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Beyond Medellin: Reconsidering Federalism Limits on the Treaty Power

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NOTES

BEYOND *MEDELLÍN*: RECONSIDERING FEDERALISM LIMITS ON THE TREATY POWER

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INTRODUCTION

The Constitution recognizes three sources of law as the supreme law of the land: the Constitution itself, federal laws passed in pursuance of the Constitution, and treaties made under the authority of the United States.[1] In addition to this recognition, the Constitution places limits on the ability to create and modify the law through each of these sources of law. Changes to the Constitution itself must be made through a formal amendment process.[2] The legislative power is limited by the enumeration of particular powers granted to Congress.[3] The power to make treaties is vested in the President, and subject to only one explicit limitation: a two-thirds vote in the Senate.[4]

Both statutes and treaties may become the supreme law of the land, and they may even pursue the same ends. Why, then, are the limits on the legislative power so different from the limits on the treaty power? If principles of federalism impose limits on the power of the federal government to legislate, does federalism constrain the power to make treaties as well?[5]

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

2 *Id.* art. V.

3 *See id.* art. I, § 8.

4 *Id.* art. II, § 2, para. 2.

5 Throughout this Note, I have used the term "federalism limits" to refer broadly to structural considerations between the federal government and state governments. This includes the concept of enumerated powers as judicially enforceable limits on

The answer to this question was long thought to be settled by *Missouri v. Holland*,[6] a 1920 case that dealt with the power of Congress to pass legislation implementing the 1916 Convention for the Protection of Migratory Birds[7] between the United States and Great Britain. The majority opinion written by Justice Holmes held that "[i]f 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."[8] Holmes went on to find that the Tenth Amendment did not bar legislation implementing the treaty despite the fact that regulation of migratory birds would be beyond the reach of Congress's enumerated powers absent the treaty.[9] In short, the treaty power was not subject to federalism limits.

In light of recent shifts in the Supreme Court's federalism jurisprudence, it is not clear that *Missouri v. Holland* was decided correctly. After largely abandoning judicial enforcement of federalism limits for five decades following the New Deal, the Court in recent years has returned to the idea of judicially enforceable federalism limits in a number of areas, most notably the commerce power.[10] With federalism limits emerging and reemerging in these other areas, the question of whether federalism constrains the treaty power is again the subject of debate.

The Supreme Court's recent decision in *Medellín v. Texas*[11] may have signaled the Court's willingness to enforce federalism limits on the treaty power. While *Medellín* does not explicitly address *Missouri v. Holland*, it does suggest a presumption against self-executing treaties—functionally, this is a presumption against preemption of state law by international obligations. The questions regarding congressional power (and the continued validity of *Missouri v. Holland*) remain open.

This Note aims to evaluate possible federalism limits on the treaty power in the wake of *Medellín*. Part I takes a closer look at *Missouri v. Holland* and precisely why it is problematic. Part II briefly traces the

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the power of the federal government, principles of states' rights, and the concept of sovereign immunity.

6 252 U.S. 416 (1920).

7 U.S.-Gr. Brit., Aug. 16, 1916, 39 Stat. 1702.

8 *Holland*, 252 U.S. at 432.

9 *Id.* at 434. In fact, a 1913 law seeking the same regulation of migratory birds had been held invalid by lower federal courts. *See infra* notes 17–19 and accompanying text. The difference between the unconstitutional 1913 law and the implementing legislation upheld in *Missouri v. Holland* was that the latter was supported by a treaty and therefore (in Holmes's view) valid. *See infra* Part I.A–B.

10 *See infra* Part II.A.

11 128 S. Ct. 1346 (2008).

death and return of judicially enforceable federalism limits from the New Deal to the Rehnquist Court's "new federalism." Part III examines the emergence of *Medellín*'s presumption against self-executing treaties. Part IV evaluates the presumption against self-executing treaties and considers other possible limits on the treaty power.

I. WHY *MISSOURI V. HOLLAND* IS PROBLEMATIC

The Court in *Missouri v. Holland* addressed the power of Congress to pass legislation implementing a treaty. The history of the case shows that the treaty in question was specifically intended to enable Congress to legislate beyond the limits of its enumerated powers. Justice Holmes's opinion thus upholds not only a broad view of the treaty power, but also the idea that the federal government can increase the power of Congress by treaty rather than by constitutional amendment. This Part addresses the historical background of the case, the opinion by Justice Holmes, and some of the problems posed by the decision.

A. *Historical Background of* Missouri v. Holland

Although the holding of *Missouri v. Holland* dealt with the power of Congress to legislate pursuant to the 1916 Migratory Bird Treaty with Great Britain,[12] the controversy actually began several years earlier.[13]

Active efforts in Congress to pass legislation protecting migratory birds began in 1904, ultimately succeeding in 1913.[14] Opponents of the legislation contended that protection of migratory birds exceeded the powers delegated to the federal government and fell within the police power reserved to state governments.[15] Even proponents of the legislation were unsure of its constitutionality.[16]

Federal district courts in Arkansas[17] and Kansas[18] agreed that the Act of 1913 was an unconstitutional interference with the rights, pow-

12 Specifically, the case was a challenge to the Migratory Bird Treaty Act, ch. 128, 40 Stat. 755 (1918) (codified as amended at 16 U.S.C. §§ 703–711 (2006)), a piece of legislation implementing the Convention for the Protection of Migratory Birds.

13 For a detailed account of federal attempts to regulate migratory birds by statute and by treaty, see Charles A. Lofgren, Missouri v. Holland *in Historical Perspective*, 1975 SUP. CT. REV. 77, 77–101. *See also* JOSEPH PAIGE, THE LAW NOBODY KNOWS 31–41 (1977) (providing historical and political context for *Missouri v. Holland*).

14 *See* Act of Mar. 4, 1913, ch. 145, 37 Stat. 828, 847; Lofgren, *supra* note 13, at 78.

15 Lofgren, *supra* note 13, at 78.

16 *Id.* at 79 ("Senator George McLean, the sponsor of the bill which passed in 1913, was so unsure at first whether the legislation could stand on its own that he introduced a constitutional amendment to validate it.").

17 United States v. Shauver, 214 F. 154, 160 (E.D. Ark. 1914).

ers, and property of the states.[19] Seeking to prevent the eventual invalidation of the Act of 1913 by the Supreme Court, the Senate passed a resolution recommending negotiation of a treaty in order to provide the federal government with the necessary authority to regulate migratory birds.[20] A treaty with Great Britain (on behalf of Canada) was swiftly concluded and approved in 1916.[21] This treaty aimed to get around the potential invalidity; "if the United States and Canada agreed to cooperate to protect the birds, Congress could enact the legislation it had previously adopted under its power to do what is 'necessary and proper' to implement the treaty."[22] As Professor David Golove noted, "[i]f ever the federal government could be charged with bad faith in making a treaty, this had to be the case."[23]

B. Justice Holmes's Opinion in Missouri v. Holland

In 1918, Congress passed the Migratory Bird Treaty Act[24] to implement its new treaty obligations. The 1918 Act was quickly challenged in court. *Missouri v. Holland* vindicated proponents of the treaty: "[t]he treaty did make a difference in judicial outcome."[25]

Writing for the Court, Justice Holmes noted that the Tenth Amendment's reservation of powers not delegated to the federal government was no bar to the 1918 Act.[26] There are three major steps in Holmes's analysis—the validity of the statute, the validity of the treaty, and the potential bar of the Tenth Amendment.

Since the power to make treaties is expressly vested in the federal government by Article II of the Constitution and those treaties are the supreme law of the land under Article VI, Holmes reasoned that the statute must be valid if made pursuant to a valid treaty.[27] That is, despite the fact that a statute would otherwise exceed the enumerated

18 United States v. McCullagh, 221 F. 288, 294–96 (D. Kan. 1915).

19 PAIGE, *supra* note 13, at 32.

20 Lofgren, *supra* note 13, at 81.

21 *Id.*; *see* Convention for the Protection of Migratory Birds, U.S.-Gr. Brit., Aug. 16, 1916, 39 Stat. 1702.

22 LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 190 (2d ed. 1996).

23 David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1256 (2000).

24 Ch. 128, 40 Stat. 755 (1918) (codified as amended at 16 U.S.C. §§ 703–711 (2006)).

25 Lofgren, *supra* note 13, at 102.

26 Missouri v. Holland, 252 U.S. 416, 433–35 (1920).

27 *Id.* at 432.

powers of Congress,[28] it may be valid as a necessary and proper means of implementing treaty obligations.[29]

Despite the potential invalidity of the 1918 Act in the absence of a treaty, Holmes determined that the limits on the treaty power are not identical to the limits on congressional power.[30] Under Article VI, statutes are the supreme law of the land when made in pursuance of the Constitution.[31] Treaties, on the other hand, are supreme when made under the authority of the United States.[32] To Holmes, this distinction suggested different limits on the power to legislate and the power to make treaties.[33]

In the absence of any express prohibition in the Constitution against such a treaty, the only question for Holmes was whether the treaty was "forbidden by some invisible radiation from the general terms of the Tenth Amendment."[34] In *Missouri v. Holland*, the treaty presented a conflict between a weak state interest and a strong federal interest. Missouri's claim was premised on the presence of migratory birds within its jurisdiction, but "[w]ild birds are not in the possession of anyone."[35] Balanced against this weak state interest, Holmes took a broad view of federal interests. Since protective regulation of such birds could only be achieved at the national and international level, the federal interest was greater.[36] Since the treaty and statute in ques-

28 Lofgren notes that the district court in *Missouri v. Holland* "agreed that the 1918 law would have been unconstitutional were it not enacted pursuant to a treaty." Lofgren, *supra* note 13, at 102.

29 *Holland*, 252 U.S. at 432. Holmes's interpretation of the Necessary and Proper Clause has been called "[t]he least controversial holding of *Holland*." CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW 419 (2d ed. 2006). *But see* Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867, 1880–92 (2005) (arguing that the Necessary and Proper Clause grants only the power to make laws necessary and proper to the creation of treaties, not the power to carry the provisions of those treaties into effect).

30 *Holland*, 252 U.S. at 433.

31 *Id.*

32 *Id.*

33 *Id.* (comparing the power to legislate and the power to make treaties and concluding that limits on the treaty power "must be ascertained in a different way").

34 *Id.* at 434.

35 *Id.*

36 Part of Holmes's test for evaluating the validity of a treaty is whether the treaty governs matters requiring national action. *Id.* at 433. Holmes's emphasis on the status of the United States as "'a nation'" rather than "'an organism'" in the post–Civil War era made it easier to assert a national interest in the protection of migratory birds. *See* G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1, 69 (1999) (quoting *Holland*, 252 U.S. at 433). White notes that this argument "seemed directed more toward confirming the breadth of the treaty power than to ascertaining any limitations on it, since the power could now be

tion were otherwise valid means of achieving this national goal, the Tenth Amendment in Holmes's view was no bar to the treaty or its implementing legislation.[37]

C. *Problems Posed by* Missouri v. Holland

The Court's decision that the treaty power is not subject to Tenth Amendment limits has endured for nearly nine decades, but it has not been without its critics. Michael D. Ramsey describes the impact of *Missouri v. Holland*:

> [T]he Supreme Court . . . came close to saying there are no constitutional limits on treaties' subject matter. That conclusion, though, has worried advocates of a meaningful federal system, both before and after *Holland*. It seems to strike at the very idea of limited national powers—that, as Madison said, the national government's powers are "few and defined."[38]

The end result of *Missouri v. Holland* is that when the federal government is unsure of the constitutionality of a statute, it can simply enter into a treaty on that subject to enlarge the power of Congress to address the previously invalid issue.[39]

Missouri v. Holland also had the unfortunate effect of resurrecting the myth that treaties are not subject to any constitutional limits[40] by emphasizing that federal statutes are supreme when made in pursuance of the Constitution, whereas treaties are supreme when made under the authority of the United States.[41] The difference in wording was intended to make clear that existing treaties at the time of the Constitution's ratification would continue to be enforced.[42] The sug-

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taken to extend to subjects that the drafters of the Treaty Clause did not view as matters of national concern." *Id.*

37 *Holland*, 252 U.S. at 435.

38 MICHAEL D. RAMSEY, THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS 300–01 (2007) (footnote omitted) (quoting THE FEDERALIST NO. 45, at 296 (James Madison) (Isaac Kramnick ed., 1987)).

39 *See* Lofgren, *supra* note 13, at 101–02 ("Proponents of the 1913 bird protection law had themselves been uncertain of its constitutionality, but saw a treaty as offering a firm foundation.").

40 CHRISTOPHER R. DRAHOZAL, THE SUPREMACY CLAUSE 163–65 (2004). Even Holmes did not go so far as to claim that treaties were not subject to any constitutional limits at all, cautioning that "[w]e do not mean to imply that there are no qualifications to the treatymaking power; but they must be ascertained in a different way." *Holland*, 252 U.S. at 433.

41 DRAHOZAL, *supra* note 40, at 163.

42 *Id.* at 158–59. By requiring federal statutes to be made in pursuance of the Constitution, only the statutes passed by the new constitutional government, and not those passed under the Articles of Confederation, would be the supreme law of the

gestion that treaties need not be made in pursuance of the Constitution (and therefore are not bound by its limits) was seized upon by Antifederalists in the ratification debate.[43] *Holland* resurrected this myth for the modern era, and it has proved persistent.[44] The Supreme Court has since clarified in several cases that treaties may not violate individual constitutional rights,[45] but the myth is damaging nonetheless.

In addition to concerns at the federal level, the treaty power unconstrained by federalism leaves the door open for Congress to legislate pursuant to treaties in areas traditionally governed by state law—just as it did in *Missouri v. Holland.* For example, it has been suggested that the federal government could enable itself to abolish the death penalty at the state level by ratifying the Second Optional Protocol to the International Covenant on Civil and Political Rights.[46] Another possibility is that the International Covenant on Civil and Political Rights[47] (CCPR) itself (to which the United States is already a party) could serve as the basis for reenacting the Religious Freedom Restoration Act[48] (RFRA),[49] a federal statute invalidated in part by *City of*

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land. By recognizing all treaties made under the authority of the United States as the supreme law of the land, existing treaties as well as future treaties would be enforced under the Constitution. *Id.* at 159–61.

43 *Id.* at 164.

44 *Id.* at 163–64. In 1952, future Secretary of State John Foster Dulles stated:

> "Treaties . . . can take powers away from the Congress and give them to the President; they can take powers away from the States and give them to the Federal Government or to some international body, and they can cut across the rights given the people by their constitutional Bill of Rights."

Id. at 163 (quoting John Foster Dulles, Address at the Regional Meeting of the American Bar Association in Louisville, Kentucky (April 11, 1952)).

45 *See, e.g.*, Boos v. Barry, 485 U.S. 312, 324 (1988) (holding that First Amendment limitations apply to the treaty power); Reid v. Covert, 354 U.S. 1, 15–19 (1957) (holding that the requirements of the Fifth Amendment limit the treaty power).

46 Second Optional Protocol to the International Covenant on Civil and Political Rights, *adopted* Dec. 15, 1989, 1642 U.N.T.S. 414; *see* BRADLEY & GOLDSMITH, *supra* note 29, at 419.

47 International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, 999 U.N.T.S. 171.

48 Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified as amended at 42 U.S.C. §§ 2000bb–2000bb-4 (2006)), *invalidated in part by* City of Boerne v. Flores, 521 U.S. 507 (1997).

49 *See generally* Gerald L. Neuman, *The Global Dimension of RFRA*, 14 CONST. COMMENT. 33 (1997) (analyzing how Congress might be able to enact a statute like RFRA that protects religious freedom by relying on its power to implement treaty obligations). Neuman concluded that "CCPR Article 18 probably does not provide a proper basis for upholding RFRA as enacted in 1993, although it would support a verbatim reenactment of the statute if Congress so chose." *Id.* at 53.

Boerne v. Flores.[50]

II. THE DEATH AND RETURN OF FEDERALISM LIMITS

A possible explanation for the Court's broad view of the treaty power in *Missouri v. Holland* is the increasingly broad view of federal power in general that became apparent with the Court's expansive reading of the Commerce Clause in the 1930s. By the early 1940s, it was clear that the Court had shifted to a more deferential approach in both practice and rhetoric.[51] Breaking from earlier cases that invalidated legislation for regulating intrastate rather than interstate commerce[52] or for regulating activity that was not truly commercial,[53] the New Deal Court "ushered in an era of virtually unlimited federal legislative power."[54]

A. *Federalism Limits on the Commerce Power*

NLRB v. Jones & Laughlin Steel Corp.[55] marked the beginning of the movement toward plenary federal legislative power.[56] There, the Court held that the Commerce Power could reach any activity that had an effect on interstate commerce, even if the source of the injury was not itself an interstate commercial activity.[57] The deference suggested by *Jones & Laughlin Steel* became more apparent in *United States v. Darby*.[58] *Darby*'s "bootstrap" approach allowed Congress to regulate noneconomic activities by prohibiting interstate shipment of a good and then regulating the activity to enforce the prohibition.[59] Notably, *Darby* also rejected the idea of a Tenth Amendment limitation on the legislative power, holding that the Tenth Amendment stated a truism but did not serve as an independent limit on federal power.[60] *Wickard*

50 521 U.S. 507 (1997). Note that the hypothetical reenactment of RFRA is analogous to *Missouri v. Holland*: a federal statute was struck down as exceeding the powers of Congress, but the same statute would be valid if enacted pursuant to a valid treaty.

51 *See* BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT 212–19 (1998).

52 *See, e.g.*, United States v. E.C. Knight Co., 156 U.S. 1, 16–17 (1895) (holding that the manufacturing of sugar was a local activity rather than interstate commerce and therefore beyond the reach of the commerce power).

53 *See, e.g.*, Hammer v. Dagenhart, 247 U.S. 251, 272 (1918) (distinguishing between the manufacture of goods and commerce).

54 RICHARD E. LEVY, THE POWER TO LEGISLATE 57 (2006).

55 301 U.S. 1 (1937).

56 LEVY, *supra* note 54, at 60.

57 *Jones & Laughlin Steel*, 301 U.S. at 31–32.

58 312 U.S. 100 (1941).

59 LEVY, *supra* note 54, at 61.

60 *See Darby*, 312 U.S. at 123–24; LEVY, *supra* note 54, at 61.

v. Filburn[61] solidified the Court's emerging deference on the scope of the commerce power. Under the aggregating approach of *Wickard*, even noneconomic local activity could be reached by the commerce power if the activity in the aggregate has a substantial economic effect.[62] This expansive view of the commerce power "appeared . . . sufficiently broad to justify any federal regulation of any activity," and it would be fifty years before the Court struck down another law for exceeding the scope of the commerce power.[63]

In the past two decades, the Supreme Court has shown a renewed interest in judicial enforcement of federalism limits,[64] striking down laws for exceeding the enumerated powers of Congress for the first time since the New Deal. In *United States v. Lopez*,[65] the Court struck down the Gun-Free School Zones Act[66] for not having sufficient relation to interstate commerce.[67] Following the *Lopez* analysis, *United States v. Morrison*[68] invalidated provisions of the Violence Against Women Act,[69] making clear that courts would defer less to legislative findings when the regulated activities were within the traditional police powers of the state.[70]

While the Rehnquist Court's new federalism was a revolution in federalism doctrine, it failed to "revolutionize the actual scope of national power."[71] Deference was not entirely cast aside, nor was the idea that individual activity could be reached by the commerce

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61 317 U.S. 111 (1942).

62 *See id.* at 125; LEVY, *supra* note 54, at 61. Examining Justice Jackson's writings on *Wickard*, Professor Barry Cushman concluded that the aggregating approach was the product of a New Deal Court that had given up earlier efforts to find judicially enforceable limits on congressional power. *See* CUSHMAN, *supra* note 51, at 212–19.

63 LEVY, *supra* note 54, at 61–62. In the meantime, federal courts found a new role as protectors of individual rights. *See, e.g.*, United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (establishing a heightened standard of judicial review for actions aimed at discrete and insular minorities).

64 LEVY, *supra* note 54, at 66. For a more detailed description of the New Federalism than I have attempted here, see Richard W. Garnett, *The New Federalism, the Spending Power, and Federal Criminal Law*, 89 CORNELL L. REV. 1, 11–23 (2003).

65 514 U.S. 549 (1994).

66 Pub. L. No. 101-647, § 1702, 104 Stat. 4789, 4844–45 (1990), *invalidated by Lopez*, 514 U.S. 549.

67 *Lopez*, 514 U.S. at 567–68.

68 529 U.S. 598 (2000).

69 Pub. L. No. 103-322, tit. IV, 108 Stat. 1902 (1994) (codified as amended in scattered sections of 8, 16, 18, 28, 42 U.S.C.), *invalidated in part by Morrison*, 529 U.S. 598.

70 *See Morrison*, 529 U.S. at 614–19; LEVY, *supra* note 54, at 67.

71 MARK TUSHNET, A COURT DIVIDED 250 (2005).

power—*Gonzales v. Raich*[72] applied *Wickard*'s aggregating approach to uphold federal laws prohibiting the growth of medical marijuana for personal use.[73] Rather than a revolution in the scope of national power, the new federalism has simply curbed some of the excesses in national power.[74]

The Commerce Clause was not the only area of law affected by the revitalization of judicially enforceable federalism limits. In recent years, the Supreme Court has applied principles of federalism to restrain the Fourteenth Amendment's enforcement power,[75] to prohibit federal commandeering of state governments,[76] and to affirm the sovereign immunity of states from suit.[77]

B. Missouri v. Holland *and the New Federalism*

The central holding of *Missouri v. Holland*, that "[m]any matters . . . may appear to be 'reserved to the States' as regards domestic legislation . . . but they are not reserved to the states so as to exclude their regulation by international agreement," has been consistently upheld since its decision.[78] But the return of judicially enforceable federalism limits in other areas of law has sparked intense debate among scholars over whether such limits should apply to the treaty

72 545 U.S. 1 (2005).

73 *See id.* at 17–22; LEVY, *supra* note 54, at 67.

74 TUSHNET, *supra* note 71, at 277.

75 *See* City of Boerne v. Flores, 521 U.S. 507, 520 (1997). The enforcement power under Section 5 of the Fourteenth Amendment is limited to remedial and preventive measures, and enforcement measures must be congruent to the ends achieved. *See also* Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 737–40 (2003) (upholding authorization of money damage suits against state governments on the basis of the showing of congruence and proportionality in the record); Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 368 (2001) (finding that the legislative record must reflect a pattern of irrational discrimination by state authorities); *Morrison*, 529 U.S. at 619–21 (holding that Section 5 enforcement measures must be directed at the state rather than at the individual).

76 *See* New York v. United States, 505 U.S. 144, 161–62 (1992) (prohibiting federal commandeering of state legislatures); *see also* Printz v. United States, 521 U.S. 898, 918–23, 935 (1997) (prohibiting federal commandeering of state law enforcement officials).

77 *See* Seminole Tribe v. Florida, 517 U.S. 44, 47 (1996) ("[N]otwithstanding Congress' clear intent to abrogate the States' sovereign immunity, the Indian Commerce Clause does not grant Congress that power, and therefore § 2710(d)(7) cannot grant jurisdiction over a State that does not consent to be sued."); *see also Garrett*, 531 U.S. at 379 n.9 (recognizing that other means of enforcing Title I of the Americans with Disabilities Act are not precluded by the Court's holding that Congress did not validly abrogate the states' sovereign immunity).

78 HENKIN, *supra* note 22, at 191.

power as well.[79] Professor Curtis Bradley's 1998 article[80] is widely credited as the first major entry in this debate. Questioning the conventional wisdom that federalism limits do not apply to treaties (a position that Professor Bradley refers to as the nationalist view of the treaty power), Professor Bradley argues that a plenary treaty power vis-à-vis the states would be inconsistent with the Supreme Court's new federalism.[81] In Professor Bradley's view, "the treaty power should be subject to the same federalism limitations" as the legislative powers of Congress.[82]

A wide range of scholars have weighed in on the issue. The nationalist argument is best exemplified by Professor David Golove, who responded directly to Professor Bradley.[83] Defending *Holland*, Professor Golove argues that the Treaty Clause is an unqualified grant of power vested entirely in the President and the Senate.[84] Accordingly, legislation to implement a treaty obligation is within the power of Congress to make laws necessary and proper for carrying into execution the national government's treaty power.[85] Nationalists also argue that federalism limits on the treaty power are unnecessary—individual rights provisions like the First Amendment are already recognized as limits on the treaty power[86] and the political process should provide any other necessary checks.[87] Finally, nationalists dis-

79 For an excellent discussion of the debate, see Duncan B. Hollis, *Executive Federalism: Forging New Federalist Constraints on the Treaty Power*, 79 S. CAL. L. REV. 1327, 1333–52 (2006).

80 Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390 (1998).

81 *Id.* at 392–94.

82 *Id.* at 450.

83 Golove, *supra* note 23, at 1278–313. For additional arguments for the nationalist view of the treaty power, see generally Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land,"* 99 COLUM. L. REV. 2095 (1999) (arguing that the original understanding of the treaty power was that treaties are self-executing and become the supreme law of the land when enacted); Carlos Manuel Vázquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154 (1999) (arguing that all valid treaties have the same force as domestic law).

84 Golove, *supra* note 23, at 1089–91.

85 *Id.* at 1099–100. As Professor Golove notes, the Necessary and Proper Clause allows Congress to carry into execution its own legislative powers and "'all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.'" *Id.* at 1099 (emphasis omitted) (quoting U.S. CONST. art. I, § 8, cl. 18). Regardless of the fact that the power to make treaties is found in Article II rather than Article I, Congress has the power to carry it into effect. *Id.* at 1099–100.

86 *Id.* at 1097.

87 *Id.* at 1099.

tinguish between the purpose of a treaty and its price; since domestic regulations are the price paid for making treaties rather than the purpose of the treaty itself, the treaty power should result in minimal domestic interference.[88]

The nationalist arguments fail to adequately address the realities of the political process as well as the changes in the structure of government since the drafting of the Treaty Clause. Professor Golove argues that domestic regulations are concessions made by the federal government in order to protect an interest in the international sphere,[89] but even he acknowledges that *Missouri v. Holland* involved a bad faith use of the treaty power.[90] The political reality recognized by the Framers is that liberty cannot depend on the good faith of politicians—why should this be any less true in the context of treaties? In addition, the institutional protections for states that existed when the Treaty Clause was drafted were distorted with the passage of the Seventeenth Amendment.[91] While the interests of the state will sometimes coincide with the interests of the people in that state, the popular election of senators lessens their incentive to be responsive to state government.

Professor Bradley and the new federalists claim additional support from the Supreme Court's return to judicially enforceable federalism limits.[92] This reliance is justified given the parallels between the Court's treatment of the commerce power and the treaty power. The Court was unwilling to enforce federalism limits on the treaty power in *Missouri v. Holland*, just as it became unwilling to enforce federalism limits on the commerce power after *Wickard v. Filburn*. Both the treaty power and the commerce power were interpreted as broad, almost plenary powers over the subsequent decades. The Court continued to enforce individual-rights limits on congressional legislation,[93] just as it did in treaty cases.[94] With the return of judicially enforceable federalism limits on the commerce power in *Lopez* and

88 *Id.* at 1093.

89 *See id.* at 1091–92.

90 *See id.* at 1256.

91 Bradley, *supra* note 80, at 442 (describing the Senate's original role as providing direct representation for state governments).

92 *See, e.g.*, Bradley, *supra* note 80, at 400; Hollis, *supra* note 79, at 1350; Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 COLUM. L. REV. 403, 420 (2003); John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 1982–83 (1999).

93 *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

94 *See supra* note 45.

Raich, it seems equally appropriate that federalism would impose some similar limitations on the treaty power.

III. EMERGING FEDERALISM LIMITS IN RECENT CASES

A. What Are We Looking for?

Just as the other new federalism developments "do not appear to signal a return to the pre–New Deal jurisprudence of the federal legislative power,"[95] a new federalist approach to the treaty power would not mean a return to pre-*Holland* jurisprudence. After *Raich*, the Court remains willing to allow regulation of noneconomic activity that in the aggregate has a substantial effect on interstate commerce. *Lopez* holds that this effect may not be too remote, but *Filburn* remains untouched. If the Commerce Clause is any guide, the new federalism will generate a similar limit on the treaty power. Such a limit would provide some additional consideration of state interests while leaving *Holland* largely untouched.

One possible means of imposing a federalism limit while stopping short of reversing *Holland* would be to adopt a presumption against preemption of state law by treaties. In the legislative area, the Supreme Court has adopted a presumption against preemption of state law by federal statutes.[96] This presumption typically applies in areas of law traditionally occupied by the states but not in areas of law traditionally occupied by the federal government.[97]

The case law is mixed as to whether the presumption against preemption should apply in the treaty context,[98] and not all treaties are created equal. Some are "self-executing," meaning that they are enforceable as domestic law immediately upon ratification.[99] Others are "non-self-executing," meaning that they require implementing legislation in order to become binding in domestic law and not merely an international obligation.[100] The distinction is longstanding, originating in Chief Justice John Marshall's opinion in *Foster v. Neil-*

95 LEVY, *supra* note 54, at 66.

96 DRAHOZAL, *supra* note 40, at 159.

97 *Id.*

98 *Id.* *Compare* United States v. Pink, 315 U.S. 203, 230 (1942) (noting that treaties should be read to minimally impact the "authority and jurisdiction" of the states), *and* Guar. Trust Co. v. United States, 304 U.S. 126, 143 (1938) ("Even the language of a treaty wherever reasonably possible will be construed so as not to override state laws or to impair rights arising under them."), *with* El Al Isr. Airlines v. Tseng, 525 U.S. 155, 174–76 (1999) (allowing a treaty to preempt otherwise applicable state law in the interest of uniformity).

99 DRAHOZAL, *supra* note 40, at 161.

100 *Id.*

son.[101] By definition, only self-executing treaties preempt inconsistent state law.[102] Thus, any analysis of whether a treaty preempts state law must begin with the question of whether the treaty is self-executing.[103]

A line of recent cases, beginning with *Breard v. Greene*[104] and culminating in *Medellín v. Texas*, suggests a presumption against self-executing treaties. Since a treaty must be self-executing in order to preempt state law, this effectively functions as a broad presumption against preemption in the treaty context.[105]

B. The Road to Medellín

1. Treaties Involved in the *Breard-Medellín* Line of Cases

The cases leading up to *Medellín* address three related treaties. Before examining the emerging presumption against self-executing treaties, a brief explanation of these international obligations is necessary.

These cases also share the same general fact pattern. The petitioners in each case are foreign nationals who have been tried and convicted by American courts for crimes committed in the United States. The petitioners are seeking to enforce the rights granted by the Vienna Convention on Consular Relations[106] (Vienna Convention). Article 36 of the Vienna Convention provides that, if a person detained by a foreign country requests, "the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State" of such detention, and "inform the [detainee] without delay of his right[ ]" to request assistance from the consul of his own state.[107] In each case, the petitioner asserts a denial of his right to consular notification granted by the Vienna Convention, and claims error in his conviction as a result.

In addition to the Vienna Convention itself, the United States was a party to the Optional Protocol to the Vienna Convention on Consu-

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101 27 U.S. (2 Pet.) 253, 314 (1829).

102 BRADLEY & GOLDSMITH, *supra* note 29, at 335; *accord* DRAHOZAL, *supra* note 40, at 161.

103 BRADLEY & GOLDSMITH, *supra* note 29, at 335.

104 523 U.S. 371 (1998) (per curiam).

105 In the case of a self-executing treaty, inconsistent state law is preempted by the treaty itself. In the case of a non-self-executing treaty, any displacement of state law comes as a result of implementing legislation passed by Congress rather than from the treaty itself.

106 Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter Vienna Convention].

107 *Id.* art. 36(1)(b).

lar Relations Concerning the Compulsory Settlement of Disputes[108] (Optional Protocol) at the time of these claimed denials.[109] Signatories of the Optional Protocol specifically consent to the compulsory jurisdiction of the International Court of Justice (ICJ) over disputes arising from the Vienna Convention.[110]

Finally, the United States has an obligation under the United Nations Charter. Article 94(1) of the Charter provides that "[e]ach Member of the United Nations undertakes to comply with the decision of the [ICJ] in any case to which it is a party."[111]

In each case, then, there are potentially three treaty obligations at stake—the Vienna Convention, the Optional Protocol, and the U.N. Charter. The United States must inform foreign nationals of their right to consular notification upon arrest. For any dispute over the meaning of this right, the United States has consented to the jurisdiction of the ICJ. Further, the United States is under an international obligation as a member of the United Nations to comply with the ICJ's decision in each case.[112]

2. An Emerging Limit

a. *Breard v. Greene*

Angel Francisco Breard, a citizen of Paraguay living in Virginia, was convicted on charges of rape and capital murder and sentenced to death.[113] After unsuccessfully appealing his convictions, Breard filed a petition for a writ of habeas corpus in federal district court, arguing for the first time that his convictions should be overturned because of alleged violations of the Vienna Convention—specifically, that the arresting authorities in Virginia failed to inform him of his right to contact the Paraguayan consulate.[114] This claim was unsuccessful in the American courts, with the Fourth Circuit upholding the district court's determination that Breard had procedurally defaulted

108 Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487 [hereinafter Optional Protocol].

109 The United States withdrew from the Optional Protocol on March 7, 2005. *See* Medellín v. Texas, 128 S. Ct. 1346, 1354 (2008) (citing Letter from Condoleezza Rice, U.S. Sec'y of State, to Kofi A. Annan, U.N. Sec'y-Gen. (Mar. 7, 2005)).

110 Optional Protocol, *supra* note 108, art. I.

111 U.N. Charter art. 94, para. 1.

112 Hollis notes that "[t]he most dramatic examples [of federalism playing a role in executive treaty practice at the enforcement stage] have occurred in the context of what remedial rights individual defendants obtain for violations of [Vienna Convention] article 36." Hollis, *supra* note 79, at 1384.

113 Breard v. Greene, 523 U.S. 371, 372–73 (1998) (per curiam).

114 *Id.* at 373.

on his Vienna Convention claim when he failed to raise it in state court and could not demonstrate cause or prejudice.[115]

In 1998, Paraguay filed a suit against the United States in the International Court of Justice alleging violations of the Vienna Convention in connection with Breard's arrest.[116] Noting its jurisdiction, the ICJ issued an order asking "the United States [to] 'take all measures at its disposal to ensure that . . . Breard [was] not executed pending the [ICJ's] final decision.'"[117] Breard then filed a habeas petition with the Supreme Court, asking the Court to grant a stay of execution to enforce the ICJ's order.[118]

The Supreme Court rejected the claim by Breard and Paraguay that the Vienna Convention, as the supreme law of the land, trumps a state's procedural default rules.[119] While this result seems consistent with a new federalist approach to treatymaking, *Breard* did not settle the debate—in fact, *Breard* avoided the most pressing questions in the treaty debate despite upholding state procedural rules over a claimed treaty violation.

The *Breard* Court hinted at possible federalism limits in affirming that "the procedural rules of the forum State govern the implementation of the treaty in that State."[120] The result in *Breard* was bolstered by the Court's recognition of a supervening federal statute. The Antiterrorism and Effective Death Penalty Act[121] (AEDPA) was passed in 1996, requiring a habeas petitioner alleging treaty violations to develop the factual basis of the claim in state court proceedings.[122] Although the Vienna Convention was the supreme law of the land, it remained subject to the last-in-time rule.[123] To the extent that the Vienna Convention required otherwise, it was supplanted by AEDPA.

While supportive of state procedural rules, *Breard* did not make any clear statement on the scope of the treaty power. Allowing imple-

115 Breard v. Pruett, 134 F.3d 615, 618–19, 621 (4th Cir. 1998).

116 *Breard*, 523 U.S. at 374.

117 *Id.* (quoting Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 248, 258 (Apr. 9)).

118 *Id.*

119 *Id.* at 375.

120 *Id.*

121 Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 8, 15, 18, 21, 22, 28, 40, 42, 49, and 50 U.S.C.).

122 *Breard*, 523 U.S. at 376.

123 *Id.* The last-in-time rule is a principle of interpretation that means exactly what it says: when there is a conflict between two sources of law and both sources are the supreme law of the land under the Supremacy Clause, the most recent source controls. DRAHOZAL, *supra* note 40, at 162. Commonly, the last-in-time rule results in a later federal statute overriding an earlier treaty, as it did in this case. *Id.*

mentation at the state level and recognizing a more recent conflicting federal statute, the Court did not truly have to decide a conflict between treaty obligations and federalism values. For meaningful federalism limits on the treaty power to emerge, the Court would have to make a stronger statement.

The preliminary ICJ order at issue in *Breard* did not state a particularly strong international obligation—the United States was asked to take all measures at its disposal to stay the execution until the ICJ case was completed.[124] In a federal system, the measures available to the national government to constrain a state government are necessarily limited. It is also worth noting that *Breard* involved a preliminary order from the ICJ rather than a final order, and that Breard's convictions had been finalized for five years before Paraguay brought the ICJ suit.

b. *LaGrand* and *Avena*

After the Supreme Court's decision in *Breard*, two ICJ cases addressed the conflict between the Vienna Convention and the procedural default rule. In *LaGrand Case*,[125] the ICJ held:

> In itself, the [procedural default] rule does not violate Article 36 of the Vienna Convention. The problem arises when the procedural default rule does not allow the detained individual to challenge a conviction and sentence by claiming, in reliance on Article 36, paragraph 1, of the Convention, that the competent national authorities failed to comply with their obligation to provide the requisite consular information 'without delay', thus preventing the person from seeking and obtaining consular assistance from the sending State.[126]

Avena and Other Mexican Nationals[127] involved an alleged violation of the Vienna Convention by the United States in the arrest, detention, trial, conviction, and death sentences of fifty-four Mexican nationals.[128] Mexico claimed that the United States had an international legal obligation not to apply the procedural default rule (or any other doctrine of municipal law, for that matter) to preclude the exercise of rights under Article 36 of the Vienna Convention.[129] Building on its logic in *LaGrand*, the ICJ agreed. In both cases, the ICJ held

124 *Breard*, 523 U.S. at 374.
125 (F.R.G. v. U.S.), 2001 I.C.J. 466 (June 27).
126 *Id.* at 497.
127 (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31).
128 *Id.* at 19.
129 *Id.* at 19–20.

that the application of the procedural default rule would prevent effective challenges to the convictions and sentences except on United States constitutional grounds.[130]

The ICJ held in *Avena* that the United States must provide a remedy to give "review and reconsideration" of the convictions and sentences alleged to violate Article 36.[131] The ICJ was careful to point out that rights under Article 36 are independent of due process rights under the U.S. Constitution, so "what is crucial in the review and reconsideration process is the existence of a procedure which guarantees that full weight is given to the violation of the rights set forth in the Vienna Convention."[132]

The *Avena* decision represents an obligation for the United States in international law, but one that is more demanding than the one at stake in *Breard*. *Avena* was a final decision of the ICJ rather than a request for stay of execution to allow for an additional hearing. Not only is it a stronger international obligation than that in *Breard*, but *Avena* arguably implicates a greater state interest than *Breard*. Where *Breard* asked for a temporary stay of execution, compliance with *Avena* would mean providing "review and reconsideration" of criminal convictions in state courts without regard to state procedural rules. In addition to the state's clear interest in the procedural rules of its court system, the ICJ's order in *Avena* reached fifty-one named foreign nationals rather than a single individual. Perhaps unsurprisingly, federal courts have been reluctant to implement the ICJ's ruling.

c. *Sanchez-Llamas v. Oregon*

The first test of the international obligation to comply with *Avena* came in *Sanchez-Llamas v. Oregon*.[133] The Supreme Court held that despite the ICJ's ruling in *Avena*, claims of Article 36 violations would continue to be controlled by *Breard v. Greene*.[134] Moises Sanchez-Llamas, a Mexican national convicted of murder in Oregon state court, claimed that he would not have made incriminating statements to police had he been informed that he could ask to have the Mexican consulate notified of his detention.[135] On that ground, Sanchez-Llamas unsuccessfully sought suppression of those statements.[136] His

130 *Id.* at 57.
131 *Id.* at 72.
132 *Id.* at 65.
133 548 U.S. 331 (2006).
134 *Id.* at 360.
135 *Id.* at 339–40.
136 *Id.* at 340.

claims were heard at the Supreme Court with those of Mario Bustillo, a Honduran national convicted of murder in Virginia state court.[137] Bustillo argued for the first time in a habeas petition that he had not been informed that he could request consular notification, but found this claim barred by the procedural default rule.[138]

The substance of Bustillo's claim was that the ICJ decisions in *LaGrand* and *Avena* interpreted the Vienna Convention as requiring American courts to allow Article 36 claims in spite of procedural default rules.[139] The Supreme Court was not persuaded. Writing for the majority, Chief Justice Roberts conceded that "the ICJ's interpretation deserves 'respectful consideration,'" but insisted that "it does not compel us to reconsider our understanding of the Convention in *Breard*."[140]

In declining to adopt the ICJ's interpretation of the Vienna Convention, the Court emphasized the nonbinding nature of ICJ decisions. Under the Statute of the International Court of Justice[141] (ICJ Statute), ICJ decisions have no binding force except between parties and in respect of that particular case, and ICJ interpretations are not binding precedent even to the ICJ itself.[142] Even the contemplated remedy for noncompliance—referral to the U.N. Security Council—is political rather than judicial.[143]

Moreover, the Supreme Court was alarmed by the ICJ's treatment of procedural default rules. Procedural default rules are an important part of an adversarial system which relies on the parties to raise issues.[144] Giving "full effect" to Article 36 as interpreted by the ICJ would trump not just procedural default rules, but also other rules, including statutes of limitations and prohibitions against successive habeas petitions.[145] Such a broad proposition cannot be reconciled with the treaty's explicit requirement that Article 36 rights must be exercised "'in conformity with the laws and regulations of the receiving State.'"[146]

Despite the decisions in *LaGrande* and *Avena*, the Supreme Court remained unwilling to back down from its protection of the procedu-

137 *Id.* at 340–41.
138 *Id.* at 341–42.
139 *See id.* at 351–53.
140 *Id.* at 353 (quoting Breard v. Greene, 523 U.S. 371, 375 (1998) (per curiam)).
141 June 26, 1945, 59 Stat. 1055, 3 Bevans 1179.
142 *Sanchez-Llamas*, 548 U.S. at 354–55.
143 *Id.* at 355.
144 *Id.* at 356–57.
145 *Id.* at 357.
146 *Id.* (quoting Vienna Convention, *supra* note 106, art. 36).

ral default rule in *Breard*. With state procedural default rules prevailing over an explicit, affirmative international obligation, an emerging federalism limit starts to become more plausible.

C. Medellín v. Texas

The Supreme Court's recent decision in *Medellín v. Texas* builds on the earlier decisions in *Breard* and *Sanchez-Llamas*. Unlike these earlier cases, in *Medellín*, the Court was asked to decide a conflict between state procedural default rules and an international obligation that not only involved the petitioner directly but that the executive branch sought to enforce in domestic law. This combination of factors made *Medellín* an ideal case to determine whether the earlier cases reflected an emerging federalism limit on the treaty power.

Jose Ernesto Medellín was one of the Mexican nationals named in *Avena*.[147] Medellín had been convicted of murder and sentenced to death in Texas state court.[148] Following the ICJ's ruling in *Avena*, Medellín sought review and reconsideration of his conviction and sentence through a habeas petition in state court, arguing that his earlier failure to raise his Vienna Convention claim was no bar given the ICJ's ruling.[149] In addition, the Bush administration had indicated its support for *Avena*—a Memorandum to the Attorney General from President George W. Bush stated that the United States would "discharge its international obligations under [*Avena*] by having State courts give effect to the decision."[150] The Texas Court of Criminal Appeals dismissed Medellín's habeas application as an abuse of the writ, insisting that Medellín's Vienna Convention claim was barred by his failure to raise it in a timely manner.[151]

The Supreme Court granted certiorari on two questions. First, the Court considered whether *Avena* was directly enforceable as domestic law in state court.[152] Second, the Court considered whether the President's Memorandum independently required states to set

147 Medellín v. Texas, 128 S. Ct. 1346, 1353 (2008).

148 *Id.*

149 *Id.*

150 Memorandum from President George W. Bush to Alberto R. Gonzales, U.S. Att'y Gen. (Feb. 28, 2005) [hereinafter President's Memorandum] (on file with author). The claim that the United States can "discharge its international obligations under the *Avena* case 'by having state courts give effect to the decision in accordance with general principles of comity'" appears to rest on the international obligation to comply with ICJ decisions. *See* Hollis, *supra* note 79, at 1386 (quoting President's Memorandum, *supra*).

151 *Medellín*, 128 S. Ct. at 1353.

152 *Id.*

aside state procedural default rules to provide review and reconsideration of claims by the Mexican nationals named in *Avena*.[153] The majority opinion by Chief Justice Roberts concluded that "neither *Avena* nor the President's Memorandum constitutes directly enforceable federal law that preempts state limitations on the filing of successive habeas petitions."[154] The implication of this conclusion for federalism limits on the treaty power is the question to which we now turn.

1. The Presumption Against Self-Executing Treaties in *Medellín*

A presumption against self-executing treaties emerges from *Medellín* as a federalism limit on the treaty power. Functionally, this is a presumption against preemption of state law by international obligations.[155] The following analysis is framed by the two questions presented to the Court—whether *Avena* is directly enforceable as domestic law in state court and whether the President's Memorandum independently requires states to provide "review and reconsideration" in spite of state procedural rules.

a. Enforcing *Avena* as Domestic Law

The Court's first line of inquiry deals with whether the ICJ's *Avena* judgment is directly enforceable as domestic law in state courts. While the Court recognizes that compliance with *Avena* constitutes an obligation on the United States in international law, "not all international law obligations automatically constitute binding federal law enforceable in United States courts."[156]

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153 *Id.*

154 *Id.*

155 *Medellín*'s presumption against self-execution has both federalism and separation of powers dimensions. On its face, a presumption against self-execution is primarily a separation of powers issue—it is concerned with the balance of power between the President and Congress in determining when treaty obligations are directly enforceable in domestic law. In separation-of-powers terms, the presumption against self-execution could be viewed as a presumption against removal of the bicameralism and presentment requirements of legislation.

More importantly for the purposes of this Note, a presumption against self-execution may be viewed in federalism terms as a presumption against preemption of state law. Although the shift toward Congress may be driven by separation-of-powers concerns, the presumption against self-execution will ultimately require more of the federal government, and therefore is fairly characterized as a federalism limit.

156 *Id.* at 1356.

The crucial determination in this regard is whether or not the treaty is self-executing.[157] Since there is clearly no implementing legislation in this case, *Avena* is only directly enforceable in American courts if ICJ opinions are self-executing. If this were not a difficult enough bar, the Court adopts what Justice Stevens refers to in his concurrence as a "presumption against self-execution."[158] That is, the majority assumes that a treaty is not self-executing unless there is clear evidence to the contrary. The consequence of this presumption is a default position that state law prevails over contradictory treaty obligations.

Turning then to the treaties themselves, the Court found nothing in the Optional Protocol,[159] the U.N. Charter,[160] or the ICJ Statute[161] to suggest that ICJ decisions are self-executing. If anything, the treaties suggest the opposite conclusion—the Optional Protocol provides only a bare grant of jurisdiction,[162] the U.N. Charter contemplates only diplomatic remedies for noncompliance,[163] and the ICJ Statute leaves no room for an individual to be a party to an ICJ proceeding.[164] In short, the treaties themselves are ambiguous or suggest that ICJ decisions are not self-executing, and neither conclusion is sufficient to override the Court's presumption against self-execution.

b. The President's Memorandum

The Court's second line of inquiry deals with whether the President's Memorandum independently requires state courts to provide "review and reconsideration" of Medellín's claims despite state procedural rules. While acknowledging that the President may act to comply with an international treaty obligation, the Court held that "the non-self-executing character of a treaty constrains the President's ability to comply with treaty commitments by unilaterally making the treaty binding on domestic courts."[165]

157 Recall that this determination is a necessary prerequisite for a treaty to preempt state law of its own force. *See supra* notes 98–103 and accompanying text.

158 *Medellín*, 128 S. Ct. at 1372 (Stevens, J., concurring).

159 *Id.* at 1358 (majority opinion).

160 *Id.* at 1358–59.

161 *Id.* at 1360.

162 *Id.* at 1358.

163 *Id.* at 1359.

164 *Id.* at 1360.

165 *Id.* at 1371. The oral argument transcript reveals the Justices' concern with the scope of executive power. Justice Scalia characterized the government's argument as "telling us that, well, we don't need the Congress; the President can make a domestic law by writing a memo to his Attorney General." Transcript of Oral Argument at

The majority's analysis of presidential power is framed by the familiar categories of Justice Jackson's opinion in *Youngstown Sheet & Tube Co. v. Sawyer*[166]:

> When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. . . .
>
> When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. . . .
>
> When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb . . . .[167]

While recognizing the President's unique qualifications to resolve sensitive foreign policy decisions and the "plainly compelling" interest in protecting international relations through mutual treaty compliance, the Court nonetheless found that "[s]uch considerations . . . do not allow us to set aside first principles."[168] Applying the *Youngstown* framework, the majority determined that the President's Memorandum fell under the third category—presidential action incompatible with the express or implied will of Congress.[169] By definition, a non-self-executing treaty is ratified with the understanding that it is not directly enforceable in domestic law without further action by Congress.[170] Given non-self-executing treaties and no further action by Congress, the President is implicitly prohibited from unilaterally making those treaty obligations enforceable in domestic law.[171]

This conclusion confirms the strength of the presumption against self-execution as a federalism limit. The presumption against self-execution rules out any immediate domestic legal effect without further action by Congress. Although the Court emphasized the non-self-executing nature of ICJ decisions in both lines of inquiry, a mere pre-

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25–26, *Medellín*, 128 S. Ct. 1346 (No. 06-984). Justice Alito asked if the government's theory would enable the President to "take any treaty that is ratified on the understanding that it's not self-executing and execute the treaty and give it force under domestic law." *Id.* at 28.

166 343 U.S. 579 (1952).

167 *Id.* at 635–37 (Jackson, J., concurring) (footnotes omitted).

168 *Medellín*, 128 S. Ct. at 1367–68.

169 *Id.* at 1369.

170 *Id.*

171 *Id.*

sumption against self-execution may not, in itself, be enough to preclude executive enforcement in all cases.[172] Instead, the Court appears to apply this presumption against self-execution as a limit on executive power—the President's Memorandum is not insufficient simply because the treaty is non-self-executing, but because enforcement of the non-self-executing treaty has not been clearly authorized by Congress. Put another way, it is conceivable that the President's Memorandum could be viewed as either authorized by congressional acquiescence to past executive enforcement actions or as presidential action in the absence of either a grant or a denial of power.[173]

IV. WHAT LIMITS SHOULD APPLY?

Is *Medellín*'s presumption against self-executing treaties the correct limit to protect federalism from encroachment through the treaty power? What plausible alternatives exist? It is to these questions that I now turn.

A. Evaluating Medellín *'s Limit*

While *Medellín* does not explicitly overrule *Missouri v. Holland*, it is not clear that it should be expected to.[174] Proponents of the nationalist view of the treaty power will likely point to the Court's central inquiry of whether or not an ICJ decision is self-executing under U.S. law as implicitly reaffirming *Missouri v. Holland*. The Court does not directly address the issue of congressional power, nor does it mention *Missouri v. Holland*. The determination that ICJ judgments, although international obligations, are non-self-executing is sufficient to deny Medellín's requested relief. But while the possibility remains that Congress could simply pass legislation making the ICJ's ruling in *Avena* a binding rule of decision for federal courts, the Court holds that the combined force of a valid international obligation and the executive branch's efforts to comply are insufficient to displace state

172 *See, e.g.*, Hollis, *supra* note 79, at 1388 (suggesting a broader role for the executive branch in the implementation and enforcement of treaties as a means of protecting states' interests).

173 Indeed, the United States argued that the President's Memorandum fell within one of the first two categories of the *Youngstown* framework. *See Medellín*, 128 S. Ct. at 1368; Transcript of Oral Argument, *supra* note 165, at 35–36.

174 *See* Swaine, *supra* note 92, at 422 ("The Court may, in any event, be able to humble *Holland* without overturning it."); *see also* Hollis, *supra* note 79, at 1352–53 ("[B]oth the nationalists and new federalists are wrong to view their debate solely through a judicial lens. . . . [T]he real issue today is how the executive branch regards the treaty power. Its views will largely determine that power's future scope.").

procedural rules. This in itself seems to be reason enough for new federalists to view *Medellín* favorably.

Despite the Court's silence on the issue of congressional power, there should be no doubt over the federalism values at stake in *Medellín*. Medellín claimed that *Avena* enjoined the operation of state law and required Texas to provide "review and reconsideration" of his case.[175] Rejecting the claim that Congress had acquiesced to executive enforcement of earlier ICJ controversies, the majority noted that "none of [the earlier exercises of Presidential authority] remotely involved transforming an international obligation into domestic law and thereby displacing state law."[176] The concurrence by Justice Stevens suggested that "States must shoulder the primary responsibility for protecting the honor and integrity of the Nation" in giving effect to international obligations.[177]

Even without directly addressing the central problem of *Missouri v. Holland*, the *Medellín* decision does provide a federalism limit on the treaty power. By adopting a presumption against self-executing treaties, *Medellín* amounts to a preservation of state law absent a clear congressional statement to the contrary. Congress still has the power to make such a statement, either by the Senate's advice and consent encouraging the Executive to pursue a self-executing treaty or by passing implementing legislation for a non-self-executing treaty. That Congress retains such power may suggest that a presumption against self-executing treaties is a fairly weak federalism limit, but in substance this is no weaker a limit on the treaty power than analogous limits on the commerce power after *Raich*.[178] A presumption against self-executing treaties seems to fit the description of a new federalist approach to the treaty power—greater consideration of state law interests while leaving the broad power of the federal government relatively unchanged.

The strength of *Medellín*'s presumption against self-executing treaties, however, is the constraint placed on the executive branch in enforcement.[179] In order to enforce an international obligation as

175 *Medellín*, 128 S. Ct. at 1366.

176 *Id.* at 1370.

177 *Id.* at 1374 (Stevens, J., concurring).

178 *See supra* Part III.A.

179 Indeed, newspaper reports focused on the limitation on presidential power. *See* Robert Barnes, *Justices Rebuff Bush and World Court*, WASH. POST, Mar. 26, 2008, at A1 ("The Supreme Court yesterday issued a broad ruling limiting presidential power and the reach of international treaties, saying neither President Bush nor the World Court has the authority to order a Texas court to reopen a death penalty case involving a foreign national."); David Stout, *Justices Rule Against Bush on Death Penalty Case,*

domestic law, the executive branch must have the clear consent of the legislature, whether the treaty is self-executing or not.[180] This may seem to be an unremarkable limit, but it is outcome determinative in *Medellín*: the presumption leads the Court to conclude that the treaties at issue were non-self-executing, and as a result, they cannot be enforced even with the President's support.

Justice Breyer's dissenting opinion objected to the majority's determination that the treaties create "a legal obligation that binds the United States internationally, but which, for Supremacy Clause purposes, is not automatically enforceable as domestic law."[181] Justice Breyer found little support in earlier cases for a presumption against self-execution and argued that the Supremacy Clause itself applied many treaty provisions directly to the states.[182] Absent such a presumption, Justice Breyer argued that the treaties were self-executing and "the President has correctly determined that Congress need not enact additional legislation."[183] If the treaties had been self-executing, then the President's Memorandum would have been more likely to fall within the first category of *Youngstown* as an exercise of the combined powers of Congress and the President.

But assuming that the treaties were non-self-executing, the majority argued that the President lacked the power to give legal effect to *Avena* in domestic courts. The Court framed this as a separation of powers issue: "'[t]he power to make the necessary laws is in Congress; the power to execute in the President.'"[184] Even so, the same concerns that drove the presumption against self-execution are applicable here. In essence, the *Medellín* Court is requiring a clear statement from Congress before an international obligation can displace state law. This echoes the usual presumption against preemption that

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N.Y. TIMES, Mar. 25, 2008, http://www.nytimes.com/2008/03/25/washington/25cndtexas.html ("[T]he Supreme Court declared on Tuesday that President George W. Bush had no power to tell the State of Texas to reopen the case of a Mexican who has been condemned for murder and rape.").

180 For a self-executing treaty, the Senate's advice and consent in ratifying the treaty are sufficient for this purpose. For a non-self-executing treaty, the Executive must seek the consent of both houses in the form of implementing legislation.

181 *Medellín*, 128 S. Ct. at 1377 (Breyer, J., dissenting).

182 *Id.* at 1380–81 ("The many treaty provisions that this Court has found self-executing contain no textual language on the point. . . . Indeed, the majority does not point to a single ratified United States treaty that contains the kind of 'clea[r]' or 'plai[n]' textual indication for which the majority searches." (alterations in original) (quoting *id.* at 1363, 1368 (majority opinion))).

183 *Id.* at 1377.

184 *Id.* at 1369 (majority opinion) (alteration in original) (quoting Hamdan v. Rumsfeld, 548 U.S. 557, 591 (2006)).

applies to conflicts between state and federal law, but it seems to operate in a broader context here. Under *Medellín*, state procedural laws can withstand the combined preemptive force of statements by Congress in the form of ratified treaty obligations, a ruling by the ICJ under the compulsory jurisdiction granted by those treaties, and the active efforts of the Executive to enforce this particular judgment.

B. Alternatives to Medellín

The presumption against self-executing treaties in *Medellín* was by no means the only possible federalism limit on the treaty power, but as discussed above in Part IV, *Medellín* was a step in the right direction. To illustrate this, a brief consideration of alternatives is helpful.

1. Internal Limits

Recalling the earlier comparison of the treaty power to the commerce power, one option would be to look for "internal limits" on treatymaking. Just as the definition of the word "commerce" acts as a limit on the exercise of the commerce power, similar internal limits could be imposed on the treaty power.

Textually, this is a difficult proposition. "[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . ."[185] The only word from which to build an internal limit is "treaties," but the accepted definition of the term is fairly broad: a treaty is "'an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.'"[186] This definition lacks any limit on the subject matter or purpose of a treaty, so it is difficult to see how an internal limits approach could work for the treaty power.

Even more than the concept of commerce, the concept of treaties has expanded dramatically since the founding era. Just as interstate commerce was a fairly limited category in 1789, so too were the typical subjects of international agreements.[187] The Founders envisioned

185 U.S. CONST. art. II, § 2, para. 2.

186 ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 16 (2d ed. 2007) (quoting Vienna Convention on the Law of Treaties art. 2(1)(a), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 333). For a discussion of each element of this definition, see *id.* at 17–24.

187 *See* Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 587 (2004) ("That the Constitution specifically carries forward the foreign affairs powers listed in the Articles of Confederation . . .

treaties as dealing primarily with questions of war, peace, and commerce.[188] Yet today, there are a bewildering variety of complex treaty regimes reaching everything from economic development to human rights.[189] This variety reinforces the difficulty (if not outright impossibility) of finding any internal limit on the treaty power.[190]

2. Enumerated Powers

Professor Bradley suggests limiting the permissible subjects of the treaty power to the enumerated powers of Congress.[191] At a minimum, limiting treaties to the enumerated powers of Congress would mean parity with federal legislation.[192] This approach has the benefit of addressing the central problem of *Missouri v. Holland.*

However, this argument is flawed from a textual perspective. The enumerated powers of Congress appear in Article I, while the power to make treaties appears in Article II, suggesting that the former does not apply to the latter. The contemplated role for Congress in treatymaking is limited to the advice and consent of the Senate, while the President (to whom the limits of Article I do not apply) is vested with the power to make treaties. As a textual matter, there is simply no room for any argument that the President and the Senate must adhere to Article I limits when entering into a self-executing treaty.[193]

3. Eliminating the Distinction Between Self-Executing and Non-Self-Executing Treaties

A more drastic solution might be to eliminate the distinction between self-executing treaties and non-self-executing treaties

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further undercuts the assertion that the Founders would have perceived some undefined package of foreign affairs powers . . . .").

188 *See id.* at 560–61 (describing the Founders' exposure to John Locke's theory on the division of government power, which classified dealings in war and peace and transactions outside of the commonwealth as federative power, distinct from legislative power and executive power).

189 *See* Thomas M. Franck, *Can the United States Delegate Aspects of Sovereignty to International Regimes?, in* DELEGATING STATE POWERS 1, 3 (Thomas M. Franck ed., 2000) ("America's . . . constitutional scheme does not fit easily the exigencies of the growing system of supranational regimes.").

190 *See* White, *supra* note 36, at 69 (recognizing that the expansive scope of national interests today confirms the breadth of the treaty power).

191 Bradley, *supra* note 80, at 456–61.

192 *Id.*

193 While this argument is flawed in the context of self-executing treaties, the same does not hold true for non-self-executing treaties. The central problem of *Missouri v. Holland* was the rejection of enumerated power limits on Congress in passing legislation for implementing non-self-executing treaties.

entirely. If the presumption against self-executing treaties in *Medellín* is too easily overridden to adequately protect federalism, this limit could be strengthened by adopting a general rule against self-executing treaties. In effect, this would require all treaties entered into by the United States to be non-self-executing.[194] Implementing legislation would be necessary in every case where an international obligation displaces state law.[195] While this approach has the advantage of certainty, the additional hurdle could harm the appearance of the United States as a desirable partner for international agreements.

The bigger problem with a rule (rather than a presumption) against self-executing treaties is that it reduces treaties to mere legislation.[196] Treaties and federal statutes are treated equally under the Supremacy Clause, but the Constitution describes distinct procedures for creating each. Article II vests the President with the ability to enter into treaties with the advice and consent of the Senate. It seems unlikely that the Framers would have set the treaty power apart from the legislative powers of Congress in this way if implementing legislation were required in every case.

Instead of a general rule against self-executing treaties, there could instead be a federalism limit in the opposite rule—all treaties must be self-executing.[197] This, too, would remove the issue of domestic enforceability of international obligations from courts, but rather than concentrating the decision in the legislative branch, this approach focuses more on the executive. To be sure, Congress would retain a role in this determination through the Senate's advice and consent, but the power to enforce international obligations would stem primarily from the efforts of the executive branch in negotiating

194 *See generally* Yoo, *supra* note 92 (arguing for a default rule of non-self-execution).

195 *See supra* text accompanying notes 99–100.

196 Treaties are, of course, distinct from legislation in that they involve partnerships with foreign nations and do not follow the bicameralism and presentment process of Article I legislation. Even so, a rule against self-execution would mean that no treaty has any effect on domestic law absent implementing legislation—that treaties have no domestic effect unless their terms are also subjected to usual bicameralism and presentment.

197 Carlos Vázquez does not argue for a flat rule of self-execution, but he does suggest that non-self-executing treaties operate only in four narrow situations. *See* Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695 (1995). Vázquez suggests that these situations arise when the treaty's authors specifically intend further legislation prior to implementation, the treaty addresses its object as a "constitutional matter," the treaty aims at a goal which the Constitution requires be promulgated by statute, or the plaintiff seeking enforcement is left without a cause of action in the absence of a statute. *Id.* at 696–97.

and framing treaties. If all international obligations are directly enforceable in domestic law, then Congress cannot use a treaty or the need to implement a treaty to justify exceeding the limits of its enumerated powers.

Although this approach solves the *Missouri v. Holland* problem, the cost is too high. Congress will be restrained from enlarging its legislative powers by treaty, but it is not clear that there is any federalism limit regarding the displacement of state law. While it may once have been true that the Senate's advice and consent on a proposed treaty was sufficient to protect state interests, today's Senate is no longer the institutional protector of state interests that it was originally conceived to be.[198] With the direct election of senators, the Senate now reflects the interests of the people of each state rather than those of the state government. While these interests will often coincide, the incentive to protect states from federal overreaching is certainly diminished.

4. No Judicially Enforceable Federalism Limits

Under *Missouri v. Holland*, there appear to be no federalism limits on the treaty power.[199] While it is troubling in theory that Congress could exceed the limits on its enumerated powers, effectively increasing its own power through the passage of a treaty, this has not been particularly problematic in practice.

One explanation for this may be the willingness of both the legislative and executive branches to themselves enforce limits on the treaty power. Duncan Hollis has argued that the executive branch is particularly suited to the role of enforcing federalism limits on the treaty power.[200]

Neither the public nor Congress seems to be seriously concerned with any threat posed by *Missouri v. Holland*. While Congress did show some passing interest in amending the Constitution to limit the permissible uses of the treaty power,[201] little effort has been made to over-

198 *See* John W. Truslow III, *Senate Vacancies Raise Questions of Framers' Intentions*, ROLL CALL (Wash., D.C.), Oct. 5, 2009, at 4 ("While a Member of the House would represent the interests of the people as citizens, a Senator would represent the very different interests of the people's sovereign state governments. . . . The legislature would domicile two distinct powers (the people and the states) to compete bill by bill for the direction and scope of the federal government.").

199 *See supra* Part I.B–C.

200 *See* Hollis, *supra* note 79, at 1388.

201 For a detailed account of Senator John Bricker's attempts to amend the Constitution in favor of a more limited treaty power, see LOCH K. JOHNSON, THE MAKING OF INTERNATIONAL AGREEMENTS 85–110 (1984).

turn the result of the case since.[202] Instead, the executive and legislative branches have responded to concerns about overreach in the treaty power on a case-by-case basis—most notably, the United States withdrew from the Optional Protocol to the Vienna Convention following *Avena*, ensuring that the United States will not be faced with future ICJ opinions regarding rights under the Vienna Convention.[203]

Nor does the absence of any federalism limit on the treaty power mean that the treaty power is unlimited. Justice Holmes himself insisted in *Missouri v. Holland* that the Court did not endorse an unlimited treaty power, but only the proposition that the Tenth Amendment was not the correct limit.[204] The Court left open the possibility that individual rights provisions could limit the treaty power, and later cases confirmed this.[205]

C. *Beyond* Medellín*: Joining the Presumption Against Self-Execution with a Limit on Congressional Power*

Medellín's presumption against self-execution may provide some protection of state interests from encroachment by federal treaties. Although *Medellín* serves primarily as a constraint on enforcement by the executive branch, it is a useful starting point for a federalism limit on the treaty power. However, the problem of *Missouri v. Holland* remains. In fact, *Medellín*'s presumption against self-executing treaties likely means that more treaties will be non-self-executing, thereby raising the problem of congressional power to pass implementing legislation more often than before.

An effective federalism limit on the treaty power must strike an appropriate balance between the nature of our federal system and the Executive's practical need for broad authority to conduct foreign affairs. As the preceding discussion makes clear, none of the proposed solutions are individually capable of satisfying this criterion. The Treaty Clause does not appear to have any internal limit. Simply

202 *See* TUSHNET, *supra* note 71, at 250 ("Liberal activists tried to get Democrats in Congress to understand that the federalism revolution was a real threat to congressional power generally. They discovered that members of Congress cared about particular issues . . . but rarely cared about the questions of political theory raised by the Rehnquist Court's federalism decisions.").

203 Medellín v. Texas, 128 S. Ct. 1346, 1354 (2008).

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

205 *See, e.g.*, Boos v. Barry, 485 U.S. 312, 324 (1988) ("[T]he fact that an interest is recognized in international law does not automatically render that interest 'compelling' for purposes of First Amendment analysis."); Reid v. Covert, 354 U.S. 1, 15–19 (1957) (holding that the requirements of the Fifth Amendment limit the treaty power).

applying the limits applicable to the enumerated powers of Congress disregards the constitutional text's specific adoption of distinct procedures for legislation and treatymaking. Requiring all treaties to be self-executing would mean that virtually any international obligation would displace state law; requiring all treaties to be non-self-executing would unduly hamper the Executive's ability to conduct foreign affairs.

To arrive at the ideal solution, we must consider the possibility that the limits on the power to make self-executing treaties are different from the limits on the power to make non-self-executing treaties.[206] Once self-executing and non-self-executing treaties are decoupled, a hybrid solution may be crafted. Such a solution allows both the nationalist and new federalist concepts of the treaty power to operate within their own spheres—the nationalist approach for self-executing treaties and the new federalist approach for non-self-executing treaties.

Medellín provides an excellent starting point in its presumption against self-executing treaties. Regardless of whether a treaty is ultimately determined to be self-executing or not, this presumption requires a clear statement from Congress prior to enforcement.[207]

For non-self-executing treaties, federalism concerns are best addressed by abandoning the rule of *Missouri v. Holland.* While the President may conclude a non-self-executing treaty on any subject, the power of Congress to pass legislation implementing such a treaty must be limited to the powers enumerated in Article I.[208] This will prevent future governments from seeking to increase the power of Congress by treaty rather than by constitutional amendment. While this may not provide much protection for state law in light of the broad scope

206 Of course, the Constitution itself makes no distinction between self-executing and non-self-executing treaties. The distinctions proposed here are entirely consistent with this premise. Regardless of whether or not a treaty is self-executing, the same Article II treatymaking process is followed. The differences arise in the additional step of passing implementing legislation for non-self-executing treaties.

207 Such a statement would come in the form of the Senate's ratification of a clearly self-executing treaty or from the passage of implementing legislation by both houses in the case of a non-self-executing treaty. *See supra* note 180.

208 This adopts Professor Bradley's solution of limiting the treaty power to the enumerated powers of Congress, but only to the extent that such a limit is consistent with the constitutional text. *See supra* Part IV.B.2. This also draws support from Rosenkranz's interpretation of the Necessary and Proper Clause as authorizing the laws necessary and proper to execute the power to make treaties but not allowing Congress to legislate beyond the scope of its enumerated powers to carry treaty obligations into effect. *See* Rosenkranz, *supra* note 29, at 1880–92.

of the federal legislative power, it would preclude the type of bad faith use of the treaty power seen in *Missouri v. Holland.*

For self-executing treaties, no additional federalism limit is necessary.[209] Aside from constitutional provisions protecting individual rights, there is no need for an additional limit. This preserves the President's power to negotiate and conclude treaties in most cases. The existing limits of individual rights and the advice and consent of the Senate remain in effect. It is possible that self-executing treaties will encroach upon and even displace state law in some cases, but this is simply the price of the Seventeenth Amendment. By amending the Constitution to provide for the direct election of senators, the people have eliminated the primary federalism limit on the treaty power from the original Constitution. As a result, state interests are protected only by political limits. However, since courts will not presume that a treaty is self-executing absent clear evidence, the limits on non-self-executing treaties are likely more important.

By recognizing that the nationalist and new federalist concepts of the treaty power coexist, this approach combines the flexibility that the executive branch needs to conduct foreign affairs with an insistence that the power of Congress has limits even when legislating pursuant to a treaty. These principles are bolstered by *Medellín*'s presumption against self-executing treaties. In most cases, treaty obligations will concern issues within the enumerated powers of Congress, and will be made directly enforceable by the passage of implementing legislation. Where Congress lacks the power to legislate or where the President otherwise desires, the federal government can enter into a self-executing treaty. In theory, the presumption against self-executing treaties will require the President to be clear in negotiating the treaty and in seeking ratification in the Senate—states and senators will be aware that the treaty will be directly enforceable in domestic law.[210]

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209 This essentially endorses the nationalist view of the treaty power as a virtually unqualified grant of power vested entirely in the President and the Senate. *See* Golove, *supra* note 23, at 1089–91. However, the nationalist concept of the treaty power should operate only in the context of self-executing treaties, and the expansive reading of the Necessary and Proper Clause championed by Professor Golove should be rejected.

210 This could also have the added benefit of making the United States a more desirable treaty partner for other countries. To get around the presumption against self-executing treaties, the President will need to ensure that the text of the treaty makes its enforceability in domestic law clear. Our treaty partners will immediately know whether they can rely on the United States to comply—the difference between political promises and legal promises will be apparent.

CONCLUSION

Under *Missouri v. Holland*, Congress has the power to pass legislation to implement a valid treaty even when it would have lacked the power to pass the same law in the absence of a treaty. The conclusion that Congress can increase its own power through treaty implementation should be deeply troubling. Despite the potential threat to federalism values, *Missouri v. Holland* has now stood for nearly ninety years.

In the time since it was originally decided, the limits of federalism on the commerce power have fallen and risen again. With the return of federalism limits to the commerce power and to other areas of law, scholars have suggested that federalism limits could and should apply to the power to make treaties.

A federalism limit has emerged in the form of a presumption against self-executing treaties. Faced with treaty obligations to comply with the ICJ's judgment in *Avena*, the Supreme Court instead determined that decisions of the ICJ are not directly enforceable in domestic law. This presumption constrains the executive branch in the enforcement of international obligations, but does not address the power of Congress to pass implementing legislation. While *Medellín* is a step in the right direction and compares favorably with limits on the commerce power, courts must go beyond *Medellín*. To effectively balance the protection of state interests and the President's authority in foreign affairs, we must recognize that the treaty power allows for operation of both the nationalist and new federalist approaches. By combining the presumption against self-executing treaties with an enumerated-powers limitation on the power of Congress to pass implementing legislation, the treaty power will better protect state interests and prevent the federal government's bad faith use of the treaty power to circumvent the constitutional amendment process. Until then, the specter of *Missouri v. Holland* will remain.