

# Missouri Law Review

---

Volume 73  
Issue 4 Fall 2008

Article 3

---

Fall 2008

## Missouri v. Holland's Second Holding

Carlos Manuel Vazquez

Follow this and additional works at: <https://scholarship.law.missouri.edu/mlr>



Part of the [Law Commons](#)

---

### Recommended Citation

Carlos Manuel Vazquez, *Missouri v. Holland's Second Holding*, 73 Mo. L. REV. (2008)  
Available at: <https://scholarship.law.missouri.edu/mlr/vol73/iss4/3>

This Conference is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact [bassettcw@missouri.edu](mailto:bassettcw@missouri.edu).

## ***Missouri v. Holland's* Second Holding**

*Carlos Manuel Vázquez\**

### I. INTRODUCTION

The Supreme Court in *Missouri v. Holland*, speaking through Justice Holmes, famously held that Congress has the power to pass a law to implement a treaty even if the law would not fall within Congress' legislative power in the absence of the treaty.<sup>1</sup> Essential to this holding were two distinct propositions. The first proposition is that the treaty-makers have the constitutional power to make treaties on matters falling outside Congress' enumerated powers. The second is that, if the treaty-makers make such a treaty and the treaty is not self-executing, the Necessary and Proper Clause gives Congress the power to implement such a treaty through a statute even if, in the absence of the treaty, the statute would be beyond Congress's legislative power. The Court in *Missouri v. Holland* focused on the first proposition. It devoted only one sentence to the second proposition: "If the treaty is valid there can be no dispute about the validity of the statute under Article I, § 8, as a necessary and proper means to execute the powers of the Government."<sup>2</sup>

As David Golove has shown, controversy concerning the issue addressed in *Missouri v. Holland* has recurred throughout our history, both before and after that decision.<sup>3</sup> Each time, however, the controversy has revolved around the power of the treaty-makers to make treaties on matters outside Congress' enumerated powers. The proposition that Congress has the power to implement any obligations undertaken under valid treaties has not been seriously questioned – until recently. In recent articles, critics of *Missouri v. Holland* have suggested that it is the second, heretofore unquestioned aspect of *Missouri v. Holland* that should be rejected rather than the first. Professor Curtis Bradley would construe the Constitution to "allow the treaty-makers the ability to conclude treaties on any subject but . . . limit their ability to create supreme federal law to the scope of Congress's power to do

---

\* Professor of Law, Georgetown University Law Center. I am grateful for comments received from Curtis Bradley, Martin Flaherty, David Golove, Vicki Jackson, Nicholas Rosenkranz, David Sloss, and Mark Tushnet. I am also grateful for the research assistance of Mark Herman.

1. 252 U.S. 416, 430-33 (1920).

2. *Id.* at 432.

3. David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1077 & nn.1-3 (2000).

so.”<sup>4</sup> In other words, the treaty-makers would have the power to conclude treaties on matters beyond Congress’ legislative powers, but such treaties could not be self-executing, and Congress would lack the power to execute them. More recently, Professor Nicholas Q. Rosenkranz has argued, too, that the treaty-makers have the power to conclude treaties on matters beyond Congress’ legislative powers and that Congress lacks the power to execute such treaties.<sup>5</sup> Rosenkranz’s proposed constitutional interpretation differs from Bradley’s in that he would recognize the treaty-makers’ power to make such treaties self-executing.

It is easy to see why no one has ever regarded it as plausible to read the Constitution to authorize the making of treaties that require implementation but deny Congress the power to implement such treaties. Such a regime would appear to contradict one of the Founders’ key convictions – that the federal government must have the power to assure compliance with its international commitments. Prominent among the reasons the Founders decided to abandon the Articles of Confederation and write a new Constitution were the failure of the States to comply with treaties during the period of the Articles of Confederation and the absence of any mechanism in the central government for assuring compliance with such treaties. The Founders feared the foreign relations problems that could be caused by treaty violations and, more affirmatively, they wanted to reap the economic benefits of a reputation for treaty compliance.<sup>6</sup> Although I believe that they gave the President and Senate the power to make treaties on matters beyond Article I,<sup>7</sup> it seems clear that the Founders would not have granted the federal government the power to conclude such treaties without giving the federal government the power to implement them. Better to have no treaty at all than a treaty likely to be violated.<sup>8</sup> Leaving the implementation of treaty commitments to the States would have been anathema.

4. Curtis A. Bradley, *The Treaty Power and American Federalism, Part II*, 99 MICH. L. REV. 98, 100 (2000) [hereinafter Bradley, *Federalism II*]; see also Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390 (1998) [hereinafter Bradley, *Federalism I*].

5. Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867, 1937-38 (2005).

6. See generally Carlos Manuel Vázquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154 (1999) [hereinafter Vázquez, *Laughing*]; Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM J. INT’L L. 695 (1995) [hereinafter Vázquez, *Four Doctrines*]; Carlos Manuel Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082 (1992) [hereinafter Vázquez, *Treaty-Based Rights*].

7. Carlos Manuel Vázquez, *Treaties and the Eleventh Amendment*, 42 VA. J. INT’L L. 713, 715 (2002) [hereinafter Vázquez, *Eleventh Amendment*]; Carlos Manuel Vázquez, Breard, Printz, and the Treaty Power, 70 U. COLO. L. REV. 1317 (1999) [hereinafter Vázquez, Breard, Printz].

8. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 393 (Max Farrand, ed., rev. ed. 1966) (Gouverneur Morris was “not solicitous to multiply [and] facilitate

Although their particular proposals are untenable, given the Founders' design, Professors Bradley and Rosenkranz are on the right track insofar as they identify the second of Justice Holmes' two propositions as the potentially problematic one from a federalism perspective. The scope of the actual federalism problem attributable to the holding of *Missouri v. Holland*, however, is far more limited than Professors Bradley and Rosenkranz suggest. Their concern that the Treaty Power will be misused to circumvent the limitations the Constitution imposes on Congress's legislative power is overstated given that such a ruse could succeed only if two-thirds of the Senate went along with it. Article II's supermajority requirement is a strong structural guarantee that treaties will be concluded only if they would truly advance the foreign relations goals of the nation.

But one of the federalism concerns obliquely raised by Bradley and Rosenkranz is potentially legitimate. Both note that a federalism problem arises when the treaty-makers conclude aspirational treaty provisions.<sup>9</sup> Though neither develops the argument, a concern along the following lines appears well-founded: when the treaty-makers, in complete good faith, conclude a treaty containing aspirational provisions, the treaty can be expected to sail through the Senate because it does not appear to require much of anything from the United States. Under *Missouri v. Holland*, such a treaty could support legislation designed to advance its purposes, even if such legislation would otherwise fall outside the legislative power. Indeed, the vaguer the aspirations, the broader the potential legislative power it supports. This federalism problem is not hypothetical; there already are numerous treaties in force containing aspirational provisions which, under a literal reading of *Missouri v. Holland*, could support legislation on any conceivable aspect of human rights.

This legitimate federalism problem, however, does not warrant a complete rethinking of Treaty Power doctrine. It just requires some tinkering around *Missouri v. Holland's* edges. The solution I propose is far narrower than those proposed by Bradley and Rosenkranz, and unlike their proposed solutions, it is consistent with the Founder's design. I argue that the power to implement treaties under the Necessary and Proper clause is the power to require compliance with treaty *obligations*. Because aspirational treaty provisions do not impose obligations in any meaningful sense of the term, the clause does not give Congress the power to implement such provisions. If such provisions concern matters otherwise beyond Congress' legislative powers, the Constitution leaves their implementation to the States. This approach is consistent with the Founders' design because the Constitution reflects the

---

Treaties. . . . The more difficulty in making treaties, the more value will be set on them.").

9. Bradley, *Federalism I*, *supra* note 4, at 443; Bradley, *Federalism II*, *supra* note 4, at 110; Rosenkranz, *supra* note 5, at 1931, 1934.

Founders' fear of treaty violations by States, and only obligatory provisions can be violated.

Part II of this article considers and rejects Professor Bradley's approach. Part III considers and rejects Professor Rosenkranz's approach. Part IV sets forth the true federalism problem posed by the holding of *Missouri v. Holland* and advances my more tailored solution to this problem.

## II. BRADLEY'S APPROACH

Professor Bradley devotes much of his article to critiquing what he calls the "nationalist" position on the Treaty Power reflected in *Missouri v. Holland*. The nationalist position, as he describes it, holds that the Power of the President and Senate to make treaties is subject neither to "subject-matter" limitations nor "states-rights" limitations, and that the power to make congressional-executive agreements and even sole executive agreements is also free of these constraints.<sup>10</sup> By "subject-matter" limitations, Bradley means such limitations as the requirement that treaties involve matters of "international" concern or concern matters that are appropriate for international negotiation.<sup>11</sup> By "states-rights" limitations, Bradley means the limitation of the Treaty Power to matters falling within Congress' legislative powers under Article I, section 8, and subsequent amendments,<sup>12</sup> as well as the prohibition against commandeering articulated in cases such as *New York v. United States*<sup>13</sup> and *Printz v. United States*,<sup>14</sup> and state sovereign immunity doctrines reflected in the Eleventh Amendment and decisions such as *Alden v. Maine*.<sup>15</sup> Bradley argues that the Founders envisioned that the Treaty Power would be constrained by either subject-matter limitations or state-rights limitations and that the nationalist view clashes with history because it would reject both types of limitations, leaving the Treaty Power entirely unconstrained.<sup>16</sup>

Professor Bradley's approach is not a narrowly originalist one, however.<sup>17</sup> In the end, he advocates the approach that he thinks is best suited to current realities. He rejects subject-matter limitations as infeasible in today's world because, in light of globalization, the line between what is international and what is national is impossible to maintain.<sup>18</sup> He also accepts that the

---

10. Bradley, *Federalism I*, *supra* note 4, 393-94, 398.

11. *Id.* at 396, 417-23.

12. *Id.* at 392-93.

13. 505 U.S. 144 (1992); Bradley, *Federalism I*, *supra* note 4, at 409.

14. 521 U.S. 898 (1997); Bradley, *Federalism I*, *supra* note 4, at 409.

15. 527 U.S. 706 (1999); Bradley, *Federalism I*, *supra* note 4, at 458.

16. Bradley, *Federalism I*, *supra* note 4, at 391-95, 409-17.

17. *Id.* at 461.

18. *Id.* at 451-56 ("[T]he line between what is domestic and what is international is difficult to define, the scope of what can plausibly be labeled international has grown substantially in recent years, and courts as a result are unlikely to restrict the

treaty-makers should be permitted to conclude treaties even if they address matters falling beyond Congress' legislative powers or contemplate action that, if taken by the Federal Government, would run afoul of other Tenth and Eleventh Amendment limitations.<sup>19</sup> He insists, however, that Congress lacks the power to implement such treaties.<sup>20</sup> To the extent such treaties require legislation that would be beyond Congress' legislative power under Article I, the implementing legislation would have to be enacted by the States.

In many respects, Professor Bradley's critique is well founded. I agree that the case for exempting the Treaty Power from the anti-commandeering doctrine and state sovereign immunity doctrines is not strong.<sup>21</sup> Also weak is the claim that the holding of *Missouri v. Holland* extends to congressional-executive agreements and sole executive agreements.<sup>22</sup> (Unlike Professor Bradley, however, I do not regard these unfounded claims as reasons for completely rethinking Treaty Power doctrine; I would just reject the unfounded claims.) Finally, I do not deny that the Treaty Power was thought by the Founders to be, and remains, limited to matters that are of inter-national concern or that are appropriate for international negotiation. I agree with Bradley and others, however, that in today's world, this "subject matter" has expanded considerably since the Founding and today embraces a state's protection of the human rights of its own citizens. Thus, very few, if any, good faith treaties would run afoul of this limitation. Like Bradley, I have difficulty envisioning a court striking down a treaty on this ground.<sup>23</sup>

The sole aspect of the Bradley-defined "nationalist" position that I embrace is the idea that the power to make Article II treaties is not limited to matters that would fall within Congress' legislative power under Article I and subsequent amendments.<sup>24</sup> On this point, the Court's holding in *Missouri v. Holland* is strongly supported by the Constitution's text and structure. The

treaty power much, if at all, based on this distinction. If federalism is to be protected in the treaty context, another approach must be found.").

19. *Id.* at 422-33.

20. *Id.* at 456-61.

21. Vázquez, *Eleventh Amendment*, *supra* note 7, at 726-33; Vázquez, Breard, Printz, *supra* note 7.

22. Vázquez, *Eleventh Amendment*, *supra* note 7, at 725; Vázquez, Breard, Printz, *supra* note 7, at 1339 n.75.

23. Bradley, *Federalism I*, *supra* note 4, at 451-56.

24. I do not mean to suggest that Professor Bradley made up the position that he describes as the nationalist one. He quotes broad statements from commentators – including one by me – to the effect that the Treaty Power is unconstrained by limitations grounded in state sovereignty. Bradley, *Federalism II*, *supra* note 4, at 102 n.21 (quoting Vázquez, Breard, Printz, *supra* note 7, at 1343). At least in my case, however, the quoted statement was broader than intended. Indeed, the whole point of the article in which that statement was made was that the Treaty Power may well be subject to the Tenth Amendment anti-commandeering doctrine. Vázquez, Breard, Printz, *supra* note 7. What I should have said is that the power to make treaties extends to matters beyond Congress' legislative power.

constitutional text affirmatively grants Congress enumerated legislative powers, such as the power to regulate interstate and foreign commerce.<sup>25</sup> By negative implication, it denies Congress the power to legislate on matters falling outside its enumerated powers. Article II separately sets forth the power to make treaties and assigns that power to the President (with the advice and consent of the Senate).<sup>26</sup> Because the Treaty Power is delegated to the federal government, the Tenth Amendment's reservation of non-delegated powers to the States and the people has no bearing. The relevant question concerns the scope of the Article II treaty-making power. To be sure, because the Supremacy Clause declares that treaties are the "supreme Law of the Land," Articles II and VI together give the President (with the Senate's consent) a legislative power. There is no textual basis, however, for confining the scope of this power to the matters over which Congress has legislative power under Article I. To conclude that the Treaty Power is so limited would be like saying that the power to regulate the army and navy extends no further than the power to establish post offices. The separately enumerated powers were plainly meant to serve different purposes; they thus incorporate different limits.

The purpose of the power to make treaties is to obtain commitments from other countries beneficial to the nation as a whole. An example of such a commitment, commonplace at the time of our Founding and throughout our history, is the commitment of another nation to respect certain rights of U.S. nationals present in its territory. The typical price we pay for such a benefit is to undertake a reciprocal obligation with respect to nationals of our treaty partners. There is no basis for believing that our Constitution disables the federal government from obtaining such benefits in areas that would otherwise be the exclusive province of the States. (Since the States are forbidden to enter into treaties,<sup>27</sup> if the federal government lacked the power to obtain such benefits, the nation as a whole would lack the power.) Indeed, from the beginning of our history, we have committed ourselves by treaty to respect rights of aliens on matters otherwise exclusively within state legislative power, and the validity of such treaties has never seriously been questioned.

That the Founders themselves viewed such treaties to be valid is shown by the fact that there were treaties in force at the time of the Founding – concluded during the period of the Articles of Confederation – that included provisions on matters outside the Article I powers of Congress. For example, a 1786 treaty with Prussia protected Prussian citizens against state legislation denying freedom of conscience or religious worship, "and when dying they were guaranteed the right of decent burial and undisturbed rest for their

---

25. U.S. CONST. art. I, § 8, cl. 3.

26. U.S. CONST. art. II, § 2, cl. 2.

27. U.S. CONST. art. I, § 10, cl. 1.

bodies.”<sup>28</sup> The Founders declared this treaty and the others concluded before the Founding to be the “supreme Law of the Land,”<sup>29</sup> thus strongly suggesting that they viewed this particular provision to be within the treaty-making power. Yet clearly this treaty concerned matters not delegated to Congress under Article I. The matter would have been of purely local concern had not Prussia undertaken reciprocal obligations towards U.S. citizens.

There is additional strong evidence that the Founders understood the Treaty Power to extend beyond Congress' legislative powers. Professor Bradley himself, in rebutting the broad nationalist view, provides persuasive evidence that the Founders understood the Treaty Power to extend to all matters of international concern.<sup>30</sup> By contrast, his evidence that the Founders considered the Treaty Power to be constructively limited to matters over which Congress had been given legislative power is flimsy. The closest he comes to finding support for that position is a statement by George Nicholas during the Virginia ratification debates to the effect “that no treaty could be made ‘which shall be repugnant to the spirit of the Constitution, or *inconsistent with the delegated powers.*’”<sup>31</sup> As discussed above, however, the Treaty Power is itself a delegated power; the question concerns its scope. Any implication in that statement that the Treaty Power extends no further than the legislative powers of Congress is overwhelmed by the contrary indications in the ratification debates in Virginia and elsewhere.<sup>32</sup>

Bradley can point to a greater number of statements in our post-ratification history that appear to support the view that the Treaty Power extends no further than the legislative power. As David Golove has persuasively shown, however, most of these statements were made by politicians opposing particular treaties.<sup>33</sup> As objective interpretations of the Constitution, these statements carry little weight. More probative on this score are expressions of the contrary view by well-known supporters of states' rights, such as John C. Calhoun, who asserted that “the treaty-making power has, indeed, been regarded to be so comprehensive as to embrace, with few exceptions, all questions that can possibl[y] arise between us and other nations, and which can only be adjusted by their mutual consent, whether the subject-matter be comprised among the delegated or the reserved powers.”<sup>34</sup>

28. Vázquez, Breard, Printz, *supra* note 7, at 1341 n.78 (quoting ROBERT T. DEVLIN, *THE TREATY POWER UNDER THE CONSTITUTION OF THE UNITED STATES* 186 n.92 (1908)).

29. U.S. CONST. art. VI, cl. 2. The Supremacy Clause by its terms applies to treaties made before as well as those made after the entry into force of the Constitution.

30. Bradley, *Federalism I*, *supra* note 4, at 429-33.

31. *Id.* at 413 (alteration in original) (citation omitted).

32. *See generally* Golove, *supra* note 3, at 1141 n.195.

33. *Id.* at 1270.

34. *Id.* at 1235 n.531 (internal quotation marks omitted). In response to David Golove's reliance on Calhoun as supporting the nationalist view, Professor Bradley



It is also significant that the judiciary has consistently upheld and enforced treaty provisions addressing matters that Congress would have lacked the power to regulate directly under then-prevailing views of the scope of Congress' enumerated powers. Numerous cases concerned the right of individuals to inherit or dispose of property within the States – a matter regarded at the time as outside the legislative power of Congress. Treaties promising to respect such rights of aliens in exchange for our treaty partners' commitment to respect similar rights of U.S. citizens have been upheld from the beginning.<sup>35</sup>

In any event, my purpose here is not to defend the holding of *Missouri v. Holland* that the power to make treaties extends to matters beyond the legislative power of Congress. In the end, Professor Bradley accepts (albeit on non-originalist grounds) that the treaty-makers should be permitted to make such treaties.<sup>36</sup> My focus is Professor Bradley's argument that treaties validly made can have no effect as domestic law insofar as they address matters beyond Congress' legislative power, and that such treaties may not be implemented by federal statutes that would exceed Congress' legislative power. This position is untenable in the light of key commitments of the Founders in adopting the Constitution. Had the Founders shared Bradley's concerns, they would have addressed them by limiting the treaty-makers' power to make such treaties in the first place. Professor Bradley's solution – to permit the treaty-makers to make the treaty but deny such treaties domestic effect and deny Congress the power to implement them<sup>37</sup> – would have been anathema.

Among the principal animating causes of the Framers' decision to establish a new government under a new Constitution, rather than simply amend the Articles of Confederation, was the inability of the central government under the Articles to ensure that the States complied with the nation's treaty obligations. Edmund Randolph listed prominently among his reasons for proposing a new constitution the fact that the Confederation “could not cause infractions of treaties or of the law of nations, to be punished.”<sup>38</sup> In assessing competing constitutional proposals, the first question James Madison asked was:

Will it prevent those violations of the law of nations [and] of Treaties which if not prevented must involve us in the calamities of

---

points out that Calhoun insisted that the treaty power extended only to matters of international concern. See Bradley, *Federalism II*, *supra* note 4, at 103-05. I do not dispute that the Founders regarded this as a limitation.

35. See, e.g., *Chirac v. Lessee of Chirac*, 15 U.S. (2 Wheat.) 259 (1817); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796).

36. Bradley, *Federalism I*, *supra* note 4, at 422-33.

37. Bradley, *Federalism I*, *supra* note 4, at 456-61.

38. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 19 (Max Farrand ed., rev. ed. 1966) [hereinafter 1 RECORDS]. See generally Vázquez, *Treaty-Based Rights*, *supra* note 6, at 1102.

foreign wars? The tendency of the States to these violations has been manifested in sundry instances. The files of Congs. contain complaints already, from almost every nation with which treaties have been formed. Hitherto indulgence has been shewn to us. This cannot be the permanent disposition of foreign nations. A rupture with other powers is among the greatest of national calamities. It ought therefore to be effectually provided that no part of a nation shall have it in its power to bring them on the whole. The existing confederacy does [not] sufficiently provide against this evil.<sup>39</sup>

The Founders were concerned not just that treaty violations would risk destructive and costly retaliation by offended treaty partners,<sup>40</sup> but also that such violations would deter other nations from concluding potentially beneficial agreements with the new nation.<sup>41</sup> There was no dissent from the view that treaty compliance could not be left to the States. It was common ground among the Founders that the Constitution must give the federal government the power to secure compliance with treaties.

To this end, the Founders designated “all Treaties” as the “supreme Law of the Land” and instructed the courts to give them effect.<sup>42</sup> This represented

39. 1 RECORDS, *supra* note 38, at 316 (alteration in original).

40. See 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 119 (Jonathan Elliott ed., 2d ed. 1891) [hereinafter ELLIOTT'S DEBATES] (statement of William Davie) (“A due observance of treaties . . . is the only means of rendering less frequent those mutual hostilities which tend to depopulate and ruin contending nations.”); *id.* at 279 (statement of Charles Cotesworth Pinckney) (“[T]reaties shall be considered law of the land; and happy will it be for America if they shall be always so considered: we shall then avoid the disputes, the tumults, the frequent wars, we must inevitably be engaged in, if we violate treaties.”); THE FEDERALIST NO. 3, at 42 (John Jay) (Clinton Rossiter ed., 1961) (“The *just* causes of war, for the most part, arise either from violations of treaties or from direct violence.”).

41. See ELLIOTT'S DEBATES, *supra* note 40, at 266 (statement of Charles Cotesworth Pinckney) (“[If treaties had not been considered the law of the land] and any individual state possessed a right to disregard a treaty made by Congress, no nation would have entered into a treaty with us.”); Oliver Ellsworth & William Samuel Johnson, Speeches in the Connecticut Convention (Jan. 4, 1788), *reprinted in* 15 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 243, 247 (John P. Kaminski & Gaspare J. Saladino eds., 1984) (“[T]reaties are not performed. The treaty of peace with Great-Britain was a very favourable one for us. But it did not happen perfectly to please some of the states: and they would not comply with it. The consequence is, Britain charges us with the breach, and refuses to deliver up the forts on our northern quarter.”); see also 1 RECORDS, *supra* note 38, at 433 (Wilson asking “What is the reason that Great Britain does not enter into a commercial treaty with us? Because [C]ongress has not the power to enforce its observance.”).

42. U.S. CONST. art. VI, cl. 2.

a reversal of the rule that prevailed in Great Britain with respect to treaties. As explained by Justice Iredell in *Ware v. Hylton*:

[I]t is an invariable practice in that country, when the King makes any stipulation [in a treaty] of a legislative nature, that it is carried into effect by an act of Parliament. The Parliament is considered as bound, upon a principle of moral obligation, to preserve the public faith, pledged by the treaty, by passing such laws as its obligation requires; but until such laws are passed, the system of law, entitled to actual obedience, remains *de facto*, as before.<sup>43</sup>

The States' adherence to the British view during the period of the Articles of Confederation had led them to decline to enforce treaties in the absence of implementing legislation. The Supremacy Clause was adopted to "obviate this difficulty."<sup>44</sup> "Under this constitution," wrote Justice Iredell:

[S]o far as a treaty constitutionally is binding, upon principles of moral obligation, it is also, by the vigour of its own authority to be executed in fact. It would not otherwise be the supreme law, in the new sense provided for, and it was so before in a moral sense. . . . [W]hen this constitution was ratified, the case as to the treaty in question stood upon the same footing, as if every act constituting an impediment to a creditor's recovery had been expressly repealed, and any further act passed, which the public obligation had before required, if a repeal alone would not have been sufficient.<sup>45</sup>

In other words, the Supremacy Clause "executed" treaties that would otherwise have been executory, thus dispensing with the need for implementing legislation.<sup>46</sup>

Professor Bradley's claim that the Constitution permits the treaty-makers to conclude treaties on matters beyond Congress' enumerated powers but denies such treaties the force of domestic law<sup>47</sup> is flatly contradicted by

43. 3 U.S. (3 Dall.) 199, 273 (1796). Justice Iredell was sitting as Circuit Justice. The Supreme Court on appeal reversed his judgment on other grounds, concluding that Justice Iredell had not construed the treaty broadly enough. They expressed no disagreement with the portions of Justice Iredell's analysis discussed in this text.

44. *Id.* at 276-77.

45. *Id.* at 277.

46. Judicial enforcement was not the sole mechanism contemplated by the Constitution for achieving compliance with treaties. For example, the Founders also gave Congress the power to provide for calling forth the militia to enforce treaties. U.S. CONST. art. I, § 8, cl. 15; see Rosenkranz, *supra* note 5; Vázquez, *Treaty-Based Rights*, *supra* note 6, at 1107 (noting that the words "enforce treaties" were omitted from the Militia Clause as redundant).

47. Bradley, *Federalism I*, *supra* note 4, at 456.

the plain text of the Supremacy Clause, which gives domestic legal force to “all” valid treaties. Such a flat conflict with constitutional text would suffice to refute a proposed constitutional interpretation were it not for the fact that it has come to be accepted by many that some valid treaties – those that are not “self-executing” – do not operate as laws in the absence of congressional implementation. I have written that there are a number of distinct reasons why a treaty might require implementing legislation.<sup>48</sup> For present purposes, the most important category of non-self-executing treaties consists of treaties that require legislative implementation because the parties to the treaty have “stipulat[ed] for [a] future legislative act.”<sup>49</sup> This category of treaties was introduced into U.S. law in Chief Justice Marshall’s opinion in *Foster v. Neilson*.<sup>50</sup> Like Justice Iredell in *Ware v. Hylton*, Marshall recognized that, in the absence of a Supremacy Clause, a treaty would not “effect, of itself, the object to be accomplished, especially so far as its operation is infra-territorial; but [would have to be] carried into execution by the sovereign power of the respective parties to the instrument.”<sup>51</sup> But, again like Justice Iredell, Marshall recognized that “[i]n the United States a different principle is established” by the Supremacy Clause.<sup>52</sup> “Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature . . . .”<sup>53</sup>

Unlike Iredell, however, Marshall wrote that treaties are equivalent to acts of the legislature only if they “operate[] of [themselves] without the aid of any legislative provision.”<sup>54</sup> Marshall’s distinction between treaties that “operate of themselves” and those that do not is the foundation of the modern-day distinction between self-executing and non-self-executing treaties. Treaties in the latter category are, in Marshall’s words, “address[ed] . . . to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.”<sup>55</sup>

---

48. One category that is relatively straightforward and unproblematic consists of treaties that require legislative action for constitutional separation of powers reasons. For example, treaties that require the appropriation of money require legislation because the Constitution provides that no money shall be taken from the Treasury except pursuant to a statute. See Vázquez, *Four Doctrines*, *supra* note 6, at 718-19. A treaty that is non-self-executing because the Constitution assigns certain powers exclusively to Congress presents no problem under Bradley’s proposed rule because Congress obviously would have the power to execute the provision under Article I. A second reason a treaty might require implementing legislation is because its provisions are too vague for judicial enforcement. *Id.* at 713-15. This type of treaty will be the focus of Part IV of this Article.

49. *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 89 (1833).

50. 27 U.S. (2 Pet.) 253 (1829).

51. *Id.* at 314.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

As I have written elsewhere, the Court could well have decided that the treaty-makers lack the power to conclude treaties “addressed to the legislature.”<sup>56</sup> The legislature, after all, makes law, and the Supremacy Clause declares treaties to be law once made. The apparent purpose of the Supremacy Clause insofar as it applies to treaties was to minimize violations of treaties by making them judicially enforceable once made. A power to make treaties subject to legislative implementation could jeopardize that goal by giving the House a veto over the implementation of a valid treaty.<sup>57</sup> There is little evidence that the Founders read the Constitution to grant the treaty-makers this power.<sup>58</sup> Just as treaties in the United Kingdom require legislative implementation no matter what the parties intended, the Court in *Foster* could have held that, given the Supremacy Clause, treaties in the United States never require implementing legislation, no matter what the parties intended. Nevertheless, it is too late in our history to reject the treaty-makers’ power to conclude treaties “addressed to the legislature.”<sup>59</sup>

Professor Bradley’s proposal, however, would greatly magnify the problem posed by the recognition of non-self-executing treaties. At least under the rule of *Missouri v. Holland*, if the treaty-makers conclude a treaty that requires implementation, the federal government has the power to implement it by virtue of the Necessary and Proper Clause. Compliance with non-self-executing treaties can be secured with the assent of the House. Under Professor Bradley’s approach, treaties would lack domestic legal force if they address matters outside Congress’ legislative power, and Congress would lack the power to enforce such treaties pursuant to the Necessary and Proper Clause. Indeed, treaties would require implementation in precisely the circumstances in which Congress would lack the power to implement them. Because this approach would rely on the States to enact the necessary implementing legislation, it would reproduce the “imbecili[c]”<sup>60</sup> aspect of the

56. Vázquez, *Four Doctrines*, *supra* note 6, at 695-97.

57. *Id.* at 706.

58. The evidence produced by John Yoo for the proposition that the Founders intended that all treaties addressing matters within Congress’ legislative powers would be subject to legislative implementation is very weak. Compare John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955 (1999), and John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218 (1999), with Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as “Supreme Law of the Land,”* 99 COLUM. L. REV. 2095 (1999), Vasav Kesavan, *The Three Tiers of Federal Law*, 100 NW. U. L. REV. 1479, 1488-89 (2006), Michael D. Ramsey, *Toward a Rule of Law in Foreign Affairs*, 106 COLUM. L. REV. 1450, 1469-73 (2006) (reviewing JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* (2005)), Michael P. Van Alstine, *Federal Common Law in an Age of Treaties*, 89 CORNELL L. REV. 892, 907-17 (2004), and Vázquez, *Laughing*, *supra* note 6.

59. See Vázquez, *Four Doctrines*, *supra* note 6, at 697, 706.

60. THE FEDERALIST NO. 15 (Alexander Hamilton).

Articles of Confederation that led the Founders to scrap the Articles in favor of an entirely new Constitution. The Founders would have been much more likely to have denied the treaty-makers the power to conclude treaties on matters beyond Article I than to allow them to conclude such treaties but rely on the States to implement them.

Bradley's proposal also fits poorly with the rest of the Constitution, which grants Congress significant legislative powers in the area of foreign affairs. Take, for example, the power to "define and punish . . . Offences against the Law of Nations."<sup>61</sup> This power is on its face significantly more intrusive of any reserved powers of the States than a power to implement valid treaties on matters otherwise beyond Congress' legislative power. The Offenses Clause gives Congress the power to codify its views about what is required by *customary international law*, a type of international law that Professor Bradley himself has claimed is less legitimate from various perspectives than treaties and just as apt to address matters otherwise beyond Congress' legislative power.<sup>62</sup> And the Clause on its face authorizes the most intrusive form of federal law – a federal criminal statute. If the Founders authorized Congress to codify and provide for the criminal enforcement of customary international law norms, why would they have denied Congress the power to implement treaty obligations that they gave the President and Senate the power to commit to, and that the President and Senate did in fact assume?

Indeed, given the Offenses Clause, Professor Bradley's view that the Constitution denies Congress the power to implement certain valid treaty obligations may be not just implausible but impossible. If the treaty-makers have the constitutional power to conclude the treaty, as Professor Bradley contemplates,<sup>63</sup> then the treaty binds us on the international plane. As a result, the United States has a duty under the law of nations law to comply with it.<sup>64</sup> The Supreme Court has recognized that the Offenses Clause authorizes the federal government to "prevent a wrong being done within its own dominion to another nation with which it is at peace."<sup>65</sup> This clearly includes the

61. U.S. CONST. art. I, § 8, cl. 10.

62. See Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997); Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 HARV. L. REV. 2260 (1998).

63. Bradley, *Federalism I*, *supra* note 4, at 456.

64. See 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 169 (1826) ("The violation of a treaty of peace, or other national compact, is a violation of the law of nations . . . ."); 4 EMMERICH DE Vattel, THE LAW OF NATIONS § 221, at 347 (1792) (1758) ("He who violates his treaties, violates at the same time the law of nations . . . .").

65. *United States v. Arjona*, 120 U.S. 479, 484 (1887).

violation of a valid treaty.<sup>66</sup> Indeed, the narrowest reading of this clause advanced at the Founding was that it authorizes Congress to punish violations of treaties.<sup>67</sup> Thus, in the face of a treaty that binds us on the international plane but addresses matters otherwise beyond Congress' legislative powers, Congress has the power to "define" as an offense against the law of nations any conduct that would constitute a breach of the treaty. If the Court's holding in *Missouri v. Holland* that the Necessary and Proper Clause authorizes implementing legislation on matter beyond Article I were to be rejected, the Offenses clause would provide the necessary authority.<sup>68</sup>

To avoid this result, Professor Bradley would have to contend that, in assessing whether it has the power to enact a law under Article I, Congress must disregard any treaties in force on the subject (which is more or less what the Bricker Amendment would have required<sup>69</sup>). To formulate the rule this way, however, is to refute it. While a constitutional amendment could certainly accomplish the task, it is clear that a Constitution that declares treaties to be the "supreme Law of the Land" cannot be read to require Congress, in exercising its other powers, to act as if a treaty that is valid and in force *did not exist*.

---

66. It is also clear that the clause authorizes Congress to regulate (not just criminalize) conduct of individuals (not just states) that risks placing the United States in violation of the law of nations. See J. Andrew Kent, *Congress's Under-Appreciated Power to Define and Punish Offenses Against the Law of Nations*, 85 TEX. L. REV. 843 (2007) (arguing that Offenses Clause also authorizes Congress to regulate conduct of U.S. States and foreign states that would violate the law of nations but recognizing that the prevailing view is that the clause authorizes Congress to regulate the conduct of individuals).

67. See *Anti-Cincinnatus*, HAMPSHIRE (MASS.) GAZETTE, Dec. 19, 1787, reprinted in 5 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 487, 489-90 (Merrill Jensen ed., 1978) (responding to claim by pamphleteer "Cincinnatus" that Offenses Clause was too broad by noting that "[a] violation of [treaties] is properly defined as an offence against the law of nations: and there is and can be no other law of nations, which binds them with respect to their treatment one of another, but these articles of agreement contained in their public treaties and alliances"); Kent, *supra* note 66, at 909-10.

68. The Offenses Clause might, indeed, be a preferable home for the power to implement treaties than the Necessary and Proper Clause, as the former is a more plausible basis for the power to repeal a law implementing a treaty. Bradley cites as an argument against the holding of *Missouri v. Holland* that the Necessary and Proper Clause cannot plausibly support a statute superseding (and thus repealing for domestic purposes) a treaty on matters beyond Congress' legislative powers. Bradley, *Federalism I*, *supra* note 4, at 457. The Offenses Clause plausibly provides such authority, as the power to "define" an offense against the law of nations would appear to encompass the power to define the absence of an offense.

69. 99 CONG. REC. 6777 (1953) ("A treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of treaty.").

To be sure, Bradley is not an originalist. He defends his approach largely on non-originalist grounds. Still, at a minimum, an approach so plainly at odds with the Founders' design is an eligible interpretation of our Constitution only if supported by truly weighty non-originalist arguments. In Part IV, I argue that most of the federalism objections Bradley raises are overstated given the Constitution's structural check on the treaty-making process. The only legitimate federalism problem with the holding of *Missouri v. Holland* can be adequately addressed through a modest refinement of that holding – a refinement that, unlike Bradley's approach, is entirely consistent with the Founders' design.

### III. ROSENKRANZ'S APPROACH

Like Professor Bradley, Professor Rosenkranz would permit the treaty-makers to conclude treaties addressing matters beyond Congress' enumerated powers. Unlike Professor Bradley, he would permit the treaty-makers to make such treaties self-executing and thus operative as laws without the need for implementation by Congress.<sup>70</sup> However, if the treaty-makers opt to make the treaty non-self-executing, Rosenkranz would deny Congress the power to pass laws to implement it.<sup>71</sup> Rosenkranz's method is very different from Bradley's. He is a textualist and, as such, relies largely on the Constitution's text and structure. He also argues, however, that (happily) the conclusion he reaches through textual and structural analysis is also normatively attractive.<sup>72</sup>

In this section, I first show that Rosenkranz's approach, though less problematic than Bradley's from the standpoint of treaty compliance, is inconsistent with the Founders' design insofar as it would leave compliance with some valid treaties entirely to the States. I also show that Rosenkranz's approach is less protective of state interests than the *Missouri v. Holland* approach. Finally, I show that Rosenkranz's textual and structural defense of his approach is unconvincing.

#### A. Rosenkranz's Approach and the Founders' Design

In Rosenkranz's view, the federal government has the power to enter into non-self-executing treaties addressing matters beyond Article I, but Congress lacks the power to implement such treaties.<sup>73</sup> Thus, by leaving

---

70. Rosenkranz, *supra* note 5, at 1919.

71. *Id.*

72. *Id.* at 1935-37.

73. *Id.* at 1919-20.



compliance with such treaties entirely to the States, Rosenkranz, like Bradley, appears to reproduce the problem that the Founders tried to fix.<sup>74</sup>

Rosenkranz does not directly address this problem with his thesis because he does not acknowledge that the constitutional interpretation he advances would leave the matter to the States. He argues that his interpretation leaves the federal government with two ways to ensure compliance with treaties addressing matters beyond Article I. Neither argument withstands scrutiny.

### 1. Implementation through Constitutional Amendment

First, Rosenkranz argues that the federal government has the power to implement such treaties through a constitutional amendment.<sup>75</sup> This possibility cannot solve his problem. The issue under consideration is whether *our Constitution* empowers the federal government to implement certain treaties. One objection to Rosenkranz's proposed interpretation is that it would recreate a key problem with the Articles of Confederation that precipitated the Constitutional Convention and that the Founders sought to fix. To suggest that this structural problem can itself be fixed through a constitutional amendment is not reassuring. Any problem with a proposed interpretation can be fixed through a constitutional amendment, including the federalism problems that Rosenkranz believes are produced by the holding of *Missouri v. Holland*. The fact remains that, under *the Constitution we have*, as Rosenkranz would interpret it, non-self-executing treaties addressing matters beyond Article I would be left for the States to implement.<sup>76</sup>

Rosenkranz claims support for his position in *Reid v. Covert*, which held that treaties that agree to do what would violate the Bill of Rights are unenforceable.<sup>77</sup> He argues that treaties that require what is prohibited by the Bill of Rights are valid treaties that, just like treaties that address matters beyond Article I, can be implemented through constitutional amendment.<sup>78</sup> His analogy is inapt. Treaties that violate the Bill of Rights are judicially

---

74. The problem raised by his proposal differs from the situation faced by the Founders in that he would recognize the power of the treaty-makers to ensure compliance with treaties by making treaties self-executing. But, for the reasons discussed below, this attempt to square his proposal with the Founders' design seems to cut against the states' interests (which are the interests protected by the enumerated powers).

75. See Rosenkranz, *supra* note 5, at 1900-01.

76. Additionally, it cannot be said that the constitutional amendment process is a power of the *federal* government. Congress has the power (through a supermajority vote of both Houses) to propose constitutional amendments, but the amendments take effect only if ratified by the legislatures of three-fourths of the states or by conventions in three-fourths of the States. U.S. CONST. art. V.

77. 354 U.S. 1 (1957).

78. Rosenkranz, *supra* note 5, at 1923-25.

unenforceable because they are *unconstitutional* – meaning they are *invalid* as a matter of U.S. law.<sup>79</sup> Rosenkranz disagrees, but in support of his claim that such treaties are valid, he relies on authorities that indicate that treaties that violate the U.S. Constitution may nonetheless bind the nation *as a matter of international law*.<sup>80</sup> The question, however, is whether such a treaty would be valid *as a matter of U.S. constitutional law*. International law itself recognizes that a treaty that is binding under international law may not be valid as a matter of domestic law. Indeed, international law recognizes that a treaty under certain circumstances is not binding as a matter of international law *because* it is invalid under domestic law. Article 46 of the Vienna Convention on the Law of Treaties provides that a treaty is not binding under international law if the treaty-makers “violat[ed] . . . a provision of . . . internal law regarding competence to conclude treaties” if “that violation was manifest and concerned a rule of . . . internal law of fundamental importance.”<sup>81</sup> If Rosenkranz’s analysis were taken seriously, the United States would not benefit from the principle reflected in article 46 because *no* treaty would be beyond the competence of the treaty-makers to conclude. If a treaty required what would violate the Bill of Rights, it would be a valid treaty that merely requires the adoption of a constitutional amendment. But Rosenkranz has offered no authority for his claim that the Constitution authorizes the treaty-makers to make treaties that require conduct that violates the Constitution.

As Rosenkranz recognizes, all non-self-executing treaties are problematic from a compliance perspective because compliance depends on the subsequent concurrence of the House.<sup>82</sup> How much more problematic a treaty that can be complied with only through the adoption of a constitutional amendment! Rosenkranz indicates that a treaty that depends on a constitutional amendment for implementation is “not qualitatively different” from a treaty that can be implemented by statute,<sup>83</sup> but obtaining the concurrence of the House on a matter that has already received the concurrence of the President and two-thirds of the Senate *is* qualitatively different from amending the Constitution. Clearly, such treaties are unconstitutional and hence invalid.<sup>84</sup>

---

79. If *Reid v. Covert* stands for the proposition that treaties that agree to perform acts that would violate the Bill of Rights are invalid, the case offers no support for Rosenkranz’s interpretation. Rosenkranz accepts *Missouri v. Holland*’s first proposition and thus recognizes the validity of such treaties, insisting instead that *Missouri v. Holland* erred by recognizing that Congress has the power to implement such treaties through ordinary legislation. *Id.* at 1876-77.

80. See Rosenkranz, *supra* note 5, at 1922-24.

81. Vienna Convention on the Law of Treaties, art. 46, ¶ 2, *opened for ratification or accession* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980). Although the United States has not ratified the Vienna Convention, it recognizes most of its provisions as a codification of customary international law.

82. Rosenkranz, *supra* note 5, at 1924.

83. *Id.* at 1925.

84. Golove, *supra* note 3, at 1083.

## 2. “Implementation” through Self-Execution

Rosenkranz’s second basis for insisting that his proposal does not leave it to the States to decide whether to comply with treaties addressing matters beyond Article I is more colorable. Although he would deny Congress the power to implement such treaties, he recognizes that such treaties can be self-executing.<sup>85</sup> Self-executing treaties would directly displace state law and existing federal statutes, and they would be enforceable in the courts (federal and state) without prior action by Congress. Because the treaty-makers have the power to make treaties self-executing, the federal government does have the power to ensure compliance with treaties.

I agree that treaties going beyond Article I can be made self-executing. Indeed, Rosenkranz is entirely correct in noting that the Founders viewed self-executing treaties to be the paradigm.<sup>86</sup> He is also correct to note that, from the standpoint of compliance, self-executing treaties are superior to non-self-executing treaties because their enforcement does not depend on the House’s consent to an implementing statute.<sup>87</sup> Those would be powerful reasons for concluding that the Constitution requires that treaties be self-executing, a conclusion that would find much support in the constitutional text and the evidence of the Founders’ intent.<sup>88</sup>

But Rosenkranz does not make such an argument. He accepts as well-settled the power of the President and Senate to conclude non-self-executing treaties.<sup>89</sup> Indeed, if the Constitution were interpreted to require that treaties be self-executing, the issue that Rosenkranz addresses in his article would simply not arise. The problem with the regime Rosenkranz defends is its simultaneous acceptance of the treaty-makers’ power to conclude treaties requiring implementation and denial of Congress’ power to implement them.

This problem could be avoided by insisting that, if a treaty addresses matters beyond Article I, the treaty-makers *must* make the treaty self-executing. If this were the rule, Congress would have the power to implement all valid treaties requiring implementation. But this would be a

85. Rosenkranz, *supra* note 5, at 1928.

86. *Id.* (“In fact, self-executing treaties are the paradigm, and non-self-executing treaties—though very much in the ascendancy today—were meant to be the exception rather than the rule.”).

87. *Id.* at 1928-29 (“[O]ur treaty partners will generally prefer self-executing treaties to non-self-executing treaties; they are equivalent international legal commitments, but only the latter pose the danger that the House of Representatives will balk at domestic execution.”).

88. *See* Flaherty, *supra* note 58; Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT’L L. 760, 760-64 (1988); Ramsey, *supra* note 58, at 1469-70; David Sloss, *Non-Self-Executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. DAVIS L. REV. 1, 7 (2002).

89. Rosenkranz, *supra* note 5, at 1889.

paradoxical solution to the issue posed by *Missouri v. Holland*. The scope of Congress' legislative power is a federalism issue – that is, an issue concerning the distribution of power as between the federal and state governments. Limitations on Congress's legislative powers serve to protect the States, whose laws on matters not enumerated are immune to displacement by Congress. From a federalism perspective, it seems odd to insist that, if a treaty addresses matters beyond Article I, the federal government may displace state law through a self-executing treaty, but it may not conclude a treaty that puts off the displacement of state law until a statute is passed by Congress to implement the treaty. The displacement of state law in one step through the adoption of a treaty by the President and two-thirds of the Senate that would be directly enforceable in the courts seems more of an impingement of the interests of the States than the displacement of state law through a two-step process that requires the consent of the same entities plus, at the second step, a majority of the House of Representatives – the most representative branch.<sup>90</sup>

Perhaps Rosenkranz would respond that self-executing treaties are more difficult to negotiate than non-self-executing ones, and thus, if the choice were between a self-executing treaty and none at all, the result may be fewer treaties and hence less displacement of state law. An argument along these lines is suggested by Rosenkranz's assertion that self-executing treaties are more difficult for states to conclude because they require agreement on matters of detail, whereas non-self-executing treaties can be more general.<sup>91</sup> He indicates, for example, that a self-executing treaty would have to look something like a prolix Family Law Code.<sup>92</sup> If self-executing treaties are indeed more difficult to negotiate, then it might be contended that state law would be displaced less often under his approach than under that of *Missouri v. Holland*. But his assumption that self-executing treaties must address matters in great detail is mistaken. One could have a self-executing treaty that simply sets forth a general standard – such as a requirement that family law matters be resolved according to the best interests of the child. State family law would be directly displaced by such a treaty, and state and federal courts

---

90. I do not mean to suggest that these federalism concerns call into question the legitimacy of self-executing treaties. As discussed above, the Founders subordinated these federalism concerns to the nation's interest in treaty compliance. My point is only that insisting on self-execution would be a paradoxical solution to the *Missouri v. Holland* problem, which is at bottom one of federalism.

I also note that my analysis here assumes that the treaty and the implementing statute have a similar content, whereas Rosenkranz appears to be most troubled by aspirational treaty provisions which, once ratified, would serve as the basis for legislation that Congress would not otherwise have power to enact. See Rosenkranz, *supra* note 5, at 1929-32. But Rosenkranz's proposed solution would apply to obligatory treaties as well as aspirational ones. In Part IV, I propose a different solution for the federalism problem posed by aspirational non-self-executing treaties. It is thus appropriate to focus here on non-self-executing treaties that are specific and obligatory.

91. See *id.* at 1930-31.

92. *Id.* at 1930.

would accordingly have to enforce it without any prior action by Congress. If self-executing treaties can be just as simple, and hence just as easy to negotiate, as non-self-executing treaties, how do *the States* benefit from allowing the displacement of their law by means of such a treaty but not by means of a non-self-executing treaty followed by an implementing statute?

Perhaps Rosenkranz's answer would be that the Senate is much less likely to agree to a self-executing treaty than a non-self-executing one. If so, then perhaps state law is less likely to be displaced under a rule requiring all treaties addressing matters beyond Article I to be self-executing than under the rule of *Missouri v. Holland*. Faced with the choice of adopting a self-executing treaty or no treaty at all, the treaty-makers may well opt for no treaty at all. The idea, in other words, would be that making treaties self-executing has become the nuclear option, unlikely to be used except in extreme circumstances. But it is far from clear that the Senate has become that hostile to self-executing treaties.<sup>93</sup> In any event, it would be odd for a textualist like Rosenkranz to defend his conclusion on this ground, as the defense is historically contingent. The Founders and ratifiers of the Constitution certainly did not believe that the Senate they were creating would be hostile to self-executing treaties.<sup>94</sup> Indeed, as Rosenkranz recognizes, the Founders regarded self-executing treaties as the paradigm.<sup>95</sup> Furthermore, this argument alleviates the federalism objection by effectively limiting the treaty-making power. If the reason States should not be concerned about having their laws displaced through self-executing treaties is because the

93. For example, the Senate has recently given its consent to 65 treaties on the condition that each be accompanied by a declaration to the effect that they are self-executing. See S. EXEC. REP. No. 110-12, at 10 (2008); S. EXEC. REP. No. 110-13, at 11 (2008); S. EXEC. REP. No. 110-14, at 6 (2008); S. EXEC. REP. No. 110-22, at 13 (2008); S. EXEC. REP. No. 110-23, at 6 (2008). The declaration would read: "This Treaty is self-executing." *E.g.*, S. EXEC. REP. No. 110-12, at 10.

94. Indeed, if the Senate today is reluctant to make treaties self-executing, that may be because it knows that Congress has the power to execute them. If *Missouri v. Holland* were overruled, the Senate may become less reluctant to enter into self-executing treaties. This is most likely to be the case with respect to the sort of treaty as to which Rosenkranz's proposal differs from mine – obligatory treaties that leave the parties with little discretion regarding what is required. See *supra* text accompanying note 90; *infra* Part IV. In the case of specific, obligatory treaties, where the treaty and the implementing legislation would have essentially the same content, if the option of a non-self-executing treaty followed by a federal implementing statute were not available, it seems likely that the treaty-makers would simply make the treaty self-executing. In consenting to a non-self-executing treaty of a specific, obligatory character, two-thirds of the Senate will have (a) accepted the substantive obligation and (b) agreed that the obligation would be fulfilled through the enactment of a statute having the same content as the treaty. If the option of a non-self-executing treaty followed by a statute were not open, presumably the Senate that would have agreed to (a) and (b) would then simply agree to displace state law in one step rather than two.

95. Rosenkranz, *supra* note 5, at 1928.

treaty-makers will rarely, if ever, adopt them, then a rule requiring that all treaties addressing matters beyond Article I be self-executing would, as a practical matter, resemble a rule forbidding treaties addressing matters beyond Article I. But Rosenkranz purports to accept that the Constitution permits the conclusion of treaties addressing matters beyond Article I, distinguishing his argument in this regard from those made by other scholars.<sup>96</sup>

In any event, Rosenkranz does not argue that all treaties that address matters beyond Article I must be self-executing. He is content to permit the treaty-makers to make non-self-executing treaties addressing matters beyond Article I.<sup>97</sup> He would just deny Congress the power to implement them.<sup>98</sup> It is the combination of his acceptance of treaties requiring implementation and his rejection of Congress's power to implement them that conflicts with the Founders' design. If making treaties self-executing were indeed regarded as the nuclear option, responsible treaty-makers would simply not conclude treaties addressing matters beyond Article I (and we would effectively have a rule forbidding treaties beyond Article I). By permitting the treaty-makers to conclude non-self-executing treaties going beyond Article I, Rosenkranz adds to the treaty-makers' menu the option of adopting a treaty that requires implementation by the States. His position amounts to the claim that the Constitution permits the treaty-makers to conclude treaties that require implementation by the States.<sup>99</sup> The Founders' contrary intent could not be plainer – they *constitutionally* federalized treaties by declaring “all” of them to be the “supreme Law of the Land.”<sup>100</sup> Rosenkranz's proposal would fly in the face of the lesson learned by the Founders during the critical period: that a treaty that depends for its compliance on the States is certain to be violated by at least some States, and the nation as a whole would wind up suffering the consequences.<sup>101</sup>

96. *Id.* at 1937-38.

97. *Id.* at 1919.

98. *Id.*

99. The problem would not be severe if the treaty allowed particular States in a federation to opt in or opt out of its requirements. See Agreement on Government Procurement, Apr. 15, 1994, Agreement Establishing the World Trade Organization, Annex 4(b), Legal Instruments - Results of the Uruguay Round (1994), [http://www.wto.org/english/docs\\_e/legal\\_e/gpr-94\\_e.pdf](http://www.wto.org/english/docs_e/legal_e/gpr-94_e.pdf). But Rosenkranz's proposal applies more broadly to treaties that require specified action.

100. U.S. CONST. art. VI, cl. 2. Admittedly, this text also calls into question the very concept of a non-self-executing treaty. As discussed in Part III.B, the fact the problem Rosenkranz addresses arises at all only because of the recognition of a doctrine that is itself hard to square with the constitutional text makes his textual methodology particularly suspect.

101. A treaty requiring implementation by the States may also violate the anti-commandeering doctrine. For a discussion of the anti-commandeering problem as applied to treaties, see Vázquez, Breard, Printz, *supra* note 7, at 1354-60.

### B. *The Problems with Rosenkranz's Textual and Structural Arguments*

In support of the novel and counterintuitive regime he proposes, Rosenkranz relies on wholly unconvincing textual and structural arguments. His principal argument is textual. He juxtaposes the text of the Necessary and Proper Clause with Article II's grant of the "power to make treaties" and argues that the two together give Congress the power to enact laws that are necessary and proper to carry into execution the power to make treaties.<sup>102</sup> Rosenkranz insists that the power to carry into execution the power to make treaties is not the same as the power to execute treaties already made.<sup>103</sup> The former power, he maintains, encompasses laws that facilitate the negotiation of treaties.<sup>104</sup> For example, Congress could, under this clause, appropriate money for the negotiation of treaties and the study of problems that might be the subject of future treaty negotiations.<sup>105</sup> But once the treaty has been made, the clause does not empower Congress to implement it. The clause, in other words, is forward looking, giving Congress powers with respect to future treaties but not present or past treaties.

Among the many problems with this interpretation is that it would appear to lead equally to the conclusion that, with respect to statutes, the Necessary and Proper Clause does no more than give Congress the power to appropriate money to hold hearings or conduct studies regarding possible subjects of legislation. Rosenkranz himself draws the analogy between the Treaty Power and the Legislative Power: "Textually, the phrase 'legislative Powers' in Article I may be paraphrased as the 'power to make laws,' which is parallel to the Article II 'Power . . . to make Treaties.'"<sup>106</sup> If the power to bring into execution the power to make treaties encompasses only the funding of negotiations and other preparatory matters, then it seems to follow (although Rosenkranz does not acknowledge it) that the power to bring into execution the power to make laws regulating commerce similarly encompasses only the funding of hearings and other preparatory matters. But such an understanding of the Necessary and Proper Clause has never been widely held.

Moreover, even if we were to accept Rosenkranz's basic approach to the text, it would not necessarily follow that Congress lacks the power to implement treaties already made. Rosenkranz appears prepared to accept that

102. Rosenkranz, *supra* note 5, at 1880-92.

103. *Id.* at 1892.

104. *Id.* at 1882.

105. *Id.*

106. *Id.* at 1886 (citing THE FEDERALIST NO. 33, at 202 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("What is a LEGISLATIVE power but a power of making LAWS?")). Rosenkranz draws the parallel between the Treaty Power and the Legislative Power in order to set up the argument that, in the Legislative context, we do not allow Congress to pass statutes that are "necessary and proper" to execute other statutes. *Id.* *United States v. Darby*, 312 U.S. 100 (1941), appears to be a counter-example.

statutes are authorized by the Necessary and Proper Clause if they facilitate the enactment of future laws.<sup>107</sup> If so, then a statute implementing an existing non-self-executing treaty might well pass muster on the ground that such implementation makes it more likely that other nations will be willing to conclude treaties with us in the future. Such an interpretation would accord with the Founders' reasons for taking control over treaty compliance away from the States.<sup>108</sup>

But there is a deeper problem with Rosenkranz's reliance on a close reading of the Necessary and Proper Clause. As Rosenkranz acknowledges, the problem he is addressing arises only if one accepts that treaties addressing matters beyond Article I may be non-self-executing. As he also recognizes, the Founders viewed self-executing treaties as the paradigm. Rosenkranz accepts the permissibility of non-self-executing treaties not because of text or Founders' intent, but because such treaties have come to be accepted.<sup>109</sup> If the question he addresses arises only because of later-developed doctrine accepting that treaties beyond Article I may be non-self-executing, then closely scrutinizing the Constitution's text for an answer is anachronistic in the extreme. A lack of textual support for a congressional power to implement non-self-executing treaties is equally consistent with the conclusion that the people who wrote the Constitution did not contemplate that treaties might be non-self-executing.<sup>110</sup>

Furthermore, a close textual analysis of other clauses of the Constitution would lead to the absurd conclusion that, while Congress lacks the power to pass statutes to implement non-self-executing treaties that address matters beyond Article I, Congress can call forth the militia to enforce such treaties

---

107. There would appear to be no other basis for reconciling the interpretation of the Necessary and Proper Clause he advances in this article with the one he advanced in Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085 (2002). In the prior article, he relied on the Necessary and Proper clause as the constitutional basis for the enactment of a federal statute on statutory interpretation. *See id.* at 2102. Presumably, such a statute is forward-looking in the sense that it serves as an aid to subsequent Congresses, permitting them to express their intent more clearly in enacting laws in the future. *See id.* at 2115-20 (arguing that general prospective interpretive statutes are constitutional).

108. *See supra* text accompanying notes 99-101.

109. *See Rosenkranz, supra* note 5, at 1928.

110. In the light of his willingness to accept the permissibility of non-self-executing treaties on the ground that such treaties have long been accepted, one wonders why Rosenkranz refuses to accept the equally long-accepted proposition that Congress has the power to execute any treaty that the President-and-Senate have the power to make. I accept both propositions because they are entrenched, but, if I considered myself free to reject one, I would reject the treaty-makers' power to render treaties beyond Article I non-self-executing. If that power were rejected, however, the issue Rosenkranz addresses would go away entirely. If all such treaties were self-executing, there would be no need for Congress to implement them.



(in light of that clause's reference to "laws").<sup>111</sup> Indeed, a close reading of the text, of the sort in which Rosenkranz engages, would lead one to conclude that the President is under a duty to faithfully execute such treaties even without congressional implementation.<sup>112</sup> These conclusions could be avoided by maintaining that non-self-executing treaties lack the force of domestic law, as some scholars and courts have done.<sup>113</sup> That conclusion, however, flies in the face of the text of the Supremacy Clause, which provides that "all" treaties are the "supreme Law of the Land." To be clear, I am not taking a position here on whether non-self-executing treaties do or do not have the force of domestic law.<sup>114</sup> My point is that in light of the tension between the concept of a non-self-executing treaty and the plain text of the Supremacy Clause – a tension that has led some courts and commentators to conclude that non-self-executing treaties lack the force of domestic law despite a constitutional text declaring "all" treaties to be the law of the land – it seems bizarre to resort to a close reading of the text of the Necessary and Proper Clause to determine Congress' power to implement non-self-executing treaties.<sup>115</sup>

Rosenkranz's structural arguments are equally unconvincing. He argues, for example, that to accept the power of the President to expand Congress' legislative power through the conclusion of a non-self-executing treaty would circumvent Article V by adding to the subjects of legislation enumerated in Article I.<sup>116</sup> But one can reach that conclusion only after deciding that *Missouri v. Holland* was decided incorrectly. If *Missouri v. Holland* correctly held that the Constitution grants Congress the power to implement valid non-self-executing treaties addressing matters beyond Article I, then recognizing that power would not circumvent Article V. Article V therefore

---

111. Rosenkranz himself lays the foundation for this argument. He concedes that the Founders' omission of the words "to enforce treaties" from the Necessary and Proper Clause as redundant would have provided very strong evidence that the Founders understood that the Necessary and Proper Clause included "the power 'to enforce treaties' beyond the other enumerated powers." See Rosenkranz, *supra* note 5, at 1912-13. If so, then the omission of those words from the Militia Clause as redundant shows that the Founders understood that clause to give Congress the power to provide for calling forth the Militia to enforce treaties beyond the other enumerated powers.

112. See U.S. Const. art VI, cl. 2 (treaties are "Law"); U.S. CONST. art. II, § 3 (The President "shall take Care that the Laws be faithfully executed.").

113. The Supreme Court's recent decision in *Medellin v. Texas*, 128 S. Ct. 1346, 1356 (2008), could be read to endorse this view but could (and should) be read more narrowly. See Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599 (2008).

114. For discussion of this issue, see Vázquez, *supra* note 113.

115. Even if Rosenkranz's argument regarding the Necessary and Proper Clause were accepted, moreover, Congress would retain the power to implement treaties under the Offenses Clause, as discussed in Part II.

116. See Rosenkranz, *supra* note 5, at 1888-1903.

does not help us determine whether *Missouri v. Holland* was correctly decided.

Rosenkranz also argues that *Missouri v. Holland* must be wrong because there is no other context in which action by the President operates to expand Congress' power to legislate.<sup>117</sup> I am not sure that there are no other contexts,<sup>118</sup> but if there are not, the more plausible conclusion is that the Treaty Power is *sui generis* in this respect. Indeed, the Treaty Power is indisputably unique in other respects that do not appear to trouble Rosenkranz. For example, the Treaty Clause is the only provision of the Constitution that gives the President the power to "make"<sup>119</sup> "Law."<sup>120</sup> Most relevantly, the power to make *non-self-executing* treaties (if we accept such a power, as Rosenkranz does) is the only example in the Constitution of a power of the President (or anyone) to make "Law" *directed to Congress*. (A non-self-executing treaty, as defined in the canonical case of *Foster v. Nielson*, is a treaty addressed to the legislature.)<sup>121</sup> Given that the question of Congress' power to implement non-self-executing treaties arises at all only because of the existence of the unique power of the President to make Law directed to Congress, it is strange that anyone would object to the recognition of the power of Congress to implement non-self-executing treaties because a similar power appears nowhere else in the Constitution.

---

117. *Id.* at 1897.

118. Consider the War Power (not discussed by Rosenkranz). It is established that the existence of a war gives Congress the power to legislate on matters otherwise beyond Art. I. See *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138 (1948). Some scholars argue that the President has the constitutional power to engage in war without congressional authorization (for example, in the event of an armed attack). Even if all war must be authorized by Congress, it would remain the case that the decision to engage in a war that has been authorized by Congress would be the President's, just as the decision whether or not to ratify a treaty after the Senate has given its consent remains the President's. The situations appear to be analogous.

119. U.S. CONST. art II, § 2 (giving the President the power to "make" treaties, with the consent of the Senate).

120. U.S. CONST. art. VI, cl. 2 (declaring treaties to be the "supreme Law of the Land").

121. See *supra* text accompanying notes 55-56.

IV. THE REAL FEDERALISM PROBLEM POSED BY *MISSOURI V. HOLLAND*

Bradley and Rosenkranz both argue that their proposals are justified because of the federalism problems created by the *Missouri v. Holland* holding. They both appear to be concerned that the Treaty Power will be used to circumvent the limits on Congress' legislative power that the Court has recently begun enforcing – for example, by concluding a treaty calling for the enactment of Gun Free School Zone laws of the sort struck down in *United States v. Lopez*.<sup>122</sup> This problem, however, can be addressed more directly, and with less harm to the Founders' design, by treating such treaties as invalid. Bradley and Rosenkranz would allow the treaty to be made but prohibit their implementation by statute. Rosenkranz would even allow the treaty-makers directly to enact a Gun Free School Zone law by adopting a self-executing Gun Free School Zone treaty. The latter is just as problematic if one is concerned with evading Supreme Court precedent.

Professors Henkin and Golove would address this problem by recognizing a “bad faith” exception to *Missouri v. Holland*.<sup>123</sup> Rosenkranz thinks that such an exception would be judicially inadministrable,<sup>124</sup> and I do not disagree. My view is that the Constitution addresses this problem through a structural mechanism: the requirement that treaties receive the consent of two-thirds of the Senate. It is difficult to get two-thirds of the Senate to agree on anything. I have trouble envisioning two-thirds of the Senate going along with any “bad faith” attempt to evade constitutional limits on the legislative power through the enactment of a treaty (particularly when they have other resources at hand, such as the Spending Power). In light of the two-thirds consent requirement, I think that the problem that concerns Bradley and Rosenkranz is very unlikely to arise. In any event, this particular problem would be solved, without raising the structural problems I identified in Part II,<sup>125</sup> by denying the treaty-makers the power to make such treaties.

I do think that *Missouri v. Holland* raises a different federalism problem, however. Today, numerous good faith treaties are in force that include aspirational provisions leaving the parties with very broad discretion to determine how best to comply.<sup>126</sup> If Congress has the power to pass statutes to implement all non-self-executing treaties, then, given the existence of these treaties, Congress' legislative power is already effectively plenary. Consider the U.N. Charter, which includes a provision calling upon member states to

122. 514 U.S. 549 (1995); see Rosenkranz, *supra* note 5, at 1871, 1890.

123. LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 185, 455 (2d ed. 1996); Golove, *supra* note 3, at 1090 n.41.

124. See Rosenkranz, *supra* note 5, at 1933-35.

125. See *supra* notes 37-60 and accompanying text.

126. See *infra* text accompanying note 127.

“promot[e] . . . human rights.”<sup>127</sup> Virtually any statute that Congress would like to pass in the social arena could be defended as an implementation of such a treaty provision.

Bradley and Rosenkranz seem particularly concerned about treaties of this character.<sup>128</sup> If that is their concern, however, the solutions they propose are overbroad. Their concern appears to be that such treaties will easily slip through the advice and consent process because they do not really obligate the nation to do anything in particular, but once in force, they will lie around like a loaded gun, ready to be relied upon by a Congress eager to pass a statute it otherwise lacks the power to enact. I agree that *Missouri v. Holland*, as applied to aspirational treaties, presents a possible problem from the perspective of federalism. In my view, however, this problem can and should be addressed by refining *Missouri v. Holland* rather than scrapping it. I would recognize that Congress has the power to enact statutes to implement a non-self-executing treaty addressing matters beyond Article I unless the treaty is aspirational, as is the U.N. Charter provision mentioned above.<sup>129</sup>

Restricting Congress' power in this way fits well with the Founders' concerns. As noted, the Founders declared treaties to be the “Law of the Land” in order to avoid the foreign relations problems that would be produced by treaty violations and to reap the benefits of a reputation for treaty compliance.<sup>130</sup> If the aim is to avoid treaty violations, then the Founders' concerns are not implicated if the treaty provision is aspirational. Aspirational treaties cannot really be violated, as they commit the parties merely to attempt to achieve certain ends. Under my proposed interpretation, such treaties could be implemented by Congress if they concern matters within the legislative power as set forth in Article I. But, if the treaty addresses matters beyond Article I, implementation would be left to the States. Implementation could safely be left to the States because, even if the States did nothing, there would be no readily identifiable treaty violation.<sup>131</sup> For the same reason, there would be no commandeering problem.

My proposal differs from those of Bradley and Rosenkranz in that I would recognize Congress' power to enact a statute to implement a

127. U.N. Charter art. 1, para. 3.

128. See Bradley, *Federalism I*, *supra* note 4; Bradley, *Federalism II*, *supra* note 4; Rosenkranz, *supra* note 5.

129. Vázquez, Breard, Printz, *supra* note 7, at 1339 n.75; Vázquez, *Eleventh Amendment*, *supra* note 7, at 722-23.

130. See *supra* text accompanying notes 99-101.

131. My solution thus does not present the structural problem I identified at the outset. The structural problem with the approaches of Bradley and Rosenkranz is that they would leave compliance with some valid treaties to the states. My approach would deny Congress the power to pass legislation pursuant to certain valid treaties, but it would not leave the question of “compliance” with such treaties to the states because aspirational treaties do not raise compliance questions in any meaningful sense.

non-self-executing treaty concerning a matter beyond Article I if the treaty imposes a determinate obligation. For example, the International Covenant on Civil and Political Rights (a non-self-executing treaty) includes a provision barring the execution of pregnant women.<sup>132</sup> This provision is obligatory, not aspirational. The Constitution, properly interpreted, gives Congress the power to enact a statute barring the execution of pregnant women in order to implement our treaty obligation to refrain from such executions.

Distinguishing aspirational from obligatory treaties will not always be an easy task. I do not address that issue here beyond noting that the aspirational category I have in mind consists of treaties that would not be violated even if nothing were done to implement them.<sup>133</sup> Thus, the aspirational category would include treaties that provide that the parties shall “promote” certain ends without specifying the means. Most relevantly, it would also include the very treaty involved in *Missouri v. Holland*, at least as the Court described it. According to the Court, that treaty merely required the parties to “propose” specified legislation to their legislatures.<sup>134</sup> A treaty that requires the proposal of legislation would not be violated if the proposed legislation were not enacted. Thus, under the interpretation I advance here, our Constitution would mandate that such legislation (if it addresses matters beyond Congress’ legislative powers) be proposed to the state legislatures.

Excluding “aspirational” treaties from those that Congress may implement through legislation that would otherwise exceed constitutional limits would thus technically require a slight limitation of *Missouri v. Holland*’s holding. But this limitation would not call into question the received understanding of the Court’s holding in that case, as subsequent courts and commentators have not generally relied on the precatory nature of the treaty involved in that case as a basis for asserting a congressional power to implement aspirational treaties.<sup>135</sup> To the extent that the test I propose does require

132. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 6, ¶ 5, U.N. Doc. A/6316 (Dec. 16, 1966).

133. The category thus does not include all treaties that leave the states-parties with a measure of discretion. For example, a treaty requiring the parties to use their best efforts to achieve certain ends leaves the parties with discretion, as it requires the parties to determine what is the best they can do, and for that reason may not be enforceable in the courts. See Vázquez, *supra* note 113, at 660-65 (arguing that the Court in *Medellín* held the treaty before it to be non-self-executing for this reason). But such a treaty is not so aspirational as to be beyond Congress’s power to implement it (if it addresses matters beyond Article I). Whether a treaty is obligatory or aspirational is a matter of degree. The category of treaty that may not be enforced by Congress if it falls outside Article I because it is aspirational is far narrower than the category of treaty that may not be directly enforced in the courts because the obligation it imposes requires the exercise of nonjudicial discretion.

134. *Missouri v. Holland*, 252 U.S. 416, 431 (1920).

135. Rosenkranz may be the only commentator to have pointed to this aspect of the Migratory Bird Treaty in determining the scope of *Missouri v. Holland*’s holding,

a limitation of *Missouri*, the limitation is a small one and it is justified by the federalism problems created by recognition of a congressional power to implement aspirational treaties going beyond Article I and the fact that the modification would be consistent with the Founders' design in adopting the relevant constitutional provisions. A broader revision of either of *Missouri v. Holland*'s two holdings, however, would conflict with the Founders' design and would not be justified by any legitimate federalism interest.

### CONCLUSION

The Court in *Missouri v. Holland* held that the treaty-makers have the power to make treaties on matters falling outside Congress's legislative power under Article I and that, if they do, Congress has the power under the Necessary and Proper Clause to enact legislation to implement such treaties. Unlike past critics of *Missouri v. Holland*, Professors Bradley and Rosenkranz accept the first proposition but challenge the second. The second proposition has always seemed the least vulnerable. Given their experience with State violations of treaties under the Articles of Confederation, it seems clear that the Founders would have been far more likely to deny the federal government the power to make treaties on matters outside of Article I than to allow such treaties to be made but relegate their enforcement to the States. The particular proposals of Professors Bradley and Rosenkranz are implausible for this and other reasons. But *Missouri v. Holland*'s second proposition does pose a potentially legitimate federalism problem in one particular context. Broad, aspirational treaties might easily gain the consent of two-thirds of the Senate because they do not seem to require very much from the nation. If such treaties could ground federal legislation on matters falling outside Article I, then Congress's legislative power could (and may already have) become effectively plenary. This problem does not require a complete rethinking of *Missouri v. Holland*'s second holding. The problem can and should be addressed by regarding *Missouri v. Holland*'s second holding as applicable to obligatory but not aspirational treaties. Under this approach, the former treaties may be implemented by Congress even if they concern matters beyond Congress's legislative power under Article I, but the latter treaties may be implemented by Congress only if they concern matters within the Article I legislative power.

---

and he does so in order to discredit the decision. See Rosenkranz, *supra* note 5, at 1930 n.285.

