid as an impermissible interference with private land reclamation powers previously granted to the locality by the California legislature.[120] Upholding the constitutionality of the BCDC and its regulations, the court acknowledged the need for uniform controls[121]

113. 11 Cal. App. 3d 557, 89 Cal. Rptr. 897 (1970).

114. *Id.* at 562, 89 Cal. Rptr. at 899.

115. *Id.*

116. *Id.* at 564-65, 89 Cal. Rptr. at 901.

117. *See* Comment, *supra* note 109, at 728-29.

118. CAL. GOV'T CODE § 66600 (WEST 1966); *see* 11 Cal. App. 3d at 564, 89 Cal. Rptr. at 900.

119. CAL. GOV'T CODE §§ 66600-04 (West 1966); 11 Cal. App. 3d at 564-65, 89 Cal. Rptr. at 901.

120. 11 Cal. App. 3d at 562-63, 89 Cal. Rptr. at 899-900. Appellant's land is situated in the Hunter's Point Reclamation District. *Id.* at 562, 89 Cal. Rptr. at 899. This district was created by the California Legislature in 1955, *id.*, (1955 Cal. Stats., ch. 1573, at 2855, (codified at CAL. WATER CODE, Appendix, at 78-1 to 17 (West 1968), and was granted the power to fill private lands in the district by "condemnation or other legal means." 11 Cal. App. 3d at 563, 89 Cal. Rptr. at 900. The court noted that, since the district had not determined to fill the Candlestick property, no immediate conflict existed between the BCDC and district powers. *Id.* Nevertheless, the court held that the powers of the BCDC were regional in scope and would override any individual projects of the district that were inconsistent with its purpose. *See id.* at 564-65, 89 Cal. Rptr. at 901.

Although violation of home-rule powers under the California Constitution was not pleaded in this particular case, it appears that such an argument would have failed for two reasons: First, the purpose of the legislation was regional rather than local in scope. Second, local governments were unable to effectively preserve the bay because its problems transcended municipal boundaries. *See* People *ex rel.* Younger v. County of El Dorado, 5 Cal. 3d 480, 493, 487 P.2d 1193, 1200, 96 Cal. Rptr. 553, 560-61 (1971) (same rationale with respect to Lake Tahoe's problems); Comment, *supra* note 109, at 758-69 (discussing home-rule argument with regard to the BCDC and preservation of San Francisco Bay).

121. 11 Cal. App. 3d at 564, 571, 89 Cal. Rptr. at 900, 905; Comment, *supra* note 109, at 765; *accord*, People *ex rel.* Younger v. County of El Dorado, 5 Cal. 3d 480, 493-94, 87 P.2d 1193, 1201, 96 Cal. Rptr. 553, 561 (1971); Tahoe Compact, CAL. GOV'T CODE § 66801 (West Supp. 1981); World Heritage Treaty, November 23, 1972, 27 U.S.T. at 40, T.I.A.S. No. 8226; *see* text & notes 84-88, 103-05 *supra*.

and stressed the regional purpose and effect of the legislation.[122]

By analogy, the foregoing California cases provide authority for the proposition that the preservation of world cultural and natural heritage is a proper treaty subject under the tests previously discussed. In each of the California cases, as in the World Heritage Treaty, irreplaceable heritage is involved. The California courts agreed that such heritage is a matter of more than purely local concern.[123] Application of this finding in a world heritage context probably insures the treaty's validity under the "international concern" test.[124] Furthermore, the California courts concluded that the heritage could not be protected without intergovernmental cooperation.[125] Such a conclusion similarly supports the validity of the World Heritage Treaty under the "inadequate protection" test.[126] Finally, the California courts noted that the benefits and burdens of such protective restrictions were shared by all concerned.[127] The "reciprocal benefits" test should thus be met as well.[128] The California cases additionally indicate that adoption of the World Heritage Treaty would not interfere with state powers reserved under the tenth amendment.[129] The World Heritage Treaty therefore

122. 11 Cal. App. 3d at 564-65, 89 Cal. Rptr. at 900-01. The court relied on the purposes stated in the Act itself. *Id. Compare* the purposes contained in the Act establishing the BCDC, *id.*, *with* those contained in the Tahoe Compact, relied upon by the California Supreme Court in People *ex rel.* Younger v. County of El Dorado, 5 Cal. 3d 480, 493, 487 P.2d 1193, 1200, 96 Cal. Rptr. 553, 560 (1971) *and* those found in the preamble to the World Heritage Treaty, November 23, 1972, 27 U.S.T. at 40, T.I.A.S. No. 8226. One court has expressed the opinion that the mere fact of legislation by the state shows a sufficient statewide purpose to avoid constitutional conflict with home-rule provisions. Fellom v. Redevelopment Agency, 157 Cal. App. 2d 243, 247, 320 P.2d 884, 887 (1958); Comment, *supra* note 109, at 763; *cf.* text & note 62 *supra* (similar argument by opponents of "international concern" requirement for treaties).

In upholding the legislation, the *Candlestick* court also considered relevant the fact that it was designed to preserve the *existing* character of the bay. 11 Cal. App. 3d at 572, 89 Cal. Rptr. at 906. Thus, the regulatory purpose and effect was to prevent public harm rather than to provide new public benefit. For a discussion of this issue and its relevance to the World Heritage Treaty, see text & note 220 *infra*.

123. People *ex rel.* Younger v. County of El Dorado, 5 Cal. 3d 480, 501, 487 P.2d 1193, 1206, 96 Cal. Rptr. 553, 566 (1971); Candlestick Properties, Inc. v. San Francisco Bay Conservation & Dev. Comm'n, 11 Cal. App. 3d at 564, 571, 89 Cal. Rptr. at 900, 905.

124. The "international concern" test is discussed at text & notes 57-72 *supra*.

125. People *ex rel.* Younger v. County of El Dorado, 5 Cal. 3d 480, 493-94, 487 P.2d 1193, 1201, 96 Cal. Rptr. 553, 561 (1971); Candlestick Properties, Inc. v. San Francisco Bay Conservation & Dev. Comm'n, 11 Cal. App. 3d at 564, 89 Cal. Rptr. at 900-01.

126. The "inadequate protection" test is discussed at text & notes 81-88 *supra*.

127. *See* People *ex rel.* Younger v. County of El Dorado, 5 Cal. 3d 480, 491-94, 501, 487 P.2d 1193, 1199-1200, 1207, 96 Cal. Rptr. 553, 559-60, 567 (1971); Candlestick Properties, Inc. v. San Francisco Bay Conservation & Dev. Comm'n, 11 Cal. App. 3d at 564, 571, 89 Cal. Rptr. at 900, 905.

128. The "reciprocal benefits" test is discussed at text & notes 73-80 *supra*.

129. *See* People *ex rel.* Younger v. County of El Dorado, 5 Cal. 3d 480, 493, 497, 487 P.2d 1193, 1200, 1204, 96 Cal. Rptr. 553, 560-61, 563 (1971); Candlestick Properties, Inc. v. San Francisco Bay Conservation & Dev. Comm'n, 11 Cal. App. 3d at 564-65, 89 Cal. Rptr. at 901. One distinction between tenth amendment powers and home-rule powers merits brief consideration. Under the United States Constitution, police powers are *reserved* to the individual states by the states themselves. Under state constitutions, similar police powers are *conferred* upon municipalities by the states. Thus, in both cases, the source of the power to regulate is the individual state. It

constitutes a valid exercise of the treaty power.

The validity of a treaty, however, does not necessarily insure the enforceability of its provisions against private citizens in the United States. A further examination of the treaty's provisions must be made to determine whether they are self-executing and thereby constitute federal law in and of themselves, or whether they are executory and require further legislation for enforceability. Consequently, the next section will characterize each type of treaty provision and analyze the contents of the World Heritage Treaty to determine whether a need exists for implementing legislation.

EXECUTORY V. SELF-EXECUTING TREATIES

The United States Constitution declares all United States treaties to be the supreme law of the land.[130] Thus, treaties override all inconsistent state laws or constitutional provisions and are binding upon the courts of every state.[131] Upon ratification by the President and Senate,[132] treaties automatically become part of the domestic law of the country, enforceable by and against private individuals.[133]

Case law, however, has provided a distinction between executory and self-executing treaty provisions. Courts have held that a treaty

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does not appear, however, that this should affect the strength of the analogy for the purposes that it is used.

130. U.S. CONST. art. VI, cl. 2. See text & note 14, *supra*, for the text of this provision.

131. U.S. CONST. art. VI, cl. 2. See text & note 14, *supra*, for the text of this provision.

132. U.S. CONST. art. II, § 2, cl. 2. See note 13 *supra* for the text of this constitutional provision. Note that the provision states that two-thirds of the senators *present* must concur. During the 1950's, when apprehension about unrestricted use of the treaty power ran high, *see* note 60 *supra*, it was pointed out that even the necessity of a quorum (majority) was not indicated. *See* Deutsch, *supra* note 49, at 795 & n.45 (citing an example where convention "ratified" with two senators present). *But see* U.S. CONST. art. I, § 5, cl. 1 (majority of each house constitutes a quorum to do business); LEGISLATIVE REFERENCE SERVICE, LIBRARY OF CONGRESS, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS & INTERPRETATION 463 (1964) (2/3 of quorum required; "otherwise the consent rendered would not be that of the Senate as organized under the Constitution to do business"); Ober, *The Treaty-making and Amending Powers: Do They Protect Our Fundamental Rights*, 36 A.B.A.J. 715, 719 (1950) (2/3 of those present means 2/3 of the 1/2 that constitutes a quorum, or 1/3 of the senators). Ober suggests, however, that 2/3 of the entire Senate should be required to concur, especially since the senators constituting the quorum may come from sparsely populated states and represent substantially less than 1/3 of the people. *Id.*

Safeguards checking abuse of the treaty power, however, do exist. For example, a subsequent act of Congress which is inconsistent with treaty provisions will overrule them. Chae Chan Ping v. United States, 130 U.S. 581, 600 (1889); Edye v. Robertson, 112 U.S. 580, 598 (1884); *see* Chafee, *Stop Being Terrified of Treaties: Stop Being Scared of the Constitution*, 38 A.B.A.J. 731, 734 (1952) (states may object through their senators and promote passage of congressional act terminating treaty); Holman, *supra* note 54, at 709 (treaty abrogation by inconsistent federal statute subsequent in time has the "effect of preserving in the people, through their elected representatives," a check on the treaty power of the President to make domestic law). Furthermore, both treaties and acts of Congress are subject to judicial scrutiny. Henkin, *supra* note 37, at 931.

133. If a provision is enforceable as "domestic law," this means that it is enforceable against private individuals in the courts of the United States. *See* Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1824); Sei Fujii v. California, 38 Cal. 2d 718, 721, 242 P.2d 617, 620 (1952); K. HOLLOWAY, *supra* note 31, at 306-07.

provision will be enforceable as domestic law only when it operates of itself, without the aid of implementing legislation.[134] Such treaties are self-executing. In order for the provision to operate of itself, it must appear that the parties to the treaty "intended to prescribe a rule that, standing alone, would be enforceable in the courts."[135] On the other hand, when the terms of a treaty appear contractual in nature—as when one (or both) of the parties promises to perform a future act—the promised act must be executed by the legislature before the judiciary can enforce its provisions.[136] These treaties are executory.[137]

It has been the task of the courts to ultimately determine whether a treaty or certain of its provisions are self-executing and therefore enforceable as domestic law.[138] In order to make such a decision, courts examine the language of the provision in issue to discover the intent of the treaty framers.[139] Treaty provisions that state general purposes and objectives are not self-executing.[140] Likewise, treaties that impose obligations intended to be discharged through legislative action, or which fail to provide guidance for executive action, are considered executory.[141] Use of language in the future tense does not necessarily brand a treaty as executory. Nevertheless, such language is considered a factor signalling the intent that a provision be executory.[142] On the other hand, treaty language that is clear and definite and manifests the intent to create rights and duties in individuals is self-executing.[143] For exam-

134. Foster v. Neilsen, 27 U.S. (2 Pet.) 253, 314 (1824) (treaty promise to perform future act must be executed by legislature for enforceability); Sei Fujii v. California, 38 Cal. 2d 718, 721, 242 P.2d 617, 620 (1952) (treaty held not to "automatically supersede" inconsistent local laws unless the treaty's provisions are self-executing).

Drafting a treaty in self-executing language, however, may not always insure its domestic enforceability. As one commentator has noted:

> [T]wo factors may, in practice, either restrict or even nullify the constitutional provision for self-execution. On the one hand, the Senate may insist on non-self-execution as a condition of its consent to ratification of the treaty, in which case Congress could prevent its application by refusing to implement legislation, or else accompany its consent by stipulations which, without affecting the terms of the treaty, may relate to domestic arrangements and thus prevent its acquiring effect as domestic law.

K. HOLLOWAY, *supra* note 31, at 311.

135. Sei Fujii v. California, 38 Cal. 2d 718, 722, 242 P.2d 617, 620 (1952); *see, e.g.*, Valentine v. United States, 299 U.S. 5, 10 (1936); Whitney v. Robertson, 124 U.S. 190, 194 (1888); Edye v. Robertson, 112 U.S. 580, 598 (1884).

136. Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1824).

137. *Id.*

138. K. HOLLOWAY, *supra* note 31, at 308.

139. *See* Valentine v. United States, 299 U.S. 5, 10 (1936); Todok v. Union Bank, 281 U.S. 449, 453-55 (1930); Nielsen v. Johnson, 279 U.S. 47, 51 (1929); K. HOLLOWAY, *supra* note 31, at 306-07; text & notes 146-53 *infra*.

140. Sei Fujii v. California, 38 Cal. 2d 718, 722-23, 242 P.2d 617, 620-21 (1952); *see* authority cited in note 143 *infra*.

141. O. SCHACHTER, *supra* note 63, at 111. "Treaties requiring some legislative action are usually not ratified or acceded to by the United States until the necessary legislation is enacted." *Id.*

142. *See* Robertson v. General Elec. Co., 32 F.2d 495, 500 (4th Cir.), *cert. denied*, 280 U.S. 571 (1929) (treaty language stated rights "shall be extended" by state parties; held not self-executing).

143. *See, e.g.*, Clark v. Allen, 331 U.S. 503, 507-08 (1947) (treaty language clearly creates

ple, treaty provisions which contain a detailed prescription of rules and regulations have been construed as self-executing.[144] In addition, treaty provisions which specifically state that one nation's citizens, while in another nation, shall enjoy the same rights as are held by that nation's own citizens have been construed as self-executing.[145]

Other general rules of treaty construction may aid the court in determining whether a particular provision is self-executing. As previously mentioned, the court's fundamental guide is the intent of the parties.[146] This intent is to be gathered from the whole instrument.[147] The preamble to the treaty is to be considered,[148] as well as the history of the treaty, including the "negotiations and diplomatic correspondence" of the parties.[149] Furthermore, it is presumed that the intent of the parties is to secure equality and reciprocity between them.[150] A treaty is to be liberally construed to carry out this intention.[151]

The rules of construction seem less certain where a treaty provision and state law conflict. On the one hand, it is said that the rule of liberal construction need not be restricted to avoid possible conflict with state law.[152] On the other hand, it is suggested that a treaty be given a stricter construction where infringement on state powers would otherwise occur.[153]

The World Heritage Treaty, when examined in light of these rules of construction and the distinction between executory and self-executing provisions, includes both executory and self-executing provi-

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specific inheritance rights in aliens); Nielsen v. Johnson, 279 U.S. 47, 50 (1929) (treaty provision definite; made certain alien rights equivalent to citizen rights); Hauenstein v. Lynham, 100 U.S. 483, 488-90 (1880) (clear and specific inheritance rights for aliens). In Sei Fujii v. California, 38 Cal. 2d 718, 242 P.2d 617 (1952), the California Supreme Court compared the treaty language at issue in *Clark, Nielsen*, and *Hauenstein* with Articles 55 and 56 of the U.N. Charter. *Id.* at 722-23, 242 P.2d at 621. The court concluded that these articles did not contain clear and definite language sufficient to create rights and duties in individuals or to be deemed self-executing. *Id.*

144. Sei Fujii v. California, 38 Cal. 2d 718, 723, 242 P.2d 617, 621 (1952), *citing* Bacardi Corp. v. Domenech, 311 U.S. 150, 158-59 (1940) (trademark regulations specified and stated to apply equally to nationals of all state parties); Asakura v. Seattle, 265 U.S. 332, 340 (1924) (treaty specified reciprocal travel, property, and business rights to citizens of Japan and United States).

145. See cases cited in note 144 *supra*.

146. *See* note 139 *supra*.

147. United States v. Texas, 162 U.S. 1, 36-37 (1896) (in boundary dispute, both language and map incorporated in treaty considered).

148. Lazarou v. Moraros, 101 N.H. 383, 385, 143 A.2d 669, 670 (1958).

149. Nielsen v. Johnson, 279 U.S. 47, 52 (1929); United States v. Texas, 162 U.S. 1, 23-27 (1896) (negotiations and diplomatic correspondence considered in determining land boundaries under treaty).

150. Bacardi Corp. v. Domenech, 311 U.S. 150, 163 (1940); Valentine v. United States, 299 U.S. 5, 10 (1936); Asakura v. Seattle, 265 U.S. 332, 342 (1924).

151. *See* cases cited in note 150 *supra*.

152. Baker v. Carr, 369 U.S. 186, 212 (1962); Nielsen v. Johnson, 279 U.S. 47, 52 (1929).

153. The presumption is against an intent to invade state powers by treaty. Treaties will thus be construed not to override state law or power unless absolutely necessary to effectuate national policy. United States v. Pink, 315 U.S. 203, 230 (1942); Guaranty Trust Co. v. United States, 304 U.S. 126, 143 (1938); Todok v. Union State Bank, 281 U.S. 449, 454 (1930).

sions.[154] In general, however, it seems clear that some sort of implementing legislation is contemplated,[155] if not mandated.[156] It is thus puzzling that no implementing legislation for this 1972 treaty exists. A federal act effectuating the treaty would aid the United States in performing its treaty obligations by insuring the continued availability of all culturally and naturally valuable properties for inclusion in the World Heritage List.

Previous discussion has led to the conclusion that the World Heritage Treaty and any congressional enactment which aids in its implementation is within the constitutional scope of the federal government's treaty-making powers. A remaining question to be considered is whether the exercise of these existing powers could so unreasonably interfere with an individual's property rights as to be held unconstitutional on fifth amendment grounds.[157] In other words, if federal regulation of private lands is valid, what are the constitutional restrictions on the manner in which it may be applied? This consideration is especially relevant in determining the nature and content of the legislation to be promulgated to implement the World Heritage Treaty. Accordingly, the remainder of this Note will focus on the due process requirements of the fifth amendment and their application to such limited federal regulation of private lands.

THE DUE PROCESS ANALYSIS

Land use regulations are generally enacted pursuant to state police powers. Thus, it is the due process guarantee of the fourteenth amend-

154. *See* World Heritage Treaty, November 23, 1972, 27 U.S.T. 37, T.I.A.S. No. 8226. For example, clear and definite language of Article 8 ("the World Heritage Committee is hereby established," *id.* at 42) is self-executing. No further legislation is needed. Article 11, equally directive, obligates the United States to nominate properties to the World Heritage List and is thus self-executing. *Id.* at 43. On the other hand, Article 4 directs each state party to "do all it can, . . . to the utmost of its own resources . . ." to ensure protection. *Id.* at 41. Since legislation is one of the "resources" that may be used by the United States and no specific guidance is provided as to what action the states must take, this provision is executory. Article 5 likewise is executory in that it contains the future promise that each state shall endeavor to adopt and take the appropriate legal and administrative measures necessary for preservation. *Id.*

155. *See id.*, arts. 4 and 5, and art. 29, which requires periodic submission of reports on "action . . . taken for the application of this Convention."

156. *See id.* art. 34, in conjunction with arts. 3, 4, and 5(d). Article 34, which applies to "States Parties . . . which have a federal or non-unitary constitutional system," states in subsection (a):

> With regard to the provisions of this Convention, *the implementation of which comes under the legal jurisdiction of the federal or central legislative power* [see U.S. Const. art. I, § 8, cl. 18, necessary and proper clause], the *obligations* of the federal or central government shall be the same as for those States Parties which are not federal States.

Id. at 49 (emphasis added).

157. *See generally* W. COWLES, *supra* note 1. In his address to the 51st annual meeting of the American Bar Association, Chief Justice Stone stated that "[m]any public purposes are carried out today by the use of treaties, which, like acts of Congress, . . . have been employed in 'the striking extension of federal police powers' which has taken place 'during the last thirty years.'" Stone, *Fifty Years' Work of the United States Supreme Court*, 53 REPORTS OF THE ABA 259, 262 (1928).

ment,[158] rather than the fifth amendment,[159] that is most often the basis for constitutional attack of such legislation. Under the fourteenth amendment, legislation affecting property or economic interests is initially presumed to be valid.[160] Losses sustained by property owners as a consequence of valid legislative restrictions are thus usually held to be incidental and noncompensable.[161] Even when the most profitable[162] or beneficial[163] use of the property is forbidden, regulations will be upheld as long as another reasonable, though less valuable, use is left to the owner.[164] If, however, no reasonable use of the property survives the effects of the regulation,[165] or if the right to use the property in a certain way is transferred to some other party,[166] a constructive taking will occur and the regulation will be invalidated under the fourteenth amendment.[167]

158. U.S. CONST. amend. XIV, § 1, provides in relevant part, "No State shall. . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

159. *Id.* amend. V., provides in relevant part, "No person shall. . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

160. Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CAL. L. REV. 1, 13, 27-28 (1971); Note, *supra* note 87, at 731. In cases involving economic or property interests, a heavy burden of proof rests on the individual challenging the regulations to show that they are unreasonable. *Id.* In general, socioeconomic regulation will be upheld if any "rational relation" between the regulation and the government purpose sought to be achieved is found. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 8-7, at 450-51 (1978); Van Alstyne, *supra*, at 27-28. In cases involving fundamental rights or liberty interests, however, a strict standard of judicial scrutiny is employed. L. TRIBE, *supra*, § 11-4, at 575. Under this standard, the government bears the burden of proof and must show "that the regulation is necessary to further a 'compelling state interest.' " *Id.*, § 12-8, at 602.

161. Comment, *The Freshwater Wetlands Act: Permissive Regulation v. Constructive Taking*, 43 ALB. L. REV. 295, 304 (1979); *see* Supreme Court cases cited in *id.* at 304 n.71.

162. *Id.* at 304; *see* cases cited in *id.* n.72.

163. *Id.* at 304; *see* cases cited in *id.* n.73.

164. South Terminal Corp. v. Environmental Protection Agency, 504 F.2d 646, 678 (1st Cir. 1974); R. STEWART & J. KRIER, ENVIRONMENTAL LAW AND POLICY 453 (2d ed. 1978); *see* Pennsylvania Cent. Transp. Co. v. New York City, 438 U.S. 104, 121 (1978); Goldblatt v. Town of Hempstead, 369 U.S. 590, 592 (1962); Van Alstyne, *supra* note 160, at 33 (uses permitted by regulations must be of a type that could reasonably be undertaken on the property).

165. *See* Arverne Bay Constr. Co. v. Thatcher, 278 N.Y. 222, 226, 15 N.E.2d 587, 589 (1938) ("To sustain an attack upon the validity of an ordinance an aggrieved property owner must show that if the ordinance is enforced the consequent restrictions upon his property preclude its use for any purpose to which it is reasonably adapted."); Note, *supra* note 87, at 747. The author proposes that in landmark preservation situations, the plaintiff should have to prove not only that no reasonable use exists (this would include sale to an owner interested in preservation), but also that through the proposed change forbidden by the regulations, he had a "reasonable expectation of beneficial use." *Id.* at 778. Economic feasibility of the proposed project should also be required. *Id.*

166. For example, government regulation authorizing public use of the property would constitute a taking. *See* South Terminal Corp. v. Environmental Protection Agency, 504 F.2d 646, 678-79 (1st Cir. 1974); W. COWLES, *supra* note 1, at 263 n.4; *cf.* Pennsylvania Cent. Transp. Co. v. New York City, 42 N.Y.2d 324, 329, 366 N.E.2d 1271, 1274 (1977) (no taking since regulation did not transfer control of private property to city), *aff'd*, 438 U.S. 104 (1978).

167. R. STEWART & J. KRIER, *supra* note 164, at 453. It should be noted that police powers under the due process clause and the powers of eminent domain are separate and distinct. Note, *supra* note 87, at 742. Thus, when a regulation goes so far as to constitute a taking, compensation is not required. Rather, the regulation is simply invalidated. *Id.* See text & notes 216-19 *infra* for a discussion of the distinctions between the eminent domain and police powers.

United States courts have held that a fifth amendment limitation on federal police power arising pursuant to a treaty is no greater than the fourteenth amendment limitation on state police power.[168] The issue remains, however, whether the due process standard applied to treaties and their effectuating regulations may be weaker than that applied to non-treaty legislation. It appears that the standard applied is the same. Certain facts and circumstances unique to treaty situations, however, may tip the balance in favor of constitutionality when a similar non-treaty statute would be found unconstitutional.[169] In any event, it is clear that treaties and their implementing legislation must pass judicial scrutiny with regard to due process standards or be held invalid as domestic law.[170] Under a due process analysis, the reasonableness of the statutory or treaty provisions in issue is examined in three areas: 1) the legislative or governmental purpose; 2) the means selected to achieve that purpose; and 3) the effect of the regulation on the interests being regulated.[171]

The regulatory purpose of legislation implementing the World Heritage Treaty, with respect to private land, is twofold. The first purpose is to effectuate and uphold a multilateral agreement entered into by the United States under its treaty power.[172] The second purpose is to promote the public welfare under the police power by preserving cultural and natural heritage.[173]

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168. W. COWLES, *supra* note 1, at 254-55; *see* United States v. American Bond & Mortgage Co., 31 F.2d 448 (N.D. Ill. 1929), *aff'd*, 52 F.2d 318 (7th Cir. 1931). In *American Bond & Mortgage Co.*, the court stated that the fifth amendment would not interfere with congressional exercise of its constitutionally-conferred power to enact any regulation "reasonably necessary" to promote the "general welfare of the public." 31 F.2d at 455-56. The case concerned the power of the United States to use a treaty and its implementing act to regulate radio stations. The district court judge found that unregulated broadcasting "would create a national nuisance." Therefore, the "rights of the individual broadcaster must give way to the paramount interest of the millions of the receiving public, who are entitled to have the waves sent out by broadcasting stations classified and arranged in such a way that the benefits resulting from this great scientific discovery may not be impaired or destroyed." *Id.* at 456; *see* text & note 208 *infra*, discussing a nuisance theory of public rights.

169. See W. COWLES, *supra* note 1, §§ 100-01, at 296-98. Cowles states,

> If the Government or other proponent of the applicability of the treaty puts comprehensive evidence of the surrounding social, economic and political facts of local, of national, and of worldwide character into the record of a well-pleaded and argued treaty case, the nature of the "application" of the due process standard would seem to carry far-reaching implications for police power legislation based in treaty.

Id. § 101, at 298.

170. United States v. American Bond & Mortgage Co., 31 F.2d at 455-56; W. COWLES, *supra* note 1, § 104, at 302.

171. Maher v. City of New Orleans, 516 F.2d 1051, 1065 (1975), *cert. denied*, 426 U.S. 905 (1976); Comment, *supra* note 161, at 304; Note, *supra* note 87, at 734.

172. *See* Cerritos Gun Club v. Hall, 21 F. Supp. 163, 165 (S.D. Cal. 1936), *aff'd*, 96 F.2d 620, 622 (9th Cir. 1938) (prohibition of placement of bait on private hunting club grounds to lure migratory birds upheld as a reasonable means to effectuate Migratory Bird Treaty); W. COWLES, *supra* note 1, § 100, at 296 (treaties having effect on property upheld; private loss is merely consequence of means to achieve international end).

173. *See* Pennsylvania Cent. Transp. Co. v. New York City, 438 U.S. 104, 127 (1978); Note, *supra* note 87, at 732-33.

In *Pennsylvania Central Transportation Company v. New York City*,[174] the United States Supreme Court held that a municipal ordinance designed to preserve architectural landmarks promoted a legitimate police power objective.[175] Declaring the police power to be sufficiently flexible to meet the needs of changing times,[176] courts have generally found that this power protects a citizen's moral, intellectual, and spiritual needs[177] as well as his physical and material interests.[178] Regulations for heritage preservation are designed to protect just these interests.[179] Thus, such regulations would reasonably relate to legitimate governmental objectives and meet the first of the due process requirements.

The second prong of the due process test requires that the regulation be a reasonable means to achieve the legitimate governmental objective. Very few regulations for the preservation of historic or natural assets have been invalidated under this test.[180] In general, courts have stressed the importance of the public interest,[181] the irreplaceable nature of the assets,[182] and the absence of alternative means for

174. 438 U.S. 104 (1978).

175. *Id.* at 129, 138; *see id.* at 119, 125. *See also* Maher v. City of New Orleans, 516 F.2d 1051, 1059 (5th Cir. 1975) (courts have repeatedly found preservation of historic landmarks to be legitimate legislative purpose), *cert. denied*, 426 U.S. 905 (1976). The Supreme Court has also found regulations protecting and preserving natural resources to fall within legitimate police power objectives. Walls v. Midland Carbon Co., 254 U.S. 300 (1920) (natural gas); Lawton v. Steele, 152 U.S. 133 (1894) (fish).

176. Berman v. Parker, 348 U.S. 26, 33 (1954); Euclid v. Ambler Realty Co., 272 U.S. 365, 386-87 (1926); Maher v. City of New Orleans, 516 F.2d 1051, 1059 (5th Cir. 1975); *cf.* Missouri v. Holland, 252 U.S. 416, 433 (1920) (reserved powers under tenth amendment interpreted in accordance with country's changing needs and circumstances); People *ex rel.* Younger v. County of El Dorado, 5 Cal. 3d 480, 498, 487 P.2d 1193, 1204, 96 Cal. Rptr. 553, 564 (1971) (constitutional concept of "municipal affairs" flexible).

177. *See* Pennsylvania Cent. Transp. Co. v. New York City, 438 U.S. 104, 109, 129, 138 (1978) (Supreme Court upheld landmark regulation benefitting citizens culturally, aesthetically, and educationally); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 57 (1973) (obscenity regulation is legitimate exercise of police power); Berman v. Parker, 348 U.S. 26, 33 (1959) (Supreme Court recognized police power to regulate for public welfare included aesthetic considerations); Opinion of the Justices to the Senate, 333 Mass. 773, 778, 128 N.E.2d 557, 561 (1955) (term "public welfare" includes "public convenience, comfort, peace and order, prosperity and similar concepts," but not "mere expediency").

178. Maher v. City of New Orleans, 516 F.2d 1051, 1060 (1975); *see* Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 424 (1952) (police powers extend to "all the great public needs"); Opinion of the Justices to the Senate, 333 Mass. 783, 787, 128 N.E.2d 563, 566-67 (1955) (proposed act whose purpose was to preserve historic assets for "educational, cultural, and economic advantage of the public" held constitutional); Note, supra note 87, at 732; Note, *The Police Power, Eminent Domain, and The Preservation of Historic Property*, 63 COLUM. L. REV. 708, 710 (1963).

179. *See* note 6 *supra*.

180. J. BANTA, F. BOSSELMAN & D. CALLIES, *supra* note 99, at 183; *see* authority cited in notes 184-92 *infra* (regulations preserving historic or natural assets upheld as constitutional). *But see* State Highway Dep't v. Branch, 222 Ga. 770, 152 S.E.2d 372 (1966) (anti-billboard statute invalid); Pacesetter Homes, Inc. v. Village of Olympia Fields, 104 Ill. App. 2d 218, 226, 244 N.E.2d 369, 371 (1968) (village architectural control ordinance held unconstitutional as "unlawful delegation of legislative authority" because ordinance failed to set forth standards governing committee's actions).

181. *See* text & notes 198-206 *infra*.

182. *See* World Heritage Treaty, Preamble, November 23, 1972, 27 U.S.T. at 40, T.I.A.S. No.

preservation.[183]

Examples of the types of regulation that have been upheld as reasonable and appropriate to accomplish the goal of cultural preservation include: prohibiting the destruction of an historic structure without a permit;[184] imposing upon an owner of historically valuable property the affirmative duty to maintain it in good repair;[185] requiring permits for the erection of new buildings or for alteration, restoration, or additions to existing buildings within an historic district;[186] controlling the character of building exteriors[187] and signs in public view;[188] and zoning reclassifications.[189] In Springfield, Illinois, an ordinance prohibiting the operation of a retail business in an historic zone around Abraham Lincoln's home was upheld as a reasonable means to accomplish the city's objective to protect the area from commercial exploita-

8226; Pennsylvania Cent. Transp. Co. v. New York City, 50 App. Div. 2d 265, 266-67, 377 N.Y.S.2d 20, 23 (1975) (historic landmarks are "irreplaceable environmental resources"); Fowler, *Protection of the Cultural Environment in Federal Law*, FED. ENVIRONMENTAL L. 1466, 1468 (1974) (cultural properties are "unique and non-renewable resources" and this factor must be considered in formulating protective regulations).

183. *See, e.g.*, Missouri v. Holland, 252 U.S. 416, 435 (1920); People *ex rel.* Younger v. County of El Dorado, 5 Cal. 3d 480, 493-94, 487 P.2d 1193, 1201, 96 Cal. Rptr. 553, 561 (1971); Candlestick Properties, Inc. v. San Francisco Bay Conservation and Dev. Comm'n, 11 Cal. App. 3d 557, 564-65, 571-72, 89 Cal. Rptr. 897, 900-1 (1970). *See also* text & notes 84-88, 103-05 *supra*; Note, *supra* note 87, at 739.

184. *See, e.g.*, Pennsylvania Cent. Transp. Co. v. New York City, 438 U.S. 104, 112, 117 (1978); Maher v. City of New Orleans, 516 F.2d 1051, 1054, 1061 (5th Cir. 1975) (Vieux Carre Ordinances pursuant to LA. CONST. art. XIV, § 22A), *cert. denied*, 426 U.S. 905 (1976); Opinion of the Justices to the Senate, 333 Mass. 773, 774, 128 N.E.2d 557, 559 (1955).

185. Pennsylvania Cent. Transp. Co. v. New York City, 438 U.S. 104, 111-12, 120 n.21 (1978); Maher v. City of New Orleans, 516 F.2d 1051, 1066-67 n.85 (5th Cir. 1975) (text of Vieux Carre Ordinance § 65-36), *cert. denied*, 426 U.S. 905 (1976). After noting that the upkeep of the building in issue was reasonably necessary to the achievement of the legislative goal, the *Maher* court remarked,

> The fact that an owner may incidentally be required to make out-of-pocket expenditures in order to remain in compliance with an ordinance does not per se render that ordinance a taking. In the interest of safety, it would seem that an ordinance might reasonably require buildings to have fire sprinklers or to provide emergency facilities for exits and light. In pursuit of health, provisions for plumbing or sewage disposal might be demanded. Compliance could well require owners to spend money. Yet, if the purpose be legitimate and the means reasonably consistent with the objective, the ordinance can withstand a frontal attack of invalidity.

516 F.2d at 1067.

186. *E.g.*, Maher v. City of New Orleans, 516 F.2d 1051, 1054 n.5, 1061 (5th Cir. 1975) (Vieux Carre), *cert. denied*, 426 U.S. 905 (1976); Opinion of the Justices to the Senate, 333 Mass. 773, 774, 128 N.E.2d 557, 559 (1955) (Nantucket); Opinion of the Justices to the Senate, 333 Mass. 783, 785, 128 N.E.2d 563, 565 (1955) (Beacon Hill); *cf.* Pennsylvania Cent. Transp. Co. v. New York City, 438 U.S. 104, 111-12 (similar restriction applying to individual landmarks not in historic district).

187. Bohannan v. City of San Diego, 30 Cal. App. 3d 416, 106 Cal. Rptr. 333 (1973).

188. *E.g.*, Bohannan v. City of San Diego, 30 Cal. App. 3d 416, 423, 106 Cal. Rptr. 333, 337 (1973); City of New Orleans v. Pergament, 198 La. 852, 858, 5 So. 2d 129, 130-31 (1941); Opinion of the Justices to the Senate, 333 Mass. 773, 774, 128 N.E.2d 557, 559 (1955); People v. Goodman, 31 N.Y.2d 262, 265-66, 338 N.Y.S.2d 97, 100-01 (1972).

189. *See, e.g.*, Bohannan v. City of San Diego, 30 Cal. App. 3d 416, 420-21, 106 Cal. Rptr. 333, 335-36 (1973); Rebman v. City of Springfield, 111 Ill. App. 2d 430, 433, 250 N.E.2d 282, 284-85 (1969); Owen E. Hall v. Village of Franklin, No. 69-52580 (Mich. Cir. Ct., Feb. 10, 1972).

tion.[190] In addition, prohibition of billboards in certain areas has been upheld as a reasonable means of preserving urban aesthetics,[191] and regulation of dredging and filling activities has been upheld as a reasonable means of preserving the natural beauty of bays and swamplands.[192]

Federal regulation prohibiting demolition or alteration of properties nominated to the World Heritage List, or regulation requiring general maintenance of such properties, clearly lies within the perimeter established by the examples discussed above. Thus, such regulation would likely be upheld as a reasonable means to effectuate the objectives of the World Heritage Treaty.

The third step in the due process analysis requires an examination of the effects of the regulation. To aid in this effort, a balancing test is applied.[193] The nature and extent of the private property loss must be weighed against the "economic, aesthetic, social, historical, and recreational value" of the regulation to the public.[194] It is recognized that this balancing test is "subjective and capable of wide variations in interpretation."[195] Even the Supreme Court has emphasized that facts,[196] rather than legalistic arguments, determine the outcome.[197]

One of the factors considered by courts in determining the weight to be accorded the "public interest" side of the equation is the nature of the regulatory objective.[198] It has been said that "objectives with a strong historic pattern of social approval are more likely to survive constitutional attack."[199] Historic or cultural preservation qualifies as such an objective due to congressional interest in the area since the turn of

190. Rebman v. City of Springfield, 111 Ill. App. 2d 430, 432, 441, 250 N.E.2d 282, 284, 288 (1969).

191. Opinion of the Justices to the Senate, 333 Mass. 773, 778-79, 128 N.E.2d 557, 561 (1955); *see, e.g.*, authority cited note 188 *supra*.

192. Just v. Marinette County, 56 Wis. 2d 7, 14, 17-18, 201 N.W. 761, 766, 768 (1972) (prohibition of filling and residential development on swampland); Candlestick Properties, Inc. v. San Francisco Bay Conservation and Dev. Comm'n, 11 Cal. App. 3d 557, 564, 572, 89 Cal. Rptr. 897, 900, 906 (1970) (prohibition of dredge and fill activities without permit to preserve bay).

193. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413-14 (1922); Note, *supra* note 87, at 743.

194. Note, *supra* note 87, at 733; *see* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413-14 (1922); Note, *supra* note 87, at 743.

195. Note, *supra* note 87, at 744.

196. For example, regarding World Heritage Treaty legislation, the presentation of the facts would concentrate on public rights that would be violated if private owners were allowed to develop their land, rather than on public benefits to be gained by regulation. *See* J. BANTA, F. BOSSELMAN & D. CALLIES, *supra* note 99, at 264; Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971).

197. J. BANTA, F. BOSSELMAN & D. CALLIES, *supra* note 99, at 139; *see* Pennsylvania Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (no set formula applied, facts of case determinative); Rhyne, *Federal Powers of Regulation*, 30 LAB. L.J. 571, 576-77 (1979) (facts, not legalistic arguments, win because they determine the way in which courts will apply National League of Cities v. Usery, 426 U.S. 833 (1976)).

198. J. BANTA, F. BOSSELMAN & D. CALLIES, *supra* note 99, at 197.

199. *Id., citing* Van Alstyne, *supra* note 160, at 15.

the century.[200]

Courts are also more likely to uphold land use regulations when their purpose is "statewide or regional in nature rather than merely local."[201] Thus, the worldwide scope of the public interest to be protected by the World Heritage Treaty and its implementing legislation is a factor that should receive ample consideration.[202]

The intensity of the public interest or need is also a relevant consideration.[203] The unavailability or inadequacy of other means of preserving world heritage,[204] the magnitude and gravity of the harm

200. *See* Watch v. Harris, 603 F.2d 310, 320-21 (2d Cir. 1979) (good synopsis of congressional actions with regard to historic preservation). *See generally* Fowler, *supra* note 182, at 1468 (noting that development of federal preservation since the late 19th century "reflects the rise of a commitment to . . . cultural resource property" and providing a very complete history of federal efforts). Expansion has occurred on many levels. At first, only "nationally significant" historical or archeological sites were matters of concern. *Id.* at 1516. Today, "cultural heritage" covering a "broad range of resources . . . significant for various reasons and at various levels—national, state, local" is sought to be protected. *Id.* Furthermore, "development of federal protection . . . has evolved . . . from federal ownership of individually significant properties to comprehensive regulation of federal activities that directly or indirectly affect the cultural aspects of the human environment." *Id.* It is significant also that within the last fifty years, all of the states and over five hundred municipalities have enacted preservation laws. Pennsylvania Cent. Transp. Co. v. New York City, 438 U.S. 104, 107 (1978).

201. J. BANTA, F. BOSSELMAN, & D. CALLIES, *supra* note 99, at 323; *see* People *ex rel.* Younger v. County of El Dorado, 5 Cal. 3d 480, 493-94, 87 P.2d 1193, 1201, 96 Cal. Rptr. 553, 561 (1971); Candlestick Properties, Inc. v. San Francisco Bay Conservation & Dev. Comm'n, 11 Cal. App. 3d 557, 564-65, 89 Cal. Rptr. 897, 900-01 (1970); *cf.* Suburban Ready-Mix Corp. v. Village of Wheeling, 25 Ill. 2d 548, 550, 185 N.E.2d 665, 666 (1962) (zoning ordinance prohibiting construction of new concrete mixing plants invalidated as tending to create a monopoly for existing plants); Pearce v. Village of Edina, 263 Minn. 533, 569, 118 N.W.2d 659, 670, 672 (1962) (regulations disallowing commercial uses of land invalidated because viewed as an attempt to protect small group of businesses from competition); Van Alstyne, supra note 160, at 19-20 (courts less likely to uphold legislation benefitting segment of population rather than population as a whole).

202. *See* text & notes 70-71, 201 *supra*.

203. *See generally* J. BANTA, F. BOSSELMAN, & D. CALLIES, *supra* note 99, at 256-65. Public purpose may even be deemed so important as to outweigh any private loss and validate the regulation in and of itself. *See id.* at 256, 260. This most often occurs in cases of regulation prohibiting land uses that are injurious to the interests of others, that is, land uses that approximate common law nuisances. *See id.* at 257; *see, e.g.*, Goldblatt v. Town of Hempstead, 369 U.S. 590, 590-91 (1962) (ordinance prohibiting use of land as quarry upheld in light of public interest in children's safety despite fact that economic value of land destroyed); Miller v. Schoene, 276 U.S. 272, 279-80 (1928) (statute providing for destruction of infected cedar trees upheld in light of public interest in protecting apple crop); Just v. Marinette County, 56 Wis. 2d 7, 14-15, 26, 201 N.W.2d 761, 767, 772 (1972) (zoning of shoreline area upheld in light of public interest in preserving natural character of land and balance in ecosystem).

In upholding regulations to preserve historic properties, the Supreme Court has relied upon *Goldblatt* and *Miller* for the proposition that severe impact on an individual owner does not of itself indicate a taking. Pennsylvania Cent. Transp. v. New York City, 438 U.S. 104, 133 (1978). The Court noted the "widespread public benefit" in all three cases and declined to distinguish *Goldblatt* and *Miller* on the grounds that "noxious" property uses were involved in those cases. *Id.* at 133-34 n.30. The *Penn Central* Court observed that while the *Goldblatt* and *Miller* property uses "were perfectly lawful in themselves," they were harmful to the implementation of an important public policy. *Id.* The Court found the situation involving historic preservation regulations to be comparable. *Id. But see id.* at 145-46 (Rehnquist, J., dissenting) (*Goldblatt* and *Miller* distinguishable because regulations at issue in *Penn Central* do not merely prohibit nuisance but impose affirmative duty of maintenance as well).

204. *See* World Heritage Treaty, Preamble, November 23, 1972, 27 U.S.T. at 40, T.I.A.S. No. 8226; authority cited in note 183 *supra*.

threatened,[205] and the irreplaceable nature of the property[206] sought to be protected weigh heavily in this regard.

It may be argued that the public has a right to preservation of cultural and natural assets.[207] The argument could be based upon either the common law of nuisance[208] or the public trust doctrine.[209] Regardless of the merits of either contention, the framers of the World Heritage Treaty have, by clear and definite language, manifested their intent that such public rights to the world heritage be recognized.[210] The benefits of the regulation are thus rights to which the world community is already entitled.[211] Consequently, the loss to the community in the event of regulation invalidation is a relevant consideration when examining the public interest in the regulation.

In the case of world heritage, the public loss would be significant

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205. *See* World Heritage Treaty, Preamble, November 23, 1972, 27 U.S.T. at 40, T.I.A.S. No. 8226; text accompanying note 85 *supra; cf.* People *ex rel.* Younger v. County of El Dorado, 5 Cal. 3d 480, 486, 507, 487 P.2d 1193, 1195, 1211, 96 Cal. Rptr. 553, 555, 571 (1971) (Lake Tahoe in grave danger; regulation upheld); Candlestick Properties, Inc. v. San Francisco Bay Conservation and Dev. Comm'n, 11 Cal. App. 3d 557, 571, 89 Cal. Rptr. 897, 905 (1970) (San Francisco Bay threatened; regulation upheld).

206. *See* World Heritage Treaty, Preamble, November 23, 1972, 27 U.S.T. at 40, T.I.A.S. No. 8226; authority cited in note 182 *supra*.

207. *See* Candlestick Properties, Inc. v. San Francisco Bay Conservation and Dev. Comm'n, 11 Cal. App. 3d 557, 564, 89 Cal. Rptr. 897, 900 (1970); Pennsylvania Cent. Transp. Co. v. New York City, 42 N.Y.2d 324, 328, 332-33, 366 N.E.2d 1271, 1273, 1275-76, 397 N.Y.S.2d 914, 916, 919 (1977), *aff'd*, 438 U.S. 104 (1978); Just v. Marinette County, 56 Wis. 2d 7, 10, 15, 17, 201 N.W.2d 761, 765, 767-68 (1972). *See also* Sax, *supra* note 196. At least one state has expressly recognized the public's right to preservation of cultural and natural assets. Article I, § 27 of the Pennsylvania State Constitution, ratified May 18, 1971, provides: "The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic, and aesthetic values of the environment." *See* Commonwealth v. National Gettysburg Battlefield Tower, Inc., 8 Pa. Commw. Ct. 231, 234, 302 A.2d 886, 888 (1973).

208. *See, e.g.*, Candlestick Properties, Inc. v. San Francisco Bay Conservation and Dev. Comm'n, 11 Cal. App. 3d 557, 564, 89 Cal. Rptr. 897, 900-01 (1970); Turnpike Realty Co. v. Town of Dedham, 362 Mass. 221, 227-29 (1972) (purpose of floodplain zoning prohibiting development was to prevent possible flood damage to persons and property and to protect community from subsequent public expenditures for disaster relief); Just v. Marinette County, 56 Wis. 2d 7, 16-17, 201 N.W.2d 761, 767-68 (1972). *See generally* Sax, *supra* note 196; RESTATEMENT (SECOND) OF THE LAW OF TORTS, § 822, at 108-09, § 824, at 116, § 825, at 117-18, § 826, at 119-22 (1979); text & notes 216-19 *infra*.

209. *See* Just v. Marinette County, 56 Wis. 2d 7, 10, 16-18, 201 N.W.2d 761, 765, 768 (1972) (noting that the state has a duty under public trust to restore lakes and rivers to original purity and to prevent further pollution); Commonwealth v. National Gettysburg Battlefield Tower, Inc., 8 Pa. Commw. Ct. 231, 235, 302 A.2d 886, 892 (1973) (Pennsylvania Constitution makes state trustee of public's right to preservation of natural and cultural assets; state has affirmative duty to conserve and maintain assets); *cf.* Pennsylvania Cent. Transp. Co. v. New York City, 42 N.Y.2d 324, 328, 332-33, 366 N.E.2d 1271, 1273; 1275-76, 397 N.Y.S.2d 914, 916, 919 (1977) (society's investment in terminal's growth and success considered; society, as well as owner, is entitled to return), *aff'd*, 438 U.S. 104 (1978).

210. *See* World Heritage Treaty, art. 6, cl. 1, November 23, 1972, 27 U.S.T. at 42, T.I.A.S. No. 8226. This article contains the following language:

> Whilst fully respecting the sovereignty of the States on whose territory the cultural and natural heritage mentioned in Articles 1 and 2 is situated, and without prejudice to property rights provided by national legislation, the States Parties to this Convention recognize that such heritage constitutes a world heritage for whose protection it is the duty of the international community as a whole to co-operate.

211. *See* note 207 *supra*.

not only because it would be permanent,[212] but also because it would cut across so many fields of human endeavor.[213] In the event of regulation invalidation, losses would be not only economic,[214] but aesthetic, spiritual, educational, social, historical, and recreational as well.[215]

It has been stated that "the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful. . . ."[216] Thus, if public benefit is obtained, compensation must be paid.[217] On the other hand, if public harm is prevented, no compensation is due.[218] Such a policy reflects common law rules that permit nuisance abatement without compensation and that specify that one is not entitled to use his property in a manner seriously harmful to others.[219]

Regulations pursuant to the World Heritage Treaty would merely prevent an individual from using his property in a manner harmful to

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212. *See* text & notes 182, 206 *supra*.

213. *See* Pennsylvania Cent. Transp. Co. v. New York City, 438 U.S. 104, 109 (1978); notes 177-78, 194 *supra*.

214. *See* Pennsylvania Cent. Transp. Co. v. New York City, 438 U.S. 104, 109, 134 (1978); City of New Orleans v. Pergament, 198 La. 852, 858, 5 So. 2d 129, 131 (1941) (preservation can be an economic benefit to the community and to the individual owner as well, for it often invites the tourist trade); Opinion of the Justices to the Senate, 333 Mass. 773, 774, 128 N.E.2d 557, 559, 562 (1955) (preservation benefits economy by developing "vacation-travel industry").

215. *See* Pennsylvania Cent. Transp. Co. v. New York City, 438 U.S. 104, 109 (1978) (historic landmark regulations benefit citizens culturally, aesthetically, and educationally); People *ex rel.* Younger v. County of El Dorado, 5 Cal. 3d 480, 485-86, 487 P.2d 1193, 1194-95, 96 Cal. Rptr. 553, 554-55 (1971) (aesthetic and recreational losses occurring in the absence of regulation protecting natural lake).

216. E. FREUND, THE POLICE POWER § 511, at 546-47 (1904).

217. Just v. Marinette County, 56 Wis. 2d 7, 16, 201 N.W.2d 761, 767 (1972); *see* U.S. CONST. amend. V.

218. Just v. Marinette County, 56 Wis. 2d 7, 16, 201 N.W.2d 761, 767 (1972); *see* Miller v. Schoene, 276 U.S. 272, 279-80 (1928) (regardless of whether infected cedar trees constituted a nuisance under common law elements, government has power to employ reasonable means to halt use of property harmful to neighboring apple crop); United States v. American Bond & Mortgage Co., 31 F.2d 448, 456 (N.D. Ill. 1929) (unregulated broadcasting is public nuisance; thus, government can regulate), *aff'd*, 52 F.2d 318, 322 (7th Cir. 1931); L. TRIBE, *supra* note 160, § 9-3, at 461 (government takeover or destruction of private property noncompensable and justified if necessary to stop owner from using property in a manner injurious to others).

219. R. STEWART & J. KRIER, *supra* note 164, at 455; *see* text & notes 208, 218 *supra*. Historically, expansion of the police power has occurred in an effort to complement nuisance law. Netherton, *Implementation of Land Use Policy: Police Power vs. Eminent Domain*, 3 LAND & WATER L. REV. 33, 36 (1968). Restrictions on nuisance-type activities are usually narrow in scope and leave a number of property uses legally available to the owner. Van Alstyne, *supra* note 160, at 16. Furthermore, the public interest is especially weighty in nuisance-type cases. *See* note 203 *supra*. Consequently, regulations that serve to prevent a public nuisance are an especially appropriate exercise of the police power. It is argued that World Heritage Treaty regulations would fall within this category. In the first place, destruction of a natural or cultural asset in which the public has an interest constitutes a public nuisance. *See* text & notes 207-11 *supra*. *But see* Pennsylvania Cent. Transp. Co. v. New York City, 438 U.S. 104, 145-46 (1978) (Rehnquist, J., dissenting) (no nuisance since development meets legal zoning, health, and safety requirements). Second, the public interest in preventing such destruction is especially strong. *See* text & notes 204-06 *supra*. Finally, the regulations would be narrowly drawn to prohibit only those property uses constituting the nuisance. *See* text & note 220 *infra*. *But see* Pennsylvania Cent. Transp. Co. v. New York City, 438 U.S. 104, 145-46 (Rehnquist, J., dissenting) (landmark preservation regulations do not merely prohibit nuisance, but impose affirmative duty of maintenance as well).

public interests. In the usual case, no uses existing at the time of the property's nomination to the World Heritage List would be affected.[220] Regulations requiring general maintenance of the property and forbidding its alteration or destruction would insure preservation of the status quo, but would generally not provide any new public benefit. Consequently, regulation under the treaty constitutes a valid exercise of police power and compensation need not be paid to those whose property is thereby affected.

In summary, regulations implementing World Heritage Treaty objectives are almost certain to be upheld under the balancing test. On the one hand, the public interest in such regulation is great. The damage to the public interest in the absence of regulation is not only severe and broad in scope, but is also irreparable. Furthermore, regulations provide the only means of preventing such destruction. On the other hand, the private loss is minimal. Regulations will generally not deprive the owner of the existing use of his property.[221] Rather, it is likely that only more profitable future uses will be forbidden. Furthermore, to meet the preservation objective, regulations need not require the owner to allow the use of his property by others. This, of course, could constitute a constructive taking.[222]

Although World Heritage Treaty legislation should survive a balancing of public and private interests under the reasonableness analysis required by the due process clause, one additional issue regarding regulatory effects merits brief consideration. Unlike historic district legislation or zoning restrictions which are applicable to all properties located in a defined area, regulations pursuant to the World Heritage Treaty would often apply to individual pieces of heritage property. Since the due process clause also affords protection from regulations that are "arbitrary or discriminatory in operation or effect,"[223] a complaining owner might assert that he was arbitrarily or unfairly selected for

220. The existing use of the property, that is, the use to which it is being put at the time the regulations become effective, is considered to be a reasonable one. Thus, where the owner is deprived of only a potential, more commercially valuable use, the regulations will usually be upheld. *See* Pennsylvania Cent. Transp. Co. v. New York City, 438 U.S. 104, 136, 138 (1978) (regulations allowing existing use of terminal building and only denying proposed construction of a skyscraper above the terminal held not to constitute a taking); Just v. Marinette County, 56 Wis. 2d 7, 22-23, 201 N.W.2d 761, 771 (1972) (loss to property owners not determined by the value of their swampland if filled and used for residential purposes). Such results are consistent with a theory that the public has a right to preservation of the existing or natural state of heritage property. *See* text & notes 207-11 *supra*. Regulations are viewed as preventing harm to public interests rather than as affirmatively harming the private owner.

221. *See* text & note 220 *supra*.

222. *See* text & note 166 *supra*.

223. United States v. American Bond & Mortgage Co., 31 F.2d 448, 455-56 (N.D. Ill. 1929), *aff'd*, 52 F.2d 322 (7th Cir. 1931); Note, *supra* note 87, at 734.

regulation.[224]

Such an argument should not prevail because the Supreme Court has upheld similar municipal regulation of privately owned landmarks.[225] In *Pennsylvania Central Transportation Company v. New York City*,[226] the Court held that landmark laws are not discriminatory because they embody a "comprehensive plan" to preserve properties of aesthetic or historic value regardless of where they are located within the city.[227] In addition, the Court rejected the contention that landmark designation decisions are inevitably arbitrary because they are based upon subjective matters of taste,[228] and noted that judicial review of such decisions is always available.[229]

World Heritage Treaty regulations are likewise part of a comprehensive plan. They must adhere to formerly established selection criteria[230] and will be uniformly applied throughout the United States.[231] Although the regulations may affect some property owners more severely than others, a taking or a denial of equal protection will not necessarily result.[232] The protection is against invidious discrimination and is not violated merely because an individual is treated differently than others, so long as there is some reasonable basis for so doing.[233] In light of *Pennsylvania Central Transportation Company v. New York City*[234] and the earlier analysis finding World Heritage Treaty regulations to be a reasonable means of achieving treaty objectives,[235] a challenge to such regulations on the grounds of arbitrariness or discrimination is unlikely to prevail.

CONCLUSION

Under the Federal Constitution, the states have conferred upon the federal government the authority to promulgate treaties and any legislation necessary to effectuate their objectives. Thus, the scope of the treaty power is not limited by the tenth amendment, which reserves

224. *See* note 158 *supra* for the text of U.S. CONST. amend. XIV, upon which this argument is based.
225. Pennsylvania Cent. Transp. Co. v. New York City, 438 U.S. 104, 131-33 (1978).
226. 438 U.S. 104 (1978).
227. *Id.* at 132.
228. *Id. See* Bohannan v. City of San Diego, 30 Cal. App. 3d 416, 425, 106 Cal. Rptr. 333, 339 (1973) (requirement that signs conform to "quaint and distinctive character" of historic district held to prescribe "sufficiently ascertainable standard").
229. 438 U.S. at 132-33; *see* Bohannan v. City of San Diego, 30 Cal. App. 3d 416, 425, 106 Cal. Rptr. 333, 339 (1973) (right of review furnishes adequate safeguard).
230. World Heritage Treaty, art. 11, November 23, 1972, 27 U.S.T. at 43, T.I.A.S. No. 8226.
231. *See* Cerritos Gun Club v. Hall, 96 F.2d 620, 622 (9th Cir. 1938) (noting that the Migratory Bird Act applies generally to all sections of the United States).
232. Pennsylvania Cent. Transp. Co. v. New York City, 438 U.S. 104, 133-34 (1978).
233. Note, *supra* note 177, at 712.
234. 438 U.S. 104 (1978).
235. *See* text & notes 180-92 *supra*.

to the states only the powers which have not been expressly delegated. Several implied limitations on the scope of the treaty power, however, have been suggested by the judiciary and other legal scholars. These do not apply in the case of the World Heritage Treaty because the treaty violates no express constitutional provision and embraces a proper subject of negotiation between nations.

Since the World Heritage Treaty constitutes a valid exercise of the treaty power, any enactment of legislation effectuating its objectives is also valid. Thus, in order to ensure preservation of the cultural and natural qualities of non-federally owned properties which might be nominated to the World Heritage List, Congress need only enact legislation to this effect. It is not clear why this has not been done. Perhaps it is felt that the public would view federal regulation of private lands as a frightening expansion of governmental control. It must be realized, however, that the World Heritage Treaty can only authorize regulations enacted for the limited purpose of preserving natural and cultural heritage. In view of public recognition as to the irreplaceable nature of heritage property, its value to mankind as a whole, and the inter-governmental cooperation necessary for its protection, regulations that are narrowly drawn and consistent with due process requirements would likely be well received.