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## Executing the Treaty Power

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ARTICLE  
EXECUTING THE TREATY POWER

BY

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# EXECUTING THE TREATY POWER

*Nicholas Quinn Rosenkranz*

## TABLE OF CONTENTS

INTRODUCTION: ENUMERATION AND THE TREATY POWER .....	1868
I. OF TREATIES AND THEIR STATUTES .....	1876
II. TEXT AND STRUCTURE.....	1880
A. <i>The Treaty Clause and the Necessary and Proper Clause</i> .....	1880
1. <i>"To Make Treaties"</i> .....	1882
2. <i>"Necessary and Proper"</i> .....	1889
3. <i>"Necessary and Proper . . . To Make Treaties"</i> .....	1892
B. <i>Expanding the Legislative Power</i> .....	1892
1. <i>"Powers Herein Granted"</i> .....	1894
2. <i>Evading Article V</i> .....	1900
C. <i>Reducing the Legislative Power</i> .....	1903
III. CONSTITUTIONAL HISTORY .....	1912
IV. PUBLIC CHOICE AND PRACTICAL CONSEQUENCES .....	1919
A. <i>The Prospect of Breach and the Possibility of Amendment</i> .....	1920
B. <i>Flexibility and Incentives</i> .....	1927
C. <i>Impermissible Motives</i> .....	1933
D. <i>Stare Decisis</i> .....	1935
CONCLUSION .....	1937

## EXECUTING THE TREATY POWER

Nicholas Quinn Rosenkranz\*

*The canonical Missouri v. Holland holds that Congress has power to enact legislation to implement a treaty, even if it would lack the power to enact the same legislation absent the treaty. It holds, in other words, that the legislative power may be increased by treaty. This proposition is of enormous theoretical importance, because it is in deep tension with the fundamental constitutional principle of enumerated legislative powers. It is also of great and increasing practical importance, because it lies at the intersection of the two most dramatic trends in American law: the explosion of the United States's commitments under international law on matters of distinctly local concern, and the new willingness of the Supreme Court to police the limits of the enumerated powers of Congress. These two trends, in combination, are creating an increasing gap between what Congress is called upon to do by treaty and what it otherwise has enumerated power to do. It is this widening gap that implicates Missouri v. Holland.*

*This Article endeavors to prove that Missouri v. Holland is wrongly decided. It shows, first, that Justice Holmes misunderstood the relationship between the Treaty Clause and the Necessary and Proper Clause. Second, it demonstrates that the standard historical defense of Missouri v. Holland is based on a false premise. It concludes, based on constitutional text, history, and structure, as well as an examination of public choice and practical consequences, that Missouri v. Holland is wrong — treaties cannot increase the legislative power of Congress. Whether or not this Article definitively resolves this issue, however, it should, at a minimum, serve to launch a new debate in the constitutional law of foreign affairs: what is the scope of Congress's power to legislate pursuant to treaty?*

### INTRODUCTION: ENUMERATION AND THE TREATY POWER

The most important sentence in the most important case about the constitutional law of foreign affairs<sup>1</sup> is this one: “If the treaty is valid there can be no dispute about the validity of the [implementing] statute under Article I, § 8, as a necessary and proper means to execute the powers of the Government.”<sup>2</sup> The sentence is wrong and the case should be overruled.

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<sup>1</sup> See LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 190 (2d ed. 1996) (describing *Missouri v. Holland*, 252 U.S. 416 (1920), as “perhaps the most famous and discussed case in the constitutional law of foreign affairs”); David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1314 (2000) (“*Missouri* is one of the cornerstones of the whole edifice of the constitutional law of foreign affairs.”).

<sup>2</sup> *Missouri v. Holland*, 252 U.S. at 432 (Holmes, J.).

The name of the case is *Missouri v. Holland*,<sup>3</sup> and what that sentence means is that if a treaty commits the United States to enact some legislation, then Congress automatically obtains the power to enact that legislation, even if it would lack such power in the absence of the treaty. In other words, the powers of Congress are not fixed by the Constitution, but rather may be expanded by treaty. And if the *Restatement (Third) of the Foreign Relations Law of the United States* is correct that there are no subject-matter limitations on the scope of the treaty power,<sup>4</sup> then it follows from *Missouri v. Holland* that treaties may increase the legislative power *virtually without limit*.

If this were so, then James Madison would have been wrong when he wrote that “[t]he powers delegated by the proposed Constitution to the Federal Government are few and defined,”<sup>5</sup> and John Marshall would have been wrong to say that “[t]he powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.”<sup>6</sup> In short, *Missouri v. Holland* is in deep tension with the fundamental constitutional principle of enumerated legislative powers, and it is therefore of enormous theoretical importance.

It is also of great and increasing practical importance, because its holding lies at the intersection of perhaps the two most dramatic trends in American law. The first of these trends is the explosion of the United States’s commitments under international law, as embodied both in treaties and in other international agreements.<sup>7</sup> Many of these

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<sup>3</sup> 252 U.S. 416.

<sup>4</sup> See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 302 cmt. c (1987) [hereinafter RESTATEMENT] (“[T]he Constitution does not require that an international agreement deal only with ‘matters of international concern.’ The references in the Constitution presumably incorporate the concept of treaty and of other agreements in international law. International law knows no limitations on the purpose or subject matter of international agreements, other than that they may not conflict with a preemptory norm of international law . . . . States may enter into an agreement on any matter of concern to them, and international law does not look behind their motives or purposes in doing so. Thus, the United States may make an agreement on any subject suggested by its national interests in relations with other nations.” (citation omitted)); see also HENKIN, *supra* note 1, at 197 (“I know no basis for reading into the Constitution such a limitation on the subject matter of treaties.”).

<sup>5</sup> THE FEDERALIST NO. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961).

<sup>6</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803); see also *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819) (“This government is acknowledged by all to be one of enumerated powers.”).

<sup>7</sup> See Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 396 (1998) (“During the latter part of [the twentieth] century . . . there has been a proliferation of treaties, such that treaty-making has now eclipsed custom as the primary mode of international law-making.”); Daniel W. Drezner, *On the Balance Between International Law and Democratic Sovereignty*, 2 CHI. J. INT’L L. 321, 322 (2001) (finding that “the number of treaties deposited in the United Nations” has more than doubled in the past twenty years); Golove, *supra* note 1, at 1304 (“[I]nternational treaty practice has greatly expanded in the past half century and promises to expand further in the decades ahead as globalization proceeds.”); Richard B. Graves III, *Glob-*

entail promises to legislate in vital areas that previously always have been left to the states.<sup>8</sup> The second trend is the new willingness of the Supreme Court to police the limits of the enumerated powers of Congress.<sup>9</sup> These two trends, in combination, are creating an increasing gap between what Congress is called upon to do by treaty and what it otherwise has enumerated power to do.<sup>10</sup>

It is this widening gap that implicates *Missouri v. Holland*. Just a few years ago, for example, two circuit courts relied upon this case in holding that Congress had power to pass a major piece of

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*alization, Treaty Powers, and the Limits of the Intellectual Property Clause*, 50 J. COPYRIGHT SOC'Y USA 199, 249 (2003) ("Both the number of treaties to which the United States is a party, and particularly the scope of those treaties, have sharply increased in recent decades.").

<sup>8</sup> See, e.g., Convention on the Rights of the Child, *adopted* Nov. 20, 1989, 1577 U.N.T.S. 3 (signed, but not yet ratified, by the United States); Convention on the Law Applicable to Succession to the Estates of Deceased Persons, *adopted* Oct. 20, 1988, 28 I.L.M. 150 (signed, but not yet ratified, by the United States); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 113; Convention on the Elimination of All Forms of Discrimination Against Women, *adopted* Dec. 18, 1979, 1249 U.N.T.S. 13 (signed, but not yet ratified, by the United States); see also Bradley, *supra* note 7, at 402 ("There are numerous instances in which Congress might use human rights treaties to overcome federalism restraints on its lawmaking power."); *id.* at 403 ("American criminal law, another area of law primarily regulated in this country at the state level, also has become the subject of treaty-making."); Stephen Breyer, *Keynote Address*, 97 AM. SOC'Y INT'L L. PROC. 265, 267 (2003) (noting that "[t]he number of treaties relevant to domestic legal disputes seems to be rising"); Graves, *supra* note 7, at 250 ("[T]wo traditional preserves of state authority, namely domestic and criminal law, have been the subject of extensive internationalization." (citations omitted)); Oona A. Hathaway, *The Cost of Commitment*, 55 STAN. L. REV. 1821, 1822 (2003) (noting that "[o]ver the last half-century, the number of treaties that address issues of human rights has grown from a handful to hundreds"); Robert Knowles, *Starbucks and the New Federalism: The Court's Answer to Globalization*, 95 NW. U. L. REV. 735, 749-50 (2001) ("In recent years, the subject matter of treaties and other international agreements has expanded to encompass nearly every part of what used to be considered the exclusive domain of state law."); Bernard H. Oxman, *Complementary Agreements and Compulsory Jurisdiction*, 95 AM. J. INT'L L. 277, 277 (2001) ("Since the founding of the United Nations, the number of treaties and the matters they address have expanded vastly."); Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 151 (2004) ("International law deals increasingly with the relationship between the government and its citizens, which has led to considerable overlap between the subject matter of treaties and the regulatory concerns of state governments.").

<sup>9</sup> See *United States v. Morrison*, 529 U.S. 598, 627 (2000) (holding that part of the Violence Against Women Act exceeded Congress's power under the Commerce Clause and Section 5 of the Fourteenth Amendment); *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (holding that the Religious Freedom Restoration Act exceeded Congress's power under Section 5 of the Fourteenth Amendment); *United States v. Lopez*, 514 U.S. 549, 567-68 (1995) (holding that the Gun-Free School Zones Act exceeded Congress's power under the Commerce Clause).

<sup>10</sup> See John C. Yoo, *Laws as Treaties?: The Constitutionality of Congressional-Executive Agreements*, 99 MICH. L. REV. 757, 848 (2001) ("As domestic affairs become internationalized, international agreements will come to play a more important role in domestic regulation. At the same time, the Supreme Court's effort to protect state sovereignty and impose new checks on congressional power removes more areas from the reach of the legislature. This phenomenon may place pressure on the political branches to turn to treaties to engage in the regulation of non-commercial activities or individual rights.").

antiterrorism legislation,<sup>11</sup> the Act for the Prevention and Punishment of the Crime of Hostage-Taking,<sup>12</sup> reasoning that the power arose from the International Convention Against the Taking of Hostages.<sup>13</sup> And the Supreme Court was urged just this Term<sup>14</sup> to hold that regardless of whether the Controlled Substances Act<sup>15</sup> exceeds Congress's Commerce Clause power, it may be sustained pursuant to the Single Convention on Narcotic Drugs.<sup>16</sup>

Meanwhile, scholars are already enthusiastically embracing the prospect that the treaty power may be used to evade the limits that the Supreme Court has marked on the legislative power of Congress. Some have suggested, for example, that even though the Supreme Court partially struck down the Religious Freedom Restoration Act<sup>17</sup> as beyond Congress's power to enforce the Fourteenth Amendment,<sup>18</sup> Congress nevertheless could and should pass an equivalent act to enforce the International Covenant on Civil and Political Rights (ICCPR).<sup>19</sup> Others have argued that the Violence Against Women

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<sup>11</sup> See *United States v. Ferreira*, 275 F.3d 1020, 1027–28 (11th Cir. 2001); *United States v. Lue*, 134 F.3d 79, 82, 84 (2d Cir. 1998). Even before the increased attention to enumerated power limitations, several courts had upheld statutes as necessary and proper to implement treaties. See, e.g., *United States v. Georgescu*, 723 F. Supp. 912, 918 (E.D.N.Y. 1989) (upholding special aircraft jurisdiction as necessary and proper to implement various treaties); *Palila v. Haw. Dep't of Land & Natural Res.*, 471 F. Supp. 985, 992–94 (D. Haw. 1979) (upholding the Endangered Species Act as necessary and proper to implement various international agreements), *aff'd*, 639 F.2d 495, 498 (9th Cir. 1981); *Stutz v. Bureau of Narcotics*, 56 F. Supp. 810, 813 (N.D. Cal. 1944) (upholding the Opium Poppy Control Act as necessary and proper to implement the International Opium Convention of 1912); see also *Bridgeman Art Library, Ltd. v. Corel Corp.*, 36 F. Supp. 2d 191, 195 (S.D.N.Y. 1999) (noting “no need to decide . . . whether the treaty power constitutionally might be used to extend copyright protection to foreign works which are not ‘original’ within the meaning of the Copyright Clause”); *United States v. Contrades*, 196 F. Supp. 803, 812 (D. Haw. 1961) (“In the light of the Court’s decision in [*Missouri v. Holland*] . . . and the very strong undertakings on the part of the United States in the various treaties and conventions relating to the control of narcotic drugs, there appears to be more than a plausible ground today . . . for justifying congressional regulation of intrastate transactions in narcotics . . . but the question is not entirely free from doubt.”).

<sup>12</sup> Pub. L. No. 98-473, §§ 2001–2003, 98 Stat. 1837, 2186 (1984) (codified as amended at 18 U.S.C. § 1203 (2000)).

<sup>13</sup> *Adopted Dec. 17, 1979*, T.I.A.S. No. 11,081, 1316 U.N.T.S. 205.

<sup>14</sup> See Brief of Amici Curiae Robert L. DuPont, M.D., Peter B. Bensinger and Herbert Kleber, M.D. in Support of Petitioners, *Ashcroft v. Raich*, *cert. granted*, 124 S. Ct. 2909 (2004) (No. 03-1454), available in 2004 WL 1843965, at \*3.

<sup>15</sup> 21 U.S.C.A. §§ 801–904 (West 1999 & Supp. 2004).

<sup>16</sup> *Done Mar. 30, 1961*, 18 U.S.T. 1407, 520 U.N.T.S. 204.

<sup>17</sup> Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4 (2000)).

<sup>18</sup> See *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

<sup>19</sup> *Adopted Dec. 19, 1966*, 999 U.N.T.S. 171, 6 I.L.M. 368 (approved by the United States Senate on Apr. 2, 1992); see, e.g., Gerald L. Neuman, *The Global Dimension of RFRA*, 14 CONST. COMMENT. 33, 53 (1997) [hereinafter Neuman, *Global Dimension*] (“[I]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.”); Jeri Nazary Sute, Note, *Reviv-*

Act<sup>20</sup> — partially struck down by the Court as beyond both the Commerce Clause power and the Fourteenth Amendment enforcement power<sup>21</sup> — might likewise be reenacted pursuant to the ICCPR.<sup>22</sup> Still others argue that major environmental statutes like the Endangered Species Act (ESA)<sup>23</sup> might be vulnerable to attack as exceeding the Commerce Clause power, but might nevertheless be sustained pursuant to the Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere (Western Convention).<sup>24</sup> And there

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*ing RFRA: Congressional Use of Treaty-Implementing Powers To Protect Religious Exercise Rights*, 12 EMORY INT'L L. REV. 1535, 1538 (1998) ("Congress's treaty-implementing power appears to provide a strong constitutional basis for a revised statute protecting religious exercise. . . . Such action also should be taken to fulfill the obligations that the United States accepted when it ratified the [ICCPR] in 1993."); *see also* Yoo, *supra* note 10, at 829 ("If *Missouri v. Holland* remains good law, then the political branches theoretically can use the treaty power to reach the same result as the Religious Freedom Restoration Act . . . without being limited by Section 5 of the Fourteenth Amendment or the Commerce Clause."). *But see* Gerald L. Neuman, *The Nationalization of Civil Liberties, Revisited*, 99 COLUM. L. REV. 1630, 1645 & n.101 (1999) ("Before *City of Boerne* was decided, I argued that Congress's power to implement the Covenant on Civil and Political Rights would have provided authority for a RFRA-like statute . . . . I have been reasonably admonished, however, that now that the Supreme Court has decided *City of Boerne*, and given the particular reasons on which the Supreme Court relied for invalidating RFRA, a new statute substantively identical to RFRA could not be based on the treaty power without encountering a high risk of invalidation as a subterfuge." (citing Daniel O. Conkle, *Congressional Alternatives in the Wake of City of Boerne v. Flores: The (Limited) Role of Congress in Protecting Religious Freedom from State and Local Infringement*, 20 U. ARK. LITTLE ROCK L.J. 633, 663 (1998))).

<sup>20</sup> Pub. L. No. 103-322, §§ 40001-40703, 108 Stat. 1796, 1902-55 (1994) (codified as amended in scattered sections of 8, 16, 18, 28, and 42 U.S.C.).

<sup>21</sup> *See* *United States v. Morrison*, 529 U.S. 598, 627 (2000).

<sup>22</sup> *See* Catharine A. MacKinnon, *The Supreme Court, 1999 Term—Comment: Disputing Male Sovereignty: On United States v. Morrison*, 114 HARV. L. REV. 135, 167 (2000) ("The International Covenant on Civil and Political Rights (ICCPR), ratified by the United States in 1992, supports congressional use of the legislative power to address violence against women in society and under law." (footnote omitted)); Ana Maria Merico-Stephens, *Of Federalism, Human Rights, and the Holland Caveat: Congressional Power To Implement Treaties*, 25 MICH. J. INT'L L. 265, 274 (2004) ("I consider whether the civil remedy provision of the Violence Against Women Act (VAWA), struck down in *Morrison*, could be reenacted as implementing legislation for the International Covenant on Civil and Political Rights . . . and conclude that it could have." (footnotes omitted)); Jordan J. Paust, *Human Rights Purposes of the Violence Against Women Act and International Law's Enhancement of Congressional Power*, 22 HOUS. J. INT'L L. 209, 221 (2000) ("[I]t is clear that Congress has power under the Constitution to enact the Violence Against Women Act partly to better effectuate the human rights of women to freedom from domestic violence. . . . Choice and power of our national political branches to effectuate international law, especially in view of the Supremacy Clause, provide an overriding constitutional propriety of the VAWA regardless of the reach of the commerce power."); *see also* Brief of Amici Curiae on Behalf of International Law Scholars and Human Rights Experts in Support of Petitioners, *Morrison* (Nos. 99-5, 99-29), available in 1999 WL 1037253, at \*28-30.

<sup>23</sup> 16 U.S.C.A. §§ 1531-1544 (West 2000 & Supp. 2004).

<sup>24</sup> *Opened for signature* Oct. 12, 1940, 56 Stat. 1354, 161 U.N.T.S. 193; *see* Katrina L. Fischer, *Harnessing the Treaty Power in Support of Environmental Regulation of Activities That Don't Substantially Affect Interstate Commerce: Recognizing the Realities of the New Federalism*, 22 VA. ENVTL. L.J. 167, 205-10 (2004) (applying a proposed treaty power framework to uphold the



are other examples.<sup>25</sup> While one imagines that the Rehnquist Court might balk at these results,<sup>26</sup> they do indeed appear to follow from the logic of *Missouri v. Holland*. This aspect of the case, therefore, has increasing practical significance, in addition to its obvious theoretical importance.

Justice Holmes provided neither reasoning nor citation for the proposition that treaties may expand legislative power. Indeed, the entire opinion takes up all of five pages of the *United States Reports*.<sup>27</sup> And while this proposition was necessary to the opinion, it is noteworthy that the State of Missouri did not put it into issue in the

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ESA); Stephen M. Johnson, *Federal Regulation of Isolated Wetlands After SWANCC*, 31 ENVTL. L. REP. 10669, 10679 (2001) ("In the same way that the Treaty Power and the Necessary and Proper Clause authorized Congress to enact legislation to protect migratory birds, those powers may authorize Congress to act to limit the destruction or degradation of isolated waters, even though such legislation, in the absence of a treaty, might be outside Congress' power in light of the Tenth Amendment, or be beyond Congress' Commerce Clause powers."); Omar N. White, *The Endangered Species Act's Precarious Perch: A Constitutional Analysis Under the Commerce Clause and the Treaty Power*, 27 ECOLOGY L.Q. 215, 234 (2000) (arguing that the treaty power provides a plausible, but unstable, justification for the ESA); Yoo, *supra* note 10, at 829 ("Some environmental protection measures . . . might encounter constitutional difficulties if undertaken solely by Congress's Commerce Clause power. Current treaties that protect endangered species might fall outside the Court's current approach to the Commerce Clause, as might proposed treaties that would protect biodiversity . . . . Only the Treaty Clause might supply a certain source of power to regulate in these areas." (footnote omitted)); *id.* at 849 ("[T]he non-commercial nature of proposed international environmental agreements and the Supreme Court's new restrictions upon the Commerce Clause may require use of the treaty form."); Gavin R. Villareal, Note, *One Leg To Stand On: The Treaty Power and Congressional Authority for the Endangered Species Act After United States v. Lopez*, 76 TEX. L. REV. 1125, 1159 (1998) ("The ESA identifies the Western Convention as one of its bases for authority, so despite the potential infirmity of either the Commerce Clause or the property power to support the ESA, it would seem that, as an implementation of the Western Convention under the treaty power, all of the judicial and constitutional requirements for that power have been satisfied."); *cf.* Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 COLUM. L. REV. 403, 416 (2003) ("[The Court] recently expressed qualms about construing the Commerce Clause to include activities at issue in *Holland*, thereby unsettling contentions that *Holland's* outcome was secure irrespective of the treaty power." (citing *Solid Waste Agency v. United States Army Corps of Engineers*, 531 U.S. 159, 173-74 (2001))).

<sup>25</sup> See, e.g., Allen E. White, *Female Genital Mutilation in America: The Federal Dilemma*, 10 TEX. J. WOMEN & L. 129, 189 (2001) ("The Convention on Discrimination Against Women and the Convention on Eradication of Violence form, in large part, rights for the female citizens of a nation vis-à-vis their own country. Under the states' rights analysis, Congress cannot enact local crime control measures not actionable under other enumerated powers. [However, u]nder the Nationalist position, Congress could legislate gender-related legislation of virtually any manner in the name of making 'concessions' to other parties to these and other treaties. Certainly, the federal [female genital mutilation] statute would be a valid exercise of the treaty power from the Nationalist perspective." (footnotes omitted)); see also Yoo, *supra* note 10, at 849 ("As the scope of the Commerce Clause recedes and efforts to harmonize domestic regulation with international standards increase, the Treaty Clause may present a more reliable source for legislative power.").

<sup>26</sup> See, e.g., Conkle, *supra* note 19, at 660-67 (arguing that the Court "probably would not" sustain the Religious Freedom Restoration Act pursuant to the International Covenant on Civil and Political Rights).

<sup>27</sup> See *Missouri v. Holland*, 252 U.S. 416, 430-35 (1920).

case.<sup>28</sup> Nor did the Court have the benefit of a reasoned lower court opinion: the court below likewise simply assumed the proposition to be correct.<sup>29</sup>

The academic literature is no more enlightening. It is true that the treaty power has been the subject of an extraordinarily rich academic debate, which in recent years has become increasingly vigorous.<sup>30</sup> And it appears to be almost obligatory for such scholarship to take a position on *Missouri v. Holland*. Oddly, though, this academic debate has focused almost exclusively on the scope of the treaty power itself and on whether treaties may or must be self-executing. Almost without exception, it has failed to address the equally important, intimately related question at issue here: what is the scope of Congress's power to legislate pursuant to treaty?<sup>31</sup> Even Professor David Golove's recent opus on the treaty power devotes only two paragraphs to this question.<sup>32</sup> For the most part, the academic community, like Justice Holmes himself, has simply assumed Justice Holmes's assertion to be true.<sup>33</sup>

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<sup>28</sup> Only the amicus brief of the State of Kansas expressly argued that a treaty cannot expand the legislative power of Congress. See Brief for the State of Kansas, Amicus Curiae at 29–37, *Missouri v. Holland* (No. 609). The parties and the Court focused instead on the constitutionality of the treaty itself and whether it ran afoul of the Tenth Amendment. See *Missouri v. Holland*, 252 U.S. at 433–34.

<sup>29</sup> See *United States v. Samples*, 258 F. 479, 482 (W.D. Mo. 1919).

<sup>30</sup> See, e.g., Bradley, *supra* note 7; Curtis A. Bradley, *The Treaty Power and American Federalism, Part II*, 99 MICH. L. REV. 98 (2000); Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land"*, 99 COLUM. L. REV. 2095 (1999); Golove, *supra* note 1; Swaine, *supra* note 24; Carlos Manuel Vázquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154 (1999); John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955 (1999) [hereinafter Yoo, *Globalism and the Constitution*]; John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218 (1999) [hereinafter Yoo, *Treaties and Public Lawmaking*].

<sup>31</sup> See, e.g., Merico-Stephens, *supra* note 22, at 304 ("No one argues that Congress lacks the power to implement treaties.").

<sup>32</sup> Golove, *supra* note 1, at 1099–1100, 1311.

<sup>33</sup> Several short pieces, mostly case comments and student notes, were written about the issues presented in *Missouri v. Holland* right around the time that the case was decided. See, e.g., Forrest Revere Black, *Missouri v. Holland — A Judicial Milepost on the Road to Absolutism*, 25 ILL. L. REV. 911 (1931); Thomas Reed Powell, *Constitutional Law in 1919–1920* (pt. 1), 19 MICH. L. REV. 1, 11–13 (1920); L.L. Thompson, *State Sovereignty and the Treaty-Making Power*, 11 CAL. L. REV. 242 (1923); C.M. Micott, Comment, 6 CORNELL L.Q. 91 (1921); Note, *The Power To Make Treaties*, 20 COLUM. L. REV. 680, 692–95 (1920); Note, *The Treaty Power and the Tenth Amendment*, 68 U. PA. L. REV. 160 (1920); Note, *Treaty-Making Power as Support for Federal Legislation*, 29 YALE L.J. 445 (1920); Note, *The Treaty-Making Power Under the United States Constitution — The Federal Migratory Birds Act*, 33 HARV. L. REV. 281 (1920); Recent Cases, 8 CAL. L. REV. 169, 177–80 (1920). These pieces, like *Missouri v. Holland* itself, focused primarily on the scope of the treaty power without squarely addressing the distinct issue of Congress's power to legislate pursuant to treaty. Indeed, none of these pieces so much as mentions the Necessary and Proper Clause, which Justice Holmes held to be the source of Congress's power to legislate pursuant to treaty.

The primary exception is the great Professor Louis Henkin, “the dean of American foreign relations law scholars,”<sup>34</sup> Chief Reporter of the *Restatement (Third) of the Foreign Relations Law of the United States*,<sup>35</sup> and author of the leading treatise in the field.<sup>36</sup> Throughout the vast literature on the treaty power generally and on *Missouri v. Holland* in particular, one finds only a single truly compelling argument in favor of Justice Holmes’s crucial sentence, and it appears in Professor Henkin’s treatise. The argument derives from the drafting history of the Constitution, and it does indeed appear conclusive. In the case mentioned above that upheld the hostage-taking statute, the Second Circuit relied on just this argument, citing Henkin.<sup>37</sup> And when the Supreme Court reached out to reaffirm *Missouri v. Holland* a few months ago — perhaps because Justice Breyer anticipated that this issue is likely to recur with increasing frequency and significance — it too cited Henkin’s treatise.<sup>38</sup> On close analysis, however, Henkin’s argument proves to derive from a premise that is simply false.

This Article endeavors to demonstrate that *Missouri v. Holland* is wrong. Part I describes the three great issues raised by the treaty power, examining them through the lens of *Missouri v. Holland* itself. Part II argues from text and structure that Justice Holmes misunderstood the relationship between the Treaty Clause and the Necessary and Proper Clause. Part III addresses Professor Henkin’s counterargument from constitutional history and demonstrates his error. Part IV considers the practical implications of this thesis and the public choice arguments for and against it. The Article concludes that the crucial sentence from *Missouri v. Holland* is flatly wrong: treaties cannot expand the legislative power of Congress.<sup>39</sup>

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<sup>34</sup> Yoo, *supra* note 10, at 759.

<sup>35</sup> RESTATEMENT, *supra* note 4, at v.

<sup>36</sup> See HENKIN, *supra* note 1.

<sup>37</sup> *United States v. Lue*, 134 F.3d 79, 82 (2d Cir. 1998).

<sup>38</sup> *United States v. Lara*, 124 S. Ct. 1628, 1634 (2004) (“[A]s Justice Holmes pointed out, treaties made pursuant to [the treaty] power can authorize Congress to deal with ‘matters’ with which otherwise ‘Congress could not deal.’ *Missouri v. Holland*, 252 U.S. 416, 433 (1920); see also L. Henkin, *Foreign Affairs and the U.S. Constitution* 72 (2d ed. 1996).”).

<sup>39</sup> Indeed, no international agreements of any sort can expand the legislative power of Congress. Under current doctrine, the United States has power to enter into international agreements other than treaties, called “executive agreements.” And the conventional wisdom is that executive agreements — even those entered into on the sole authority of the President — can, like treaties, expand the legislative power of Congress. See RESTATEMENT, *supra* note 4, § 111 cmt. j (“A treaty valid under the Constitution . . . affords a Constitutional basis for an act of Congress to implement the treaty, even if Congress would not have the power to enact such law in the absence of the treaty. *Missouri v. Holland* . . . . An executive agreement made by the President under his own constitutional authority . . . would afford a similar basis for Congressional legislation.”). This Article focuses on treaties, but its analysis and conclusion apply equally to executive agreements. If treaties cannot expand the legislative power, then a fortiori executive agreements cannot do so either.

Whether or not this Article definitively resolves the issue, however, it should make one thing quite clear: this question is momentous, and it is far more complex than Justice Holmes and the academic community have assumed. Until now, the two great academic debates about the treaty power have concerned whether treaties may or must constitute domestic law of their own force, and whether the treaty power has subject-matter limitations. At a minimum, this Article means to launch a third, closely related, equally important debate: what is the scope of Congress's power to legislate pursuant to treaty?

### I. OF TREATIES AND THEIR STATUTES

Professor Henkin well summarizes the back story of *Missouri v. Holland*:

In 1913, Congress enacted a statute to regulate the hunting of migratory birds. Two lower federal courts declared the statute invalid, finding that it was not within any enumerated power of Congress, and the Department of Justice feared that the statute might meet the same fate in the Supreme Court. It was suggested, however, that migratory birds were a subject of concern to other nations as well, for example Canada; and 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. The treaty was made [and] the statute enacted . . . .<sup>40</sup>

The situation implicitly raised all three of the great issues implicated by the treaty power. The first is whether a treaty must constitute domestic law of its own force ("self-executing"), or whether instead it may consist merely in a promise that Congress will enact implementing legislation ("non-self-executing"). The second is whether a treaty may concern subjects beyond the enumerated powers of Congress. And the third is whether — if a single treaty may be non-self-executing *and* may extend beyond enumerated powers — Congress may enact legislation pursuant to such a treaty, even though it could not have enacted the same legislation absent the treaty. In other words, can such a treaty expand the legislative power of Congress?

The first issue, whether a treaty can be non-self-executing, detained Justice Holmes not at all, because Chief Justice Marshall had decided it long before. As Marshall explained:

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, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty

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<sup>40</sup> HENKIN, *supra* note 1, at 190.

addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.<sup>41</sup>

In other words, though the Constitution stipulates that treaties are “the supreme Law of the Land,”<sup>42</sup> it does not follow that a treaty must constitute domestic law of its own force. Instead, if the treaty-makers so choose, it can be couched as a promise to enact certain legislation. Such a promise constitutes a binding *international* legal commitment, but it does not, in itself, constitute domestic law.<sup>43</sup> This conclusion has prompted the first great debate in modern treaty scholarship: whether treaties are *presumptively* self-executing or non-self-executing.<sup>44</sup> For present purposes, it suffices to note that almost everyone agrees with Chief Justice Marshall that a treaty *can* be non-self-executing if the treaty-makers so choose.<sup>45</sup> The treaty at issue in *Missouri v. Holland* was non-self-executing, and the treaties of concern in this Article are as well.

The second issue raised by *Missouri v. Holland* concerned the scope of the treaty power. In particular, the case presented the question whether the treaty power was limited by the Tenth

<sup>41</sup> *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829).

<sup>42</sup> U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.” (emphasis added)).

<sup>43</sup> See *Islamic Republic of Iran v. Boeing Co.*, 771 F.2d 1279, 1283 (9th Cir. 1985) (stating that non-self-executing treaties “are merely executory agreements between the two nations and have no effect on domestic law absent additional governmental action”); *United States v. Postal*, 589 F.2d 862, 875 (5th Cir. 1979) (stating that “it was early decided that treaties affect the municipal law of the United States only when those treaties are given effect by congressional legislation or are, by their nature, self-executing”); RESTATEMENT, *supra* note 4, § 111(4)(a) (calling a treaty non-self-executing if it “manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation”); see also *Vázquez*, *supra* note 30, at 2181 (defining treaties “addressed to the legislature in the sense that the obligation they impose is an obligation to pass domestic legislation” as non-self-executing); *id.* (noting that under *Foster*, “a treaty is not self-executing if the obligation it imposes is an obligation to enact domestic legislation”).

<sup>44</sup> Compare *Yoo*, *Globalism and the Constitution*, *supra* note 30, and *Yoo*, *Treaties and Public Lawmaking*, *supra* note 30, with HENKIN, *supra* note 1, at 201 (“What seems clear, from the language of the Constitution and of John Marshall, is that in the United States the strong presumption should be that a treaty or a treaty provision is self-executing, and that a non-self-executing promise is highly exceptional. A tendency in the Executive branch and in the courts to interpret treaties and treaty provisions as non-self-executing runs counter to the language, and spirit, and history of Article VI of the Constitution.”), Flaherty, *supra* note 30, and *Vázquez*, *supra* note 30. For cases illustrating the competing positions, compare *Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 968 (4th Cir. 1992), with *Beharry v. Reno*, 183 F. Supp. 2d 584, 593 (E.D.N.Y. 2002).

<sup>45</sup> See, e.g., RESTATEMENT, *supra* note 4, § 111 cmt. c (“Some international agreements of the United States are non-self-executing and will not be applied as law by the courts until they are implemented by necessary legislation.”); see also Malvina Halberstam, *International Human Rights and Domestic Law Focusing on U.S. Law, with Some Reference to Israeli Law*, 8 CARDOZO J. INT’L & COMP. L. 225, 234 (2000) (noting the “accepted black letter law that in the United States treaties may be self-executing or non-self-executing”); sources cited *supra* note 44.

Amendment<sup>46</sup> to the subjects enumerated in the list of Congress's legislative powers.<sup>47</sup> Recall, lower courts had already held that the regulation of migratory birds was beyond Congress's enumerated powers and thus ran afoul of the Tenth Amendment.<sup>48</sup> The question, then, was whether a treaty concerning the same subject matter could be valid. This is the issue that drew the Court's focus and exhausted almost all of the opinion. As Justice Holmes stated the issue: "The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment."<sup>49</sup> He concluded that it was not.<sup>50</sup>

This conclusion has prompted the second great debate about the treaty power: whether there are any subject-matter limitations whatsoever on that power and, if so, what those limits might be.<sup>51</sup> For present purposes, though, it suffices to note the predominant view, which is that there are none.<sup>52</sup> And while there have been impassioned scholarly arguments suggesting *some* limits on the treaty power, there is broad consensus that treaties are not limited to the subject matter of the legislative powers enumerated in Article I, Section 8.<sup>53</sup>

These two conclusions raise the third great issue of the treaty power, which lies at the intersection of the first two. What happens when a treaty *both* concerns subjects beyond the enumerated powers of Congress *and* is non-self-executing? In such a case, is Congress automatically vested with power to enact legislation to implement the treaty, even though it would lack power to enact such legislation

<sup>46</sup> U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.")

<sup>47</sup> See *id.* art. I, § 8.

<sup>48</sup> See *United States v. McCullagh*, 221 F. 288, 290 (D. Kan. 1915); *United States v. Shauver*, 214 F. 154, 160 (E.D. Ark. 1914).

<sup>49</sup> *Missouri v. Holland*, 252 U.S. 416, 433-34 (1920).

<sup>50</sup> See *id.* at 435.

<sup>51</sup> Compare, e.g., Bradley, *supra* note 7, and Bradley, *supra* note 30, at 131-32, with Golove, *supra* note 1.

<sup>52</sup> See RESTATEMENT, *supra* note 4, § 302 cmt. c; Bradley, *supra* note 7, at 393 ("[Under] the conventional wisdom . . . treaties and executive agreements are *not* thought to be limited either by subject matter or by the Tenth Amendment's reservation of powers to the states."); Richard A. Epstein, *Smoothing the Boundary Between Foreign and Domestic Law: Comments on Professors Dodge, Golove, and Stephan*, 52 DEPAUL L. REV. 663, 667 (2002) ("The treaty power imposes no specific subject matter limitation on the President or Senate."); Knowles, *supra* note 8, at 750 ("Today . . . most scholars support the view that the treaty power has no subject-matter limitation."); Yoo, *supra* note 10, at 838 ("[U]nlike statutes, treaties have no defined subject matter, which means that the treatymakers can enter into an international agreement on any matter, regardless of whether the Constitution grants control over it to another branch.")

<sup>53</sup> See, e.g., GARY LAWSON & GUY SEIDMAN, *THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION AND AMERICAN LEGAL HISTORY* 34-35 (2004); Golove, *supra* note 1, at 1287-88; sources cited *supra* note 52.

absent the treaty? Or, to put the finest point on the question, can a treaty expand the legislative power of Congress?

The striking fact is that the *Missouri v. Holland* litigation never squarely addressed this issue. Missouri apparently never argued that even if a treaty can reach beyond enumerated powers, it cannot thereby expand the legislative power of Congress.<sup>54</sup> According to the district court, the defendants contended only that:

[The statute was unconstitutional] because the subject-matter thereof is exclusively within the property rights and police powers of the state; because no provision can be found in the federal Constitution for the protection of migratory birds; and because the convention between the United States and Great Britain exceeds the limitations of the treaty making powers under the Constitution, and is therefore in violation of the Constitution itself.<sup>55</sup>

Only one sentence in the district court opinion implicitly acknowledged the issue, by assuming an answer:

Where, then, any power has been granted to the federal government by the Constitution, to be exercised through legislation by Congress, *or as an incident of the legitimate treaty making power*, it is superior to state Constitutions and state laws, and to all other powers, including police powers, ordinarily belonging to the states.<sup>56</sup>

Three other district courts also considered the constitutionality of the same act, but they too skipped over the question of whether the treaty could give Congress legislative power that it did not otherwise possess. One of them said only: “[T]he power to make the treaty in controversy exists, and the act of Congress to carry it into effect was in discharge of a moral obligation assumed by the nation, by the convention with Great Britain”<sup>57</sup> — simply assuming that with this moral obligation came enhanced legislative power. The other two said even less, apparently assuming that if the treaty was constitutional then the statute must be as well.<sup>58</sup>

Likewise, the Supreme Court focused almost exclusively on the propriety of the treaty itself. As for the scope of the legislative power pursuant to treaty, Justice Holmes said only this: “It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty *followed by such an act* could,”<sup>59</sup> and “[i]f the treaty is valid there can be no dispute about the validity of the statute under Article I, § 8, as a

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<sup>54</sup> See *supra* note 28 and accompanying text.

<sup>55</sup> *United States v. Samples*, 258 F. 479, 480 (W.D. Mo. 1919).

<sup>56</sup> *Id.* at 482 (emphasis added).

<sup>57</sup> *United States v. Thompson*, 258 F. 257, 268 (E.D. Ark. 1919).

<sup>58</sup> See *United States v. Rockefeller*, 260 F. 346, 348 (D. Mont. 1919); *United States v. Selkirk*, 258 F. 775, 776 (S.D. Tex. 1919).

<sup>59</sup> *Missouri v. Holland*, 252 U.S. 416, 433 (1920) (emphasis added).

necessary and proper means to execute the powers of the Government."<sup>60</sup>

In short, the issue of Congress's power to legislate pursuant to treaty received no analysis whatsoever, either in the district court opinions or in the Supreme Court in *Missouri v. Holland*.<sup>61</sup> And it has received almost no scholarly attention since. Yet it is at least as important, both in theory and in practice, as the two other issues implicated by *Missouri v. Holland*, which have so preoccupied the academy.

Moreover, of the three issues, this is the one that Justice Holmes most clearly got wrong.

## II. TEXT AND STRUCTURE

Part I examined *Missouri v. Holland* and noted both Justice Holmes's assumption that a treaty may be non-self-executing and his conclusion that a treaty may extend to subjects beyond those enumerated in Article I, Section 8 of the Constitution. The question is: What happens when these two propositions intersect? Does Congress automatically obtain power to enact implementing legislation pursuant to a non-self-executing treaty, even if it would not have power to pass the same legislation absent the treaty? Can a treaty confer new legislative power on Congress?

### A. *The Treaty Clause and the Necessary and Proper Clause*

The answer turns on the relationship between two clauses of the Constitution:<sup>62</sup> the Necessary and Proper Clause and the Treaty

<sup>60</sup> *Id.* at 432.

<sup>61</sup> Three earlier Supreme Court opinions took or assumed the same position in dicta with the same conspicuous absence of reasoning. See *Keller v. United States*, 213 U.S. 138, 147 (1909) (assuming that a treaty could confer authority upon Congress that would sustain a statute otherwise beyond the scope of legislative power); *Neely v. Henkel*, 180 U.S. 109, 121 (1901) ("The power of Congress to make all laws necessary and proper for carrying into execution as well the powers enumerated in section 8 of article I of the Constitution, as all others vested in the Government of the United States, or in any Department or the officers thereof, includes the power to enact such legislation as is appropriate to give efficacy to any stipulations which it is competent for the President by and with the advice and consent of the Senate to insert in a treaty with a foreign power."); *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 619 (1842) (Story, J.) ("Treaties made between the United States and foreign powers, often contain special provisions, which do not execute themselves, but require the interposition of Congress to carry them into effect, and Congress has constantly, in such cases, legislated on the subject; yet, although the power is given to the executive, with the consent of the senate, to make treaties, the power is nowhere in positive terms conferred upon Congress to make laws to carry the stipulations of treaties into effect. It has been supposed to result from the duty of the national government to fulfil all the obligations of treaties.")

<sup>62</sup> The Court has occasionally relied on the notion of unenumerated legislative power over foreign affairs, see, e.g., *Perez v. Brownell*, 356 U.S. 44, 57-58 (1958), but Justice Holmes did not contend that the power of Congress to implement non-self-executing treaties was somehow "unenumerated" or "extraconstitutional." And rightly so. See *Kansas v. Colorado*, 206 U.S. 46, 89 (1907)



Clause.<sup>63</sup> The first step is to understand how these clauses fit together. Article I provides:

The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.<sup>64</sup>

The treaty power is not a “foregoing” power because it appears in Article II, not earlier in Article I. It is, however, an “other Power[] vested by th[e] Constitution in the Government,” specifically in the President of the United States. The Treaty Clause provides:

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(“[T]he proposition that there are legislative powers affecting the Nation as a whole which belong to [Congress], although not expressed in the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers.”); cf. Christopher G. Blood, *The “True” Source of the Immigration Power and Its Proper Consideration in the Elian Gonzalez Matter*, 18 B.U. INT’L L.J. 215, 222–36 (2000) (contending that Congress’s power over immigration is not unenumerated or extraconstitutional but rather may be derived from the enumerated powers). See generally Michael D. Ramsey, *The Myth of Extraconstitutional Foreign Affairs Power*, 42 WM. & MARY L. REV. 379 (2000) (refuting the notion of unenumerated legislative power over foreign affairs).

<sup>63</sup> One other clause might appear relevant, but its relevance is illusory. Congress has power “[t]o regulate Commerce with foreign Nations.” U.S. CONST. art. I, § 8, cl. 3. Some statutes enacted to implement non-self-executing treaties might fall within this enumerated power (just as they might fall within any other enumerated power). But one might go further and contend that every statute passed to implement a non-self-executing treaty falls, by definition, within the power to regulate commerce with foreign nations. The claim might be that every treaty constitutes foreign commerce, and therefore every statute passed pursuant to a treaty constitutes a regulation of foreign commerce. Cf. AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A GUIDED TOUR* (forthcoming 2005) (manuscript at 128, on file with the Harvard Law School Library) (“[C]ommerce’ also had in 1787, and retains even now, a broader meaning referring to all forms of intercourse in the affairs of life, whether or not narrowly economic or mediated by explicit markets. . . . Structurally, the broader reading of ‘commerce’ in this clause would seem to make better sense of the framers’ general goals by enabling Congress to regulate *all* interactions and altercations with foreign nations . . .”).

This argument fails for a number of reasons. First, to say that all treaties — even peace treaties and human rights treaties — are themselves “Commerce” is inconsistent with the plain meaning and original understanding of the term. See, e.g., *United States v. Lopez*, 514 U.S. 549, 585–87, 590–91 (1995) (Thomas, J., concurring). Second, if all treaties themselves were “Commerce with foreign Nations,” the grammatical implication would be that Congress has power “[t]o regulate” treaties under the foreign commerce clause — that is, Congress would have power to regulate how and when treaties are made. See U.S. CONST. art. I, § 8, cl. 3. Stated this way, the general proposition is inconsistent with Article II, which grants the treaty-making power to the President with the consent of the Senate, and which deliberately excludes the House of Representatives. See *id.* art. II, § 2, cl. 2. Third, even if the Foreign Commerce Clause did amount to a power to regulate treaties themselves, such a power, as a matter of grammar, would not embrace a power to enact laws *executing* non-self-executing treaties. And fourth, if this argument were sound, it would mean that the Foreign Commerce Clause power of Congress could be expanded by treaty, a proposition that is inconsistent with the basic constitutional structure of enumerated legislative powers. See *infra* section II.B, pp. 1892–1903. It is unsurprising, therefore, that neither *Missouri v. Holland* nor any other case has suggested that Congress’s power to enact statutes pursuant to non-self-executing treaties derives, automatically and in every case, from the Foreign Commerce Clause.

<sup>64</sup> U.S. CONST. art. I, § 8.

[The President] shall have *Power*, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.<sup>65</sup>

By echoing the word “Power,” the Treaty Clause leaves no doubt: the treaty power is an “other Power[]” referred to in the “relatively unexamined [and] . . . obscure half”<sup>66</sup> of the Necessary and Proper Clause.

This much is implicit in *Missouri v. Holland*, although Justice Holmes did not quote either the Treaty Clause or the Necessary and Proper Clause, let alone discuss how they fit together grammatically. Indeed, it is striking to find that the phrase “necessary and proper” and the phrase “to make treaties” *never* appear in the same sentence in the *United States Reports*. And while some scholars have recognized that the treaty power is an “other Power[]” referred to in the Necessary and Proper Clause,<sup>67</sup> it seems that no scholar has ever taken the trouble to conjoin explicitly and properly the two clauses.<sup>68</sup> Nevertheless, the conjunction of the two clauses is essential to an analysis of whether a treaty may increase the legislative power of Congress. Here, then, is the way that these two clauses fit together as a matter of grammar:

The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution . . . [the President’s] Power, by and with the Advice and Consent of the Senate, to make Treaties . . . .<sup>69</sup>

The question is the scope of that power. What is a “Law[] . . . for carrying into Execution . . . [the] Power . . . to make Treaties”?

1. “*To Make Treaties.*” — For the purpose of this inquiry, the key term is the infinitive verb “to make.” The power granted to Congress is emphatically not the power to make laws for carrying into execution “the treaty power,” let alone the power to make laws for carrying into execution “all treaties.” Rather, on the face of the conjoined text, Congress has power “To make all Laws which shall be necessary and proper for carrying into Execution . . . [the] Power . . . *to make Treaties.*”

This power would certainly extend to laws appropriating money for the negotiation of treaties. It would, for example, clearly have justified a statute paying for John Jay’s passage to Great Britain to

<sup>65</sup> *Id.* art. II, § 2, cl. 2 (emphasis added).

<sup>66</sup> William W. Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause*, 40 LAW & CONTEMP. PROBS., Spring 1976, at 102, 107.

<sup>67</sup> See, e.g., Golove, *supra* note 1, at 1099–1100, 1311.

<sup>68</sup> A March 2, 2005 search in Westlaw’s Journals and Law Reviews (JLR) database yielded only twenty articles using “necessary and proper” and “to make treaties” in the same sentence, none of which reflected the grammatical conjunction of the two constitutional clauses.

<sup>69</sup> U.S. CONST. art. I, § 8, art. II, § 2.

negotiate the Jay Treaty.<sup>70</sup> As James Hillhouse explained in the great debate over that treaty in the House of Representatives, “the President has the power of sending Ambassadors or Ministers to foreign nations to negotiate Treaties . . . [but] it is . . . clear that if no money is appropriated for that purpose, he cannot exercise the power.”<sup>71</sup> And this power would likewise embrace any other laws necessary and proper to ensure the wise use of the power to enter treaties. These might include, for example, appropriations for research into the economic or geopolitical wisdom of a particular treaty, or even provisions for espionage in service of the negotiation of a treaty.<sup>72</sup> And of course, Congress’s discretion to determine whether any particular law is

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<sup>70</sup> Treaty of Amity, Commerce, and Navigation, Nov. 19, 1794, U.S.-Gr. Brit., 8 Stat. 116.

<sup>71</sup> 5 ANNALS OF CONG. 673–74 (1796).

<sup>72</sup> See David E. Engdahl, *The Necessary and Proper Clause as an Intrinsic Restraint on Federal Lawmaking Power*, 22 HARV. J.L. & PUB. POL’Y 107, 107 (1998) (“[T]he Necessary and Proper Clause enables Congress to create offices and departments to help the President carry out his Article II powers.”).

Steven G. Calabresi and Saikrishna B. Prakash have explored the relationship between the Necessary and Proper Clause and two other Article II powers, the pardon power and the nomination power. In considering these analogous cases, they offer similar examples of statutes that would be permissible under the conjoined clauses: “[W]ith respect to the executive branch, the [Necessary and Proper] Clause would allow Congress to institute an agency to help the President wisely employ his pardoning power, or to establish a department to assist the President in selecting officers for nomination.” Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power To Execute the Laws*, 104 YALE L.J. 541, 591 (1994). Importantly, this conception of the relationship between the Necessary and Proper Clause and Article II does not leave the scope of the legislative power contingent on any particular *exercise* of Article II power. See LAWSON & SEIDMAN, *supra* note 53, at 63 (“The [Necessary and Proper] Clause is an implementational power in that it grants Congress power only to pass laws ‘for carrying into Execution’ other granted powers. But Congress does not need to wait for those other powers actually to be exercised in order to use its authority under the [Necessary and Proper] Clause. For instance, Congress could appropriate funds and authorize appointment of officers for the negotiation of a particular treaty, even if the President ultimately chooses not to negotiate the treaty at all.”).

Of course, it is true that under current doctrine, all these hypothetical statutes might be sustained under the Spending Clause, without recourse to the Necessary and Proper Clause. See *United States v. Butler*, 297 U.S. 1, 66 (1936) (“[T]he power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution.”). If this doctrine is correct, then the conjunction of the Necessary and Proper Clause and the Treaty Clause (or the other Article II clauses) might add little or nothing to the legislative power. This result would not be particularly surprising, and it is perfectly consistent with the interpretive rule disfavoring superfluities. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) (rejecting an interpretation that would make part of the Constitution “mere surplusage, . . . entirely without meaning,” because “[i]t cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it”). Every clause of the Constitution presumptively does some work, but it hardly follows that *every combination of two clauses* must do some additional work. The Treaty Clause individually confers important power of course, and the Necessary and Proper Clause presumptively does too, but see *infra* pp. 1891–92. But there is no reason to assume that the combination of the two clauses confers any additional power.

“necessary and proper” to serve this object is quite broad.<sup>73</sup> But on the plain text of the conjoined clauses, the object itself is limited to the “Power . . . to *make* Treaties” in the first place. This is not the power to implement non-self-executing treaties already made.

Nor will it do to say that the phrase “make Treaties” is a term of art meaning “conclude treaties with foreign nations and then give them domestic legal effect.” First, if that were the meaning of the phrase, the implication would be that the President, not Congress, has power to give non-self-executing treaties domestic legal effect, for it is he who has the “Power . . . to make Treaties.” This conclusion would not support the claim of *congressional* power endorsed in *Missouri v. Holland*. But second, there is no indication that that the phrase “make Treaties” had such a term-of-art meaning at the Founding. British treaties at that time were non-self-executing, requiring an act of Parliament to be enforceable as domestic law,<sup>74</sup> and yet Blackstone wrote simply of “the *king’s* prerogative to *make* treaties,” without any suggestion that Parliament had a role in the making.<sup>75</sup> Blackstone thus understood the difference between *making* a treaty, which the King could do, and giving it domestic legal effect, which required an act of Parliament. The “Power . . . to make Treaties” is exhausted once a treaty is ratified; implementation is something else altogether.

The Supreme Court saw this textual point clearly when construing a statute with similar language. In *Patterson v. McLean Credit Union*,<sup>76</sup> the statute at issue concerned the “right . . . to make . . . contracts.”<sup>77</sup> This provision is textually and conceptually parallel

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<sup>73</sup> See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) (“Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”); see also *Sabri v. United States*, 124 S. Ct. 1941, 1946 (2004) (characterizing *McCulloch* as “establishing review for means-ends rationality under the Necessary and Proper Clause”). But see *id.* at 1949 (Thomas, J., concurring in the judgment) (“[T]he Court[] characteriz[es] . . . *McCulloch* . . . as having established a ‘means-ends rationality’ test, . . . a characterization that I am not certain is correct.” (citation omitted)); *id.* at 1950 (“[I]t would seem necessary to show some obvious, simple, and direct relation between the statute and the enumerated power.”).

<sup>74</sup> See Vázquez, *supra* note 30, at 2158 (“[T]reaties in Great Britain lacked the force of domestic law unless implemented by Parliament.”); see also Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT’L L. 695, 697–98 (1995) (“[U]nder the fundamental law of Great Britain, all treaties are ‘non-self-executing.’”); Yoo, *Treaties and Public Lawmaking*, *supra* note 30, at 2226–27 (“[T]he British treaty system was one of non-self-execution.”). But see Flaherty, *supra* note 30, at 2108–12 (“British doctrine actually points toward self-execution . . .”).

<sup>75</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES \*249 (emphases added); see also *id.* at \*243 (“[T]he king . . . may *make* what treaties . . . he pleases.” (emphasis added)); *id.* at \*244 (“[T]he king may *make* a treaty.” (emphasis added)).

<sup>76</sup> 491 U.S. 164 (1989).

<sup>77</sup> *Id.* at 176 (alterations in original) (quoting 42 U.S.C. § 1981 (1988) (current version at 42 U.S.C. § 1981(a) (2000))) (internal quotation mark omitted).

to the “Power . . . to make Treaties” both because of the key infinitive verb “to make” and because, as Chief Justice Marshall explained, a non-self-executing treaty is itself in the nature of a contract.<sup>78</sup> This is what the Court said in *Patterson*:

[T]he right to *make* contracts does not extend, as a matter of either logic or semantics, to conduct . . . *after* the contract relation has been established, including breach of the terms of the contract . . . . Such *postformation* conduct does not involve the right to *make* a contract, but rather implicates the *performance* of established contract obligations . . . .<sup>79</sup>

Just so here. The “Power . . . to make Treaties” does not extend, as a matter of logic or semantics, to the implementation of treaties already made.

To put the textual point another way, a treaty and the “Power . . . to make Treaties” are not the same thing. But the adherents of *Missouri v. Holland* have conflated the two. Professor Gerald Neuman’s statement is typical: “The Necessary and Proper Clause empowers Congress to enact legislation implementing a valid international *treaty*, just as it may implement other federal *powers*.”<sup>80</sup> But a treaty is not a power. To the contrary, a treaty is the fruit of the exercise of a particular power — the “Power . . . to make Treaties.” Yet Neuman and others have tacitly assumed that since Congress has power to make laws carrying into execution the “Power . . . to make Treaties” (for example, to appropriate money for John Jay’s passage to England), it necessarily has power to make laws carrying into execution *the fruit of an exercise of* the “Power . . . to make Treaties” — that is, treaties themselves.

An analogy demonstrates that this assumption is unsound. The treaty power is somewhat analogous, textually and structurally, to the legislative power vested in the Congress by Article I, Section 1.<sup>81</sup>

<sup>78</sup> See *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (“[W]hen the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the court.”); see also 1 BLACKSTONE, *supra* note 75, at \*249 (referring to “treaties, leagues, and alliances” as “contracts”).

<sup>79</sup> *Patterson*, 491 U.S. at 177 (emphases added); see also *id.* at 179 (noting that the relevant part of 42 U.S.C. § 1981 “covers only conduct at the initial formation of the contract”). The result in *Patterson* was reversed by the Civil Rights Act of 1991, see Pub. L. No. 102-166, § 101, 105 Stat. 1071, 1071-72 (amending 42 U.S.C. § 1981 to include “all benefits, privileges, terms, and conditions of the contractual relationship”), but this fact suggests only that the subsequent Congress preferred a different policy result; it does not cast the Court’s interpretive analysis of the original statute into doubt.

<sup>80</sup> Neuman, *Global Dimension*, *supra* note 19, at 49 (emphases added).

<sup>81</sup> See U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States . . . .”); see also David Golove, *Human Rights Treaties and the U.S. Constitution*, 52 DEPAUL L. REV. 579, 589 (2002) (analogizing the treaty power to Congress’s legislative power since “[b]oth are delegations of authority to the national government to create binding domestic norms in certain defined subject matter areas”); Laurence H. Tribe, *Taking Text and*

Textually, the phrase “legislative Powers”<sup>82</sup> in Article I may be paraphrased as the “power to make laws,”<sup>83</sup> which is parallel to the Article II “Power . . . to make Treaties.”<sup>84</sup> Structurally, both powers may be used to create “supreme Law of the Land.”<sup>85</sup> And if the legislative power is analogous to the treaty power, then a statute is analogous to a treaty. A statute, like a treaty, is not itself a “Power[] vested by th[e] Constitution”;<sup>86</sup> rather, like a treaty, it is the fruit of the exercise of one such power — in this case, the legislative power vested in the Congress by Article I, Section 1. Yet it has never been suggested that because Congress has power to make all laws which shall be necessary and proper for carrying into execution the “legislative Powers” of Article I, Section 1, it thus has power to make laws necessary and proper for carrying into execution *the fruits of the exercise of such powers, which is to say, other statutes.*

In *United States v. Lopez*,<sup>87</sup> for example, the government (unsuccessfully) defended the Gun-Free School Zones Act<sup>88</sup> as an exercise of the power to regulate interstate commerce — and as a law necessary and proper for carrying into execution that power.<sup>89</sup> It was not heard to argue, however, that the Act was necessary and proper for carrying into execution *some other federal statute.* The government might have said, for example, that keeping guns away from schools is necessary and proper to execute educational spending statutes,<sup>90</sup> because the

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*Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1268 (1995) (“The treaty-making process is an alternative legislative process . . .” (quoting Letter from Anne-Marie Slaughter, Professor, Harvard Law School, to Sen. Ernest F. Hollings 4–5 (Oct. 18, 1994), in *GATT Implementing Legislation: Hearings on S. 2467 Before the Senate Comm. on Commerce, Sci. & Transp.*, 103d Cong. 286, 287 (1994))).

<sup>82</sup> U.S. CONST. art. I, § 1.

<sup>83</sup> See THE FEDERALIST NO. 33, at 202 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“What is a LEGISLATIVE power but a power of making LAWS?”).

<sup>84</sup> U.S. CONST. art. II, § 2.

<sup>85</sup> *Id.* art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . .”); see also *The Chinese Exclusion Case*, 130 U.S. 581, 600 (1889); *Whitney v. Robertson*, 124 U.S. 190 (1888); *Head Money Cases*, 112 U.S. 580 (1884); RESTATEMENT, *supra* note 4, § 115 cmt. a (“An act of Congress and a self-executing treaty of the United States . . . are of equal status in United States law, and in case of inconsistency the later in time prevails.”).

<sup>86</sup> U.S. CONST. art. I, § 8, cl. 18.

<sup>87</sup> 514 U.S. 549 (1995).

<sup>88</sup> Pub. L. No. 101-647, § 1702, 104 Stat. 4789, 4844–45 (1990) (current version at 18 U.S.C. § 922(q) (2000)).

<sup>89</sup> Brief for the United States, *Lopez* (No. 93-1260) [hereinafter U.S. *Lopez* Brief], available in 1994 WL 242541, at \*13 n.4.

<sup>90</sup> See, e.g., School Dropout Prevention and Basic Skills Improvement Act, Pub. L. No. 101-600, 104 Stat. 3042 (1990); Education and Training for a Competitive America Act, Pub. L. No. 100-418, §§ 6001–6403, 102 Stat. 1107, 1469–1545 (1988); School Dropout Demonstration Assistance Act, Pub. L. No. 100-297, sec. 1001, §§ 6001–6007, 102 Stat. 130, 265–70 (1988); cf. U.S. *Lo-*

money is wasted if children cannot concentrate for fear of gun violence. But this sort of argument is inconsistent with the Necessary and Proper Clause, which authorizes statutes “necessary and proper for carrying into Execution” *powers*, not *statutes*. Moreover, the contrary view would permit illegitimate bootstrapping, by which Congress could increase its own legislative power, statute by statute, *ad infinitum*.<sup>91</sup>

Yet this is precisely analogous to the implicit logic of *Missouri v. Holland*. Justice Holmes and the few scholars to have considered the

*pez* Brief, *supra* note 89, at \*35–40 (relying on these educational spending statutes to demonstrate a federal interest, but not as an independent hook for the power to legislate pursuant to the Necessary and Proper Clause).

<sup>91</sup> *Sabri v. United States*, 124 S. Ct. 1941 (2004), is not to the contrary. In that case, the Supreme Court upheld a federal statute criminalizing bribery of state officials of entities that receive at least \$10,000 in federal funds. *Id.* at 1945. The case is correctly read to hold that 18 U.S.C. § 666(a)(2) (2000) is necessary and proper to bring into execution *the spending power*, not that it is necessary and proper to bring into execution *particular spending statutes*. See *Sabri*, 124 S. Ct. at 1947 (“*Sabri* would be hard pressed to claim, in the words of the *Lopez* Court, that § 666(a)(2) ‘has nothing to do with’ *the congressional spending power*.” (emphasis added) (quoting *Lopez*, 514 U.S. at 561)). To see the distinction, consider that § 666(a)(2) does not rely for its constitutionality on the existence of federal spending statutes authorizing spending of more than \$10,000; if some of those statutes were repealed, the *scope of application* of § 666(a)(2) would shrink, but it would not thereby be “rendered” unconstitutional. Like all federal statutes, its authority derives from the Constitution itself, not from other federal statutes. See *infra* section II.C, pp. 1903–12.

Similarly, cases like *Houston, East & West Texas Railway Co. v. United States (Shreveport Rate Cases)*, 234 U.S. 342 (1914), are not to the contrary. That case upheld an order of the Interstate Commerce Commission regulating *intrastate* railroad rates, because the order was necessary to maintain its regime of *interstate* rates. See *id.* at 353–55, 360. But to say that Congress can regulate intrastate railroad rates only *when* and *because* it is also regulating interstate railroad rates is not quite the same as saying that regulating interstate railroad rates *expands the power of Congress* to reach intrastate rates. The case is probably best read to hold that *a single act of Congress* (the Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379 (codified as amended in scattered sections of 49 U.S.C.)) regulating *both* interstate and intrastate rates is necessary and proper to carry into execution the power to regulate interstate commerce. See *id.* at 353 (“Congress *in the exercise of its paramount power* may prevent the common instrumentalities of interstate and intrastate commercial intercourse from being used in their intrastate operations to the injury of interstate commerce. This is not to say that Congress possesses the authority to regulate the internal commerce of a state *as such*, but that it does possess the power to foster and protect interstate commerce, and to take all measures necessary or appropriate to that end, although intrastate transactions of interstate carriers may thereby be controlled.” (emphases added)). It does not follow, however, that an act of Congress regulating *only* intrastate rates would be constitutional — even if there were already another act of Congress on the books regulating interstate rates.

In other words, assume that (1) *X* alone is within Congress’s power; (2) *Y* alone is not; and (3) *Y* is necessary to carry *X* into execution. It may be that a single act of Congress *X + Y* is constitutional, because *X + Y* may fairly be described as a law regulating interstate commerce. It does not follow, however, that *Y* could ever be enacted alone, even after the enactment of *X*, because *Y* alone could never be described as a law regulating interstate commerce. Evaluation of the Article I power to enact a statute may rightly depend on the content of the *whole* statute, *cf.* *United States v. Darby*, 312 U.S. 100, 124–25 (1941) (upholding recordkeeping requirement pursuant to a statute regulating wages and hours), but probably should not depend on the existence of other statutes already enacted. The question in each case should be whether any given statute — all of it, in itself — may be said to be an exercise of an enumerated power.

question have implicitly assumed that a law implementing a non-self-executing treaty that has already been made would somehow fit the bill as a "Law[] which shall be necessary and proper for carrying into Execution . . . [the] Power . . . to make Treaties."<sup>92</sup> The error stems, perhaps, from a failure to quote the relevant clauses. Or perhaps it stems from the coincidental echo of the word "execution" in the Necessary and Proper Clause and in the doctrine of non-self-executing treaties.<sup>93</sup> At any rate, as noted at the outset of this Article, Justice Holmes contented himself with just a single conclusory sentence: "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>94</sup>

Even Professor David Golove, who has done the most comprehensive analysis of the treaty power in modern scholarship,<sup>95</sup> provides little more. His article leaves no stone unturned in its survey of the historical evidence on the scope of the treaty power. But on the corresponding question of Congress's power to pass statutes pursuant to treaty, Professor Golove provides only the most perfunctory textual analysis:

Under the Necessary and Proper Clause, it is quite clear that Congress has the power to adopt legislation executing the provisions of any valid treaty. . . . If the President and Senate have the power to conclude treaties on subjects that are beyond the scope of Congress's legislative powers, then the Necessary and Proper Clause makes clear that Congress has the power to adopt legislation implementing the provisions of such treaties as domestic law. . . . The treaty power is a power vested in the government of the United States or in a department thereof. *Hence*, the least controversial portion of Justice Holmes's opinion in *Missouri*: if the President and Senate had the power to conclude a migratory bird treaty with Canada, then Congress had the power to pass legislation implementing the

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<sup>92</sup> U.S. CONST. art. I, § 8, cl. 18, art. II, § 2, cl. 2.

<sup>93</sup> As discussed above, a treaty that merely stipulates that the United States will enact certain legislation is said to be "non-self-executing." See *supra* pp. 1876-77. In this context, the word "executing" is used in the contracts sense rather than in the United States constitutional sense. The phrase "non-self-executing" in the treaty context signifies that the United States has not, by signing the treaty, thereby automatically performed, or "executed," its obligations under that treaty. Cf. 17 C.J.S. *Contracts* § 8 (1999) ("An executed contract is one as to which nothing remains to be done by either party. An executory contract is one the obligation of which relates to the future."). If new legislation is required, then when Congress passes such legislation, the United States thus "executes" the treaty in that it thereby fulfills its treaty obligation. Cf. *id.* The President then "executes" the *legislation* pursuant to his Article II duty to "take Care that the Laws be faithfully executed," U.S. CONST. art. II, § 3, but this has nothing to do with "execution" of the *treaty* and is a different sense of the word.

<sup>94</sup> *Missouri v. Holland*, 252 U.S. 416, 432 (1920).

<sup>95</sup> See Golove, *supra* note 1.



treaty, notwithstanding its lack of authority to pass the same legislation in the absence of the treaty.<sup>96</sup>

With that, Professor Golove leaves the issue, returning to it only briefly in an equally conclusory passage:

The constitutional text . . . makes . . . clear where authority lies for implementing non-self-executing treaties: Congress is given the authority “[t]o make all Laws which shall be necessary and proper for carrying into Execution” not only its own powers, but “all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” The treaty power is without doubt such a power, and *there has never been any question* but that Congress has the power under the Necessary and Proper Clause to implement any (constitutional) treaty made by the President and Senate . . .<sup>97</sup>

In short, Professor Golove agrees that the treaty power is an “other Power[]” referred to in the Necessary and Proper Clause. But on the next logical question — whether a law *implementing* a non-self-executing treaty *already made* is a “Law[] . . . for carrying into Execution . . . [the] Power . . . to *make* Treaties” — Professor Golove says only “[h]ence,” and “there has never been any question.”

2. “*Necessary and Proper.*” — Perhaps Professor Golove and Justice Holmes had the following argument in mind. Perhaps they would say that a law implementing a non-self-executing treaty already made is necessary and proper for carrying into execution the power to make treaties, because such a law might make it easier for the President “to make” the *next* treaty, by showing prospective treaty partners that the United States has power to perform its obligations under such treaties. This argument fails for two reasons. First, one might say that this argument as stated is too speculative, that it fails even *McCulloch v. Maryland*’s<sup>98</sup> permissive test<sup>99</sup> of necessity and propriety.<sup>100</sup> Indeed, it may be difficult to contend that laws implementing non-self-executing

<sup>96</sup> *Id.* at 1099–1100 (emphasis added) (citations omitted). The passage also includes a one-sentence structural argument, omitted at the second ellipsis. I consider this argument in section IV.A, pp. 1920–27.

<sup>97</sup> See Golove, *supra* note 1, at 1311 (brackets in original) (emphasis added) (footnote omitted) (quoting U.S. CONST. art. I, § 8, cl. 18).

<sup>98</sup> 17 U.S. (4 Wheat.) 316 (1819).

<sup>99</sup> See *id.* at 421 (“Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”).

<sup>100</sup> See 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, § 5-3, 801 (3d ed. 2000) (“[T]he power to do what is necessary and proper — even if those words are watered down until they mean nothing more than ‘convenient’ — for ‘carrying into execution’ another, more specific power is not, and must not be confused with, a power to do whatever might bear some possible relationship to one of the more specific powers.”); Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 331 (1993) (“To carry a . . . power into execution . . . does *not* mean to regulate unenumerated subject areas to make the exercise of enumerated powers more efficient.”).

treaties are ever “necessary” in this sense, if only because a treaty beyond enumerated powers may always be self-executing.<sup>101</sup>

But second, even were this argument not speculative at all, it proves far too much. Imagine that no speculation is necessary, because a prospective treaty partner explicitly conditions treaty negotiations on some legislation beyond the enumerated powers of Congress. Imagine, for example, that France declares that it will not enter into any treaty negotiations whatsoever with the United States until the United States forbids guns near schools, despite *Lopez*. Here, no speculation is necessary, because clearly the President’s “Power . . . to make Treaties” with France would be enhanced by the Gun-Free School Zones Act. But surely such a naked demand for legislation by a foreign country cannot be enough to render such legislation necessary and proper. Indeed, consider how this reasoning would apply to another Article II power: the appointments power. On this logic, if a prospective presidential appointee threatens to refuse his appointment until the nation forbids guns near schools, then such a law would become necessary and proper to bring into execution the President’s appointments power. This cannot be right. The mere desire of a prospective treaty partner (or a prospective appointee) for certain legislation — even if the desire is framed as an express demand or condition — cannot suffice to bring such legislation within the legislative power. A fortiori, the speculative prospect that some treaty partners might be more amenable to

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<sup>101</sup> See *infra* note 278 and accompanying text. Justice Story endorsed an analogous line of reasoning in 1820, the year after *McCulloch*. At issue was whether Congress could compel a state court-martial to try a federal offense. See *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 67 (1820) (Story, J., dissenting). That question is similar to the one presented here because it concerns whether Congress may create an alternative, indirect mechanism for the enforcement of its laws (commandeering state courts-martial), even though it has unquestioned constitutional power to create a direct mechanism (federal courts-martial). Justice Story concluded that under such circumstances, the alternative, indirect mechanism could never be “necessary.” See *id.* (“Such an authority is no where confided to [Congress] by the constitution . . . [and] it is not an implied power *necessary or proper* to carry into effect the given powers. The nation may organize its own tribunals for this purpose; and it has no *necessity* to resort to other tribunals to enforce its rights.” (emphases added)); see also Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and “Dual Sovereignty” Doesn’t*, 96 MICH. L. REV. 813, 939 (1998) (“The general power to demand regulatory services from state and local governments . . . is not *necessary* [for purposes of the Necessary and Proper Clause, because] Congress can obtain the services of nonfederal officials simply by entering into an intergovernmental agreement with them.” (emphasis added)). Likewise, one might argue that the alternative, indirect mechanism for enforcing treaties (subsequent implementing legislation) is “necessary,” because the Constitution provides a direct mechanism for enforcing treaties: making them self-executing, such that they are supreme law of the land of their own force. Cf. Tribe, *supra* note 81, at 1251 (rejecting the proposition that “[a]nything that falls substantively within the subject-matter reach of Article I may be embodied by Congress in any governmental or institutional form that might rationally be deemed ‘necessary and proper’ — regardless of whether Article II . . . specifically empowers a different combination of actors to achieve the result in question”); *infra* pp. 1928–29.

negotiation if Congress had certain power cannot suffice to give Congress that power under the Necessary and Proper Clause.

Finally, it is worth noting that both Hamilton<sup>102</sup> and Madison<sup>103</sup> (and probably Chief Justice Marshall<sup>104</sup>) believed that the Necessary and Proper Clause adds nothing to the power of Congress and that all constitutional powers would be precisely the same if it had been omitted. This notion is plausible and consistent with the holding of *McCulloch*, because Congress's enumerated powers standing alone might well have implied legislative power to bring them into execution. Absent the Necessary and Proper Clause, one might still, for example, read the Commerce Clause to imply the power to pass legislation necessary and proper to regulate interstate commerce. But the Necessary and Proper Clause operates quite differently when applied to powers outside of Article I.<sup>105</sup> It would be impossible to justify the result of *Missouri v. Holland* absent the Necessary and Proper Clause, because the treaty power is granted in Article II.<sup>106</sup> If the Necessary and Proper Clause had been omitted, Congress would have no plausible claim of power to legislate pursuant to treaty because the mechanism for making treaties is not legislative and their enforcement is (generally) automatic under the Supremacy Clause.<sup>107</sup> In short, absent the Necessary and Proper Clause, it would be clear that Congress has no power to legislate pursuant to treaty beyond its enumerated powers. And both Hamilton and Madison (and probably Marshall) believed

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<sup>102</sup> See THE FEDERALIST NO. 33, *supra* note 83, at 202 (“[I]t may be affirmed with perfect confidence that the constitutional operation of the intended government would be precisely the same if [the Necessary and Proper Clause] were entirely obliterated.”).

<sup>103</sup> See THE FEDERALIST NO. 44, at 285 (James Madison) (Clinton Rossiter ed., 1961) (“Had the Constitution been silent on this head, there can be no doubt that all the particular powers requisite as means of executing the general powers would have resulted to the government by unavoidable implication.”).

<sup>104</sup> Chief Justice Marshall implies this view in *McCulloch*: “The result of the most careful and attentive consideration bestowed upon [the Necessary and Proper Clause] is, that *if it does not enlarge*, it cannot be construed to restrain the powers of Congress . . .” *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 420 (1819) (emphasis added).

<sup>105</sup> Cf. Van Alstyne, *supra* note 66.

<sup>106</sup> Cf. Defendants' Opposition to Plaintiffs' Motion for Summary Judgment at 19–27, *Kucinich v. Bush*, 236 F. Supp. 2d 1 (D.D.C. 2002) (Civ. No. 02-1137) [hereinafter Defendants' *Kucinich* Opposition] (“[T]he Constitution does not grant Congress any enumerated powers relating to treaties except for the power of the Senate to give its advice and consent and to concur in ratification. Granting Congress the power to terminate treaties is therefore not ‘necessary and proper’ to the exercise of an ‘otherwise granted’ power.”).

<sup>107</sup> See HENKIN, *supra* note 1, at 201 (“What seems clear, from the language of the Constitution and of John Marshall, is that in the United States the strong presumption should be that a treaty or a treaty provision is self-executing, and that a non-self-executing promise is highly exceptional. A tendency in the Executive branch and in the courts to interpret treaties and treaty provisions as non-self-executing runs counter to the language, and spirit, and history of Article VI of the Constitution.”); Flaherty, *supra* note 30; Vázquez, *supra* note 30.

that the Necessary and Proper Clause increases the power of Congress not at all. If they were right, then *Missouri v. Holland* is wrong.<sup>108</sup>

3. “*Necessary and Proper . . . To Make Treaties.*” — Justice Story apparently saw all this long before Justice Holmes wrote *Missouri v. Holland*. And although Justice Story suggested in dicta that Congress has implicit power to execute treaties (by way of supporting the holding that Congress had implicit power to enact the Fugitive Slave Act<sup>109</sup>), his reason was structural, not textual; indeed, he seemed to disclaim explicit textual justification for the position. He wrote for the Court:

Treaties made between the United States and foreign powers, often contain special provisions, which do not execute themselves, but require the interposition of Congress to carry them into effect, and Congress has constantly, in such cases, legislated on the subject; yet, although the power is given to the executive, with the consent of the senate, to make treaties, *the power is nowhere in positive terms conferred upon Congress to make laws to carry the stipulations of treaties into effect.* It has been supposed to result from the duty of the national government to fulfil all the obligations of treaties.<sup>110</sup>

The structural argument suggested in this passage will be addressed below.<sup>111</sup> For present purposes, though, it is enough to note that Justice Story, unlike Justice Holmes and Professor Golove, did not think that the Necessary and Proper Clause, in conjunction with the Treaty Clause, “in positive terms conferred upon Congress [the power] to make laws to carry the stipulations of treaties into effect.”

And Justice Story was right. Those two clauses in conjunction confer on Congress only the power “To make all Laws which shall be necessary and proper for carrying into Execution . . . [the] Power . . . to make Treaties.”<sup>112</sup>

### B. *Expanding the Legislative Power*

Under *Missouri v. Holland*, some statutes are beyond Congress’s power to enact absent a treaty, but within Congress’s power given a

<sup>108</sup> Moreover, the Court has recently rejected the suggestion that the Necessary and Proper Clause may be interpreted to augment enumerated powers to the point that they trench on state sovereignty. In *Printz v. United States*, 521 U.S. 898 (1997), the Court called the Necessary and Proper Clause “the last, best hope of those who defend ultra vires congressional action” and declared: “When a ‘La[w] . . . for carrying into Execution’ the Commerce Clause violates the principle of state sovereignty . . . , it is not a ‘La[w] . . . proper for carrying into Execution the Commerce Clause,’ and is thus, in the words of The Federalist, ‘merely [an] ac[t] of usurpation’ which ‘deserve[s] to be treated as such.’” *Id.* at 923–24 (internal quotation alterations in original) (quoting U.S. CONST. art. I, § 8, cl. 18; and THE FEDERALIST NO. 33, *supra* note 83, at 204).

<sup>109</sup> See *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 618–22 (1842).

<sup>110</sup> *Id.* at 619 (emphasis added).

<sup>111</sup> See *infra* section IV.A, pp. 1920–27.

<sup>112</sup> U.S. CONST. art. I, § 8, cl. 18, art. II, § 2, cl. 2 (emphasis added).

treaty. This implication runs counter to the textual and structural logic of the Constitution.

First, and most important, this means that the legislative powers of Congress are not fixed by the Constitution, but rather may be increased by treaty. Under *Missouri v. Holland*, as Professor Golove has said, “[non-self-executing] treaties provide Congress with a new basis for subject-matter jurisdiction over the areas covered in the treaties.”<sup>113</sup> Thus, the possible subject matter for legislation is not limited to the subjects enumerated in the Constitution. Rather, it is limited to those subjects, plus any subject that may be addressed by treaty. And according to the *Restatement (Third) of the Foreign Relations Law of the United States*:

[T]he Constitution does not require that an international agreement deal only with “matters of international concern.” The references in the Constitution presumably incorporate the concept of treaty and of other agreements in international law. International law *knows no limitations on the purpose or subject matter of international agreements*, other than that they may not conflict with a peremptory norm of international law. States may enter into an agreement on *any matter of concern to them*, and international law does not look behind their motives or purposes in doing so. Thus, the United States may make an agreement on *any subject suggested by its national interests* in relations with other nations.<sup>114</sup>

If this is so, then the legislative powers are not merely somewhat expandable by treaty; they are expandable virtually without limit.<sup>115</sup> The United States may, ostensibly to foster better relations with another country,<sup>116</sup> exchange reciprocal promises to regulate the citizenry

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<sup>113</sup> Golove, *supra* note 81, at 590 n.38; see also 1 TRIBE, *supra* note 100, § 4-4, at 645-46 (“By negotiating a treaty and obtaining the requisite consent of the Senate, the President . . . may endow Congress with a source of legislative authority independent of the powers enumerated in Article I . . .”).

<sup>114</sup> RESTATEMENT, *supra* note 4, § 302 cmt. c (emphases added) (citation omitted).

<sup>115</sup> The only apparent limit is that a treaty cannot empower Congress to violate express prohibitions in the Constitution, like those in the Bill of Rights. See *Reid v. Covert*, 354 U.S. 1, 16 (1957) (plurality opinion).

<sup>116</sup> See Golove, *supra* note 81, at 606 (arguing that U.S. ratification of human rights treaties may be justified, “most importantly,” because the U.S. thereby “demonstrate[s] its good faith and willingness to undertake reciprocal obligations and its respect for the views of other nations”); see also Golove, *supra* note 1, at 1303-04 n.771 (2000) (“The way that other states treat their own nationals is of crucial importance . . . because we believe that states that violate fundamental human rights are more likely to be aggressive . . . , because the humanitarian and economic disasters that frequently accompany regimes that systematically violate human rights . . . force us to make substantial financial and even military commitments when conflicts erupt, because such regimes do not make good trading partners . . . , because we feel powerful moral commitments to uphold basic rights for all persons wherever located, and because our international standing may be seriously compromised unless we are willing to make the same commitments that we urge — indeed sometimes coerce — other states to undertake.”).

so as to maximize the collective welfare — thus conferring upon Congress plenary legislative power.<sup>117</sup>

Needless to say, this proposition is in deep tension with the basic constitutional scheme of enumerated legislative powers,<sup>118</sup> and it stands contradicted by countless canonical statements that the powers of Congress are fixed and defined. Just recently, Chief Justice Rehnquist wrote for the Court that “Congress’ regulatory authority is not without effective bounds.”<sup>119</sup> But it was Chief Justice Marshall, almost two centuries before, who explained why in the clearest terms: “enumeration presupposes something not enumerated,”<sup>120</sup> or more emphatically, “[t]he powers of the legislature are *defined, and limited*; and that those limits may not be mistaken, or forgotten, the constitution is written.”<sup>121</sup>

1. “*Powers Herein Granted.*” — Chief Justice Marshall’s view is reinforced by the juxtaposition of the three Vesting Clauses, the first sentences of Articles I, II, and III of the Constitution. Article I, Section 1 provides: “All legislative Powers *herein granted* shall be vested in a Congress of the United States.”<sup>122</sup> By contrast, Article II, Section 1 provides that “[t]he executive Power shall be vested in a President of the United States of America,”<sup>123</sup> and Article III, Section 1 provides that “[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from

<sup>117</sup> Whether the President and Senate would have to possess a proper *motive* for such a treaty is discussed *infra* section IV.C, pp. 1933–35.

<sup>118</sup> See, e.g., 1 WESTEL WOODBURY WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES § 216, at 504 (1st ed. 1910) (“[I]t would not be a proper or constitutional exercise of the treaty-making power to provide that Congress should have a general legislative authority over a subject which has not been given it by the Constitution.”); Black, *supra* note 33, at 911 (“The one decision that has cut the deepest inroads into the doctrine of limited government is *Missouri v. Holland*.”); Swaine, *supra* note 24, at 416 (“[T]he Court’s apparent conviction that the enumeration of federal powers must leave the states with *some* authority beyond the federal reach is inconsistent with *Holland*.”). Compare Convention Providing a Uniform Law on the Form of an International Will, Oct. 26, 1973, art. I, § 1, 12 I.L.M. 1302, 1302 (signed, but not yet ratified, by the United States) (“Each Contracting Party undertakes that not later than six months after the date of entry into force of this Convention in respect of that Party it shall introduce into its law the rules regarding an international will set out in the Annex to this Convention.”), with THE FEDERALIST NO. 33, *supra* note 83 (discussing the scope of the Necessary and Proper Clause and asking, rhetorically: “Suppose, by some forced constructions of its authority (which, indeed, cannot easily be imagined), the federal legislature should attempt to vary the law of descent in any State, would it not be evident that in making such an attempt it had exceeded its jurisdiction and infringed upon that of the State?”).

<sup>119</sup> *United States v. Morrison*, 529 U.S. 598, 608 (2000); see also *Printz v. United States*, 521 U.S. 898, 919 (1997) (“[T]he Constitution[] confer[s] upon Congress . . . not all governmental powers, but only discrete, enumerated ones . . .”).

<sup>120</sup> *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824).

<sup>121</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) (emphasis added).

<sup>122</sup> U.S. CONST. art. I, § 1 (emphases added).

<sup>123</sup> *Id.* art. II, § 1 (emphasis added).

time to time ordain and establish."<sup>124</sup> Some scholars have deduced from this juxtaposition that the executive branch has unenumerated powers, whereas Congress does not.<sup>125</sup> Others have rejected this view.<sup>126</sup> Both sides, though, have neglected a simpler explanation for the difference.

Congress is the first mover in the mechanism of United States law. It "make[s] . . . Laws."<sup>127</sup> By contrast, the executive branch subsequently "execute[s]" the laws made by Congress,<sup>128</sup> and the judicial branch interprets those laws.<sup>129</sup> The scope of the executive and judicial power, therefore, is *contingent* on acts of Congress. For example, the Constitution provides that the President "shall take Care that the Laws be faithfully executed."<sup>130</sup> By passing a new statute, therefore, Congress can expand the powers of the President by giving him a new law to execute. This structural fact explains the difference in phrasing between the first sentence of Article I and the first sentence of Article II. Vesting in the President only the executive power "herein granted" would have confused matters, because some executive powers, in a sense, are granted not by the Constitution but by acts of Congress. As Justice Jackson explained in the *Steel Seizure Case*,<sup>131</sup> "[w]hen 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*."<sup>132</sup> In other words, the subject-matter jurisdiction of the executive power can be expanded by acts of Congress; it is not fixed by the Constitution. By contrast, the scope of the legislative power is not contingent on the acts

<sup>124</sup> *Id.* art. III, § 1 (emphasis added).

<sup>125</sup> See, e.g., Steven G. Calabresi, *The Vesting Clauses as Power Grants*, 88 NW. U. L. REV. 1377, 1393–94 (1994); Calabresi & Prakash, *supra* note 72, at 570–79; Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1175–76 (1992); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 337–38 (2002); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 256–57 (2001); John C. Yoo, *Politics as Law?: The Anti-Ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation*, 89 CAL. L. REV. 851, 869 (2001) (book review); see also William R. Casto, *Pacificus and Helvidius Reconsidered*, 28 N. KY. L. REV. 612, 627 (noting "Hamilton's and Madison's agreement that the 'executive Power' clause vests the President with unenumerated powers").

<sup>126</sup> Cf. Daniel A. Farber, *Playing Without a Referee: Congress, the President, and Foreign Affairs*, 19 CONST. COMMENT. 693, 700 (2002) ("[Some argue] that the subtle differences of phrasing between the vesting clauses for the various branches simply escaped any notice at the time.").

<sup>127</sup> U.S. CONST. art. I, § 8, cl. 18 (emphasis added).

<sup>128</sup> See *id.* art. II, § 3 ("[The President] shall take Care that the Laws be faithfully executed.").

<sup>129</sup> See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); see also *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 44 (1825) (Marshall, C.J.) ("The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law.").

<sup>130</sup> U.S. CONST. art. II, § 3.

<sup>131</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

<sup>132</sup> *Id.* at 635 (Jackson, J., concurring) (emphasis added).

of the other branches. As the Founders explained, it is fixed and defined by the Constitution alone.<sup>133</sup> Congress has the enumerated powers “herein granted” and no others.<sup>134</sup>

This analysis gives the lie to Justice Holmes’s notion that the legislative power may be expanded by treaty. If that were so, then the textual difference between Article I and Articles II and III would make no sense; the subject-matter jurisdiction of the legislative power, like the executive and judicial powers, would not be fixed by the Constitution alone and limited to those powers “herein granted,” but would be expandable by the President and the Senate by treaty, just as the executive and judicial power can be expanded by act of Congress.

Indeed, Article III is even more telling. It provides that the judicial power shall “extend” to certain sorts of cases and controversies.<sup>135</sup> The verb “to extend” suggests today just what it signified in 1789: stretching, enlarging.<sup>136</sup> And as Article III provides, “[t]he judicial Power shall *extend* to all Cases, in Law and Equity, arising under this Constitution, [and] *the Laws of the United States*.”<sup>137</sup> Thus, the scope of the judicial power — like the scope of the executive power but unlike the scope of the legislative power — is not entirely fixed by the Constitution but may be stretched or enlarged by acts of Congress. Therefore, it would not have made sense to vest in the Supreme Court and the inferior courts only the judicial powers “herein granted.” A new federal statute can give the judiciary something new to do, thus expanding its power.

Even more to the point, “[t]he judicial Power shall *extend* to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, *and Treaties made, or which shall be made, under*

<sup>133</sup> See THE FEDERALIST NO. 45, *supra* note 5, at 292 (“The powers delegated by the proposed Constitution to the federal government are few and defined.”); see also *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *Marbury*, 5 U.S. (1 Cranch) 137; *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 223 (1796) (opinion of Chase, J.) (“The legislative power of every nation can only be restrained by its own constitution.”).

<sup>134</sup> See *United States v. Lopez*, 514 U.S. 549, 592 (1995) (Thomas, J., concurring) (“Even before the passage of the Tenth Amendment, it was apparent that Congress would possess only those powers ‘herein granted’ by the rest of the Constitution.”).

<sup>135</sup> See U.S. CONST. art. III, § 2, cl. 1.

<sup>136</sup> See, e.g., N. BAILEY, AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (Edward Harwood ed., London, J.F. & C. Rivington et al., 25th ed. 1790) (“To EXTEND . . . to stretch out, to enlarge.”); SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London, W. Strahan et al., 4th ed. 1773) (“To EXTEND . . . 1. *To stretch out* towards any part. . . 5. *To enlarge*; to continue. . . 6. To encrease in force or duration. . . 7. To enlarge the comprehension of any position. . . 9. To seize by a course of law.” (emphases added)); THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (John Andrews ed., Philadelphia, W. Youngs, Mills & Son, 6th ed. 1796) (“To Extend . . . *To stretch out*; to spread abroad; *to enlarge*; to impart; to communicate.” (emphases added)).

<sup>137</sup> U.S. CONST. art. III, § 2, cl. 1 (emphases added).



*their Authority.*"<sup>138</sup> This clause expressly provides that the scope of the judicial power may be expanded not only by statute but also by treaty. A new (self-executing) treaty, like a new statute, gives the judiciary something new to do, thus expanding its power. So, again, it would not have made sense to limit the federal courts to the powers "herein granted," because the scope of the judicial power may be expanded, not only by statute but also by treaty.

But Article I has no such provision. The legislative power does not "extend . . . to Treaties made, or which shall be made."<sup>139</sup> Indeed, it does not "extend" at all. Rather, the only legislative powers provided for in the Constitution are those that it enumerates, those that it says are "herein granted." Contrary to *Missouri v. Holland*, the scope of the legislative power — unlike the scope of the executive and the judicial powers — does not change with the passage of statutes or the ratification of treaties.

This textual dichotomy between Article I and Articles II and III is consistent with the underlying theory of separation of powers. To create a tripartite government of limited powers, it is logically necessary that at least one of the branches have fixed powers — powers that cannot be increased by the other branches. And in a democracy, that branch naturally would be the legislature. As one would expect, Congress is the first branch of government, the first mover in American law, the fixed star of constitutional power.<sup>140</sup> It can increase the power of the President (and the courts), but the President cannot increase the power of Congress in return. If he could, the federal government as a whole would cease to be one of limited power.

Moreover, to the extent that any branch of the government may increase in jurisdiction, it is naturally left to a *different* branch to work

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<sup>138</sup> *Id.* (emphases added).

<sup>139</sup> *Id.*

<sup>140</sup> See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1443 n.71 (1987) ("Of course, Congress remained in many ways *primus inter pares*. Schematically, Article I precedes Articles II and III. Structurally, Congress must exercise the legislative power before the executive and judicial powers have a statute on which to act. Textually, the 'necessary and proper' clause vests Congress with significant control over powers vested 'in the Government of the United States, or in any Department or Officer thereof.' And historically, the Federalists expected Congress to be the most powerful — and thus the most dangerous — branch." (citations omitted) (quoting U.S. CONST. art. I, § 8, cl. 18 (emphasis added)) (citing THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961))); see also Akhil Reed Amar, *Architexture*, 77 IND. L.J. 671, 693 (2002) ("From the order of the first three articles, and the specific wording of the Necessary and Proper Clause giving Congress important powers to legislate concerning the other departments, the document suggested to citizens in 1787 that, if any department could claim to be first among equals, it was Congress." (footnote omitted)); Van Alstyne, *supra* note 66, at 116–17 ("[T]he sweeping clause is one of several that made Congress *primus inter pares*. This view is supported by the language of the full clause, its placement in article I, the absence of any equivalent in articles II and III, occasional illustrations specifically given of its horizontal use, and the common sense of the matter in terms of the function.").

the expansion. To entrust Congress to expand the subject-matter jurisdiction of the executive and the judiciary is consistent with the theories of Montesquieu and Madison, because Congress will have no incentive to overextend the powers of the other branches at its own expense.<sup>141</sup> But it is quite another matter to entrust treaty-makers — the President and Senate — to expand the subject-matter jurisdiction of lawmakers — the President, Senate, and House. Here, there is no ambition to counteract ambition; instead, ambition is handed the keys to power.<sup>142</sup> As Henry St. George Tucker wrote in his treatise on the treaty power five years before *Missouri v. Holland*, “[s]uch interpretation would clothe Congress with powers beyond the limits of the Constitution, with no limitations except the uncontrolled greed or ambition of an unlimited power.”<sup>143</sup>

And if it seems strange that, under *Missouri v. Holland*, the President and the Senate may agree to increase the legislative power, surely it is stranger still to think that *either* the President *or* the Senate alone may work such an expansion. Yet this too follows from *Missouri v. Holland* and the school of thought that it has engendered.

First, as for the President, recall that in addition to treaties, he also has power to enter into “sole executive agreements” on his own authority, without the concurrence of the Senate.<sup>144</sup> And the conventional wisdom is that under *Missouri v. Holland*, sole executive agreements, like treaties, may increase the legislative power.<sup>145</sup> Thus, the President, acting alone, can expand the legislative power.<sup>146</sup>

Second, if that is not enough, consider that under the conventional wisdom, the Senate can also, in some circumstances, unilaterally increase the legislative power. After the President concludes negotiation of a treaty — even a treaty that he intends to be self-executing — the

<sup>141</sup> See 1 BLACKSTONE, *supra* note 75, at \*142 (“[W]here the legislative and executive authority are in distinct hands, the former will take care not to entrust the latter with so large a power, as may tend to the subversion of [its] own independence, and therewith of the liberty of the subject.”).

<sup>142</sup> See CHARLES DE SECONDAT, BARON DE MONTESQUIEU, *THE SPIRIT OF LAWS* bk. XI, ch. IV, at 161 (photo. reprint 1991) (J.V. Prichard ed., Thomas Nugent trans., G. Bell & Sons 1914) (1748) (“[E]very man invested with power is apt to abuse it, and to carry his authority as far as it will go.”).

<sup>143</sup> HENRY ST. GEORGE TUCKER, *LIMITATIONS ON THE TREATY-MAKING POWER* § 113, at 130 (1915).

<sup>144</sup> See *supra* note 39.

<sup>145</sup> See RESTATEMENT, *supra* note 4, § 111 cmt. j (“A treaty valid under the Constitution . . . affords a Constitutional basis for an act of Congress to implement the treaty, even if Congress would not have the power to enact such law in the absence of the treaty. *Missouri v. Holland* . . . . An executive agreement made by the President under his own constitutional authority . . . would afford a similar basis for Congressional legislation.”).

<sup>146</sup> *Cf. id.* cmt. h (“If the international agreement is silent as to its self-executing character and the intention of the United States is unclear, account must be taken of any statement by the President in concluding the agreement or in submitting it to the Senate for consent . . .”).

Senate may render it non-self-executing by declaration.<sup>147</sup> (Indeed, the Senate has attached such a declaration “to every major human rights treaty to which it has given its advice and consent since World War II.”<sup>148</sup>) If the Senate does so in a case in which the subject matter of the treaty is beyond the legislative power, it thereby triggers the rule of *Missouri v. Holland* and increases Congress’s power. In fact, as far as the Restatement is concerned, a formal Senate declaration is not required: *statements made by individual senators and never voted upon by the Senate* may suffice.<sup>149</sup> So after the negotiation of a treaty is complete, the Senate — or even just a few senators with the implicit assent of their colleagues — can then unilaterally use the treaty to increase the legislative power of Congress.<sup>150</sup> None of this is consistent with the text of the Constitution or with its underlying theory of separation of powers.<sup>151</sup>

The Supreme Court realized this long before *Missouri v. Holland*, in a case that Justice Holmes failed to cite. As the Court explained in 1836, just seven years after it created the doctrine of non-self-executing

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<sup>147</sup> See *id.* § 111(4) (“An international agreement of the United States is ‘non-self-executing’ . . . if the Senate in giving consent to a treaty . . . requires implementing legislation.”); *id.* § 303 cmt. d (“The Senate may . . . give its consent on conditions that . . . relate to [a treaty’s] domestic implementation, e.g., that the treaty shall not be self-executing.”); *id.* § 303 reporters’ note 4 (“Such a proviso is an expression of the Senate’s constitutional authority to grant or withhold consent to a treaty, which includes authority to grant consent subject to a condition. The authority to impose the condition implies that it must be given effect in the constitutional system.”); *cf. id.* § 111 reporters’ note 5 (“The Senate . . . when consenting to a treaty, has sometimes insisted that it should not go into effect until implementing legislation had been enacted.”).

<sup>148</sup> David N. Cinotti, Note, *The New Isolationism: Non-Self-Execution Declarations and Treaties as the Supreme Law of the Land*, 91 GEO. L.J. 1277, 1278 (2003).

<sup>149</sup> See RESTATEMENT, *supra* note 4, § 314 cmt. d (“Although the Senate’s resolution of consent may contain no statement of understanding, there may be such statements in the report of the Senate Foreign Relations Committee or in the Senate debates. In that event, the President must decide whether they represent a general understanding by the Senate and, if he finds that they do, must respect them in good faith.”).

<sup>150</sup> The President may thwart the Senate in this regard, but only by “declin[ing] to proceed with ratification of the treaty.” See *id.* cmt. b.

<sup>151</sup> See *INS v. Chadha*, 462 U.S. 919, 947 (1983) (noting “the profound conviction of the Framers that the powers conferred on Congress were the powers to be most carefully circumscribed”); *United States v. Brown*, 381 U.S. 437, 444 (1964); *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. Off. Legal Counsel 124, 131 (1996) [hereinafter *Separation of Powers*] (“Although the founders were concerned about the concentration of governmental power in any of the three branches, their primary fears were directed toward congressional self-aggrandizement . . .” (citing *Mistretta v. United States*, 488 U.S. 361, 411 n.35 (1989))); THE FEDERALIST NO. 49, at 313–14 (James Madison) (Clinton Rossiter ed., 1961) (“[T]he tendency of republican governments is to an aggrandizement of the legislative at the expense of the other departments.”); Laurence Claus, *Montesquieu’s Mistakes and the True Meaning of Separation*, 25 OXFORD J. LEGAL STUD. (forthcoming 2005) (manuscript at 2, on file with the Harvard Law School Library) (“The critical liberty-promoting criterion for separation [of powers] is . . . whether apportionment will prevent actors from conclusively determining the reach of their own powers.”).

treaties:<sup>152</sup> “The government of the United States . . . is one of limited powers. It can exercise authority over no subjects, except those which have been delegated to it. Congress cannot, by legislation, enlarge the federal jurisdiction, *nor can it be enlarged under the treaty-making power.*”<sup>153</sup>

2. *Evading Article V.* — Another way to put the point is that *Missouri v. Holland* permits evasion of the constitutional amendment mechanism specified in Article V. As a general rule, the subject matter of the legislative power can be increased only by constitutional amendment.<sup>154</sup> The process provided by the Constitution for its own amendment is of course far more elaborate than the process for making treaties.<sup>155</sup> And while some have suggested that Article V does not constitute the sole mechanism for amending the Constitution,<sup>156</sup> none have suggested conjunction of the Treaty Clause and the Necessary and Proper Clause as an alternative. Yet, *Missouri v. Holland* entails precisely that: non-self-executing treaties may “provide Congress with a new basis for subject-matter jurisdiction over the areas covered in

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<sup>152</sup> See *supra* pp. 1876–77.

<sup>153</sup> *Mayor of New Orleans v. United States*, 35 U.S. (10 Pet.) 662, 736 (1836) (emphasis added); see also *Downes v. Bidwell*, 182 U.S. 244, 369–70 (1901) (Fuller, C.J., dissenting) (“The grant by Spain [of Puerto Rico, by treaty] could not enlarge the powers of Congress . . . . Indeed a treaty which undertook . . . to enlarge the federal jurisdiction, would be simply void.”).

<sup>154</sup> This expansion has happened several times. See U.S. CONST. amend. XIII, § 2 (“Congress shall have power to enforce this article by appropriate legislation.”); *id.* amend. XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”); *id.* amend. XV, § 2 (“The Congress shall have power to enforce this article by appropriate legislation.”); *id.* amend. XIX, cl. 2 (“Congress shall have power to enforce this article by appropriate legislation.”); *id.* amend. XXIII, § 2 (“The Congress shall have power to enforce this article by appropriate legislation.”); *id.* amend. XXIV, § 2 (“The Congress shall have power to enforce this article by appropriate legislation.”); *id.* amend. XXVI, § 2 (“The Congress shall have power to enforce this article by appropriate legislation.”).

<sup>155</sup> Compare U.S. CONST. art. II, § 2, cl. 2 (“[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 . . . .”), with *id.* art. V (“The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress . . . .”).

<sup>156</sup> See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 458–59 (1994) (“We the People of the United States . . . retain an unenumerated, constitutional right to alter our Government and revise our Constitution in a way not explicitly set out in Article V.”); Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1044 (1988) (arguing for “constitutional amendment by direct appeal to, and ratification by, We the People of the United States”); see also Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799 (1995).

the treaties.”<sup>157</sup> In other words, the legislative subject-matter jurisdiction of Congress may be increased not just by constitutional amendment but also by treaty.

True, the power “To make all Laws which shall be necessary and proper for carrying into Execution . . . [the] Power . . . to make Treaties” is *itself* a power enumerated in the Constitution. But the point here is that this power, as construed by Justice Holmes in *Missouri v. Holland*, may be expanded at will by political acts of political actors, unlike any other enumerated power. This anomalous result is inconsistent with the text, history, and structure of the Constitution, all of which suggest that constitutional amendment is the only way to increase the scope of legislative power.<sup>158</sup>

The Supreme Court made just this point in an analogous context. The Necessary and Proper Clause has a counterpart later in the Constitution, in Section 5 of the Fourteenth Amendment. Section 5 provides: “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”<sup>159</sup> And the Supreme Court has made clear that “[b]y including [Section] 5 the draftsmen sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause.”<sup>160</sup> Indeed, the word “appropriate” in Section 5 of the Fourteenth Amendment is a deliberate textual echo of the word “proper” in the Necessary and Proper Clause.<sup>161</sup>

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<sup>157</sup> Golove, *supra* note 81, at 590 n.38; see also 1 TRIBE, *supra* note 100, § 4-4, at 645-46 (“By negotiating a treaty and obtaining the requisite consent of the Senate, the President . . . may endow Congress with a source of legislative authority independent of the powers enumerated in Article I . . .”).

<sup>158</sup> See Tribe, *supra* note 81, at 1247-48 (“Those provisions of the Constitution that are manifestly *instrumental* and *means-oriented* and that frame the architecture of the government ought to be given as fixed and determinate a reading as possible — one whose meaning is essentially frozen in time insofar as the shape, or topology, of the institutions created is concerned. . . . [This is] especially [so] in light of the Tenth Amendment, whose clear message is that federal *powers* in particular are not to be invented, or to be generated extemporaneously, but must find a solid source in constitutional text.”).

<sup>159</sup> U.S. CONST. amend. XIV, § 5; see also sources cited *supra* note 154.

<sup>160</sup> *Katzenbach v. Morgan*, 384 U.S. 641, 650 (1966).

<sup>161</sup> Professor Akhil Amar has explained:

[T]he framers saw the Enforcement Clause phrase “appropriate legislation” as *equivalent* to the Article I, Section 8 phrase “proper laws.” Ordinary dictionaries confirm the obvious etymological link between “proper” and “appropriate.” And in one of *McCulloch*’s most famous passages, Marshall cemented this etymological linkage in words that the Thirty-Ninth Congress knew and relied on: “Let the end be legitimate, let it be within the scope of the constitution, and all means which are *appropriate*, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.” Only a couple of years after the Fourteenth Amendment became part of our supreme law, the Supreme Court itself quoted this famous passage in full and then declared that “[i]t must be taken then as finally settled, so far as judicial decisions can settle anything, that the words” of the Necessary and Proper Clause were “equivalent” to the word “appropriate.”

Both the Necessary and Proper Clause and Section 5 of the Fourteenth Amendment specify an *object* for the exercise of legislative power (in the first case, to carry into execution a power of government; in the second case, to enforce the provisions of the Fourteenth Amendment), as well as the *nexus* that any statute must have with that object (in the first case, “necessary and proper”; in the second case, “appropriate”). For the Necessary and Proper Clause, the nexus was defined, very broadly, by Chief Justice Marshall: “Let the end be legitimate, let it be within the scope of the constitution, and *all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.*”<sup>162</sup> In the case of Section 5 of the Fourteenth Amendment, the Supreme Court has held, based largely on the history of the section and on its intratextual link with the Necessary and Proper Clause, that the nexus standard is the same.<sup>163</sup>

The question at issue here is not one of nexus, however, but rather one of the *object* of the legislation, and whether that object may expand in scope. Notice the beginning of Chief Justice Marshall’s famous formulation: “[l]et the end be legitimate, let it be within the scope of the constitution,” and only then does the permissive and deferential standard of necessity and propriety apply. In the case of Section 5, the object — “the end” — of the legislation must be “to enforce . . . the provisions of” the Fourteenth Amendment.<sup>164</sup> In the case of the Necessary and Proper Clause, the object — “the end” — of the legislation must be “carrying into Execution the . . . Powers”<sup>165</sup> of the federal government — and in particular, for present purposes, the “Power . . . to make Treaties.”<sup>166</sup>

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Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 825–26 (1999) (second alteration in original) (footnotes omitted) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) (emphasis added); and *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603, 614–15 (1870) (citing 1 THE OXFORD ENGLISH DICTIONARY 586 (2d ed. 1989)).

<sup>162</sup> *McCulloch*, 17 U.S. (4 Wheat.) at 421 (emphasis added).

<sup>163</sup> See *Katzenbach*, 384 U.S. at 649–51.

<sup>164</sup> U.S. CONST. amend XIV, § 5.

<sup>165</sup> *Id.* art. I, § 8, cl. 18. Since the object of legislation under the Necessary and Proper Clause is to carry into execution the “Powers” of government, the clause does not itself apply to the first four sections of the Fourteenth Amendment, which do not convey any power. This distinction is the reason that Section 5 of the Fourteenth Amendment is not superfluous. See Lawson & Granger, *supra* note 100, at 311 n.189 (“The Sweeping Clause only empowers Congress to enact laws that ‘carry[] into Execution’ powers vested in the national government. Inasmuch as the substantive provisions of the Reconstruction Amendments do not vest powers in the national government, but rather *prohibit* the exercise of state power, an explicit enforcement power was needed to enable Congress to legislate in the subject areas the Amendments covered.” (alteration in original)).

<sup>166</sup> U.S. CONST. art. II, § 2, cl. 2.

In *City of Boerne v. Flores*,<sup>167</sup> the Court considered whether the object of legislation under Section 5 — “to enforce . . . the provisions of” the Fourteenth Amendment — could be expanded by act of Congress:

If Congress could define its own powers by altering the Fourteenth Amendment’s meaning, no longer would the Constitution be “superior paramount law, unchangeable by ordinary means.” It would be “on a level with ordinary legislative acts, and, like other acts, . . . alterable when the legislature shall please to alter it.” Under this approach, it is difficult to conceive of a principle that would limit congressional power. Shifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V.<sup>168</sup>

In other words, under Section 5, the *nexus* between the legislation and its object may be relatively loose, but the object *itself* cannot be expanded by the political branches. If the object of such legislation — “to enforce . . . the provisions of” the Fourteenth Amendment — could be expanded by the political branches, the result would be an impermissible expansion of legislative power outside of the amendment mechanism of Article V.

The situation is the same here. By interpreting “Laws . . . for carrying into Execution . . . [the] Power . . . to make Treaties” as synonymous with “laws for carrying into execution *any given treaty*,” *Missouri v. Holland* renders an object of the Necessary and Proper Clause expandable with the ratification of each new treaty. Such an interpretation, in turn, allows for an expansion of legislative power, which “effectively circumvent[s] the difficult and detailed amendment process contained in Article V.”<sup>169</sup>

### *C. Reducing the Legislative Power*

If it is strange to think that the legislative power may be *expanded*, not by constitutional amendment, but by an action of the President with the consent of the Senate, it is surely stranger still to think that the legislative power may be *contracted* by the President alone. Yet this too is an implication of *Missouri v. Holland*.

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<sup>167</sup> 521 U.S. 507 (1997).

<sup>168</sup> *Id.* at 529 (citations omitted) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)) (citing William W. Van Alstyne, *The Failure of the Religious Freedom Restoration Act Under Section 5 of the Fourteenth Amendment*, 46 DUKE L.J. 291, 292–303 (1996)).

<sup>169</sup> *Id.*; see also *Reid v. Covert*, 354 U.S. 1, 17 (1957) (plurality opinion) (“It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights — let alone alien to our entire constitutional history and tradition — to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions. In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V.”).

The scope of executive power is determined in part by acts of Congress, so it is unsurprising that a presidential act may be unconstitutional today even though it was constitutional yesterday — in the interim, Congress may have changed the law. As Justice Jackson explained in the *Steel Seizure Case*:

When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers *minus any constitutional powers of Congress over the matter*. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject.<sup>170</sup>

Congress can, for example, render an executive regulation unconstitutionally *ultra vires*<sup>171</sup> by repealing the statute that provided the grant of authority. Indeed, regulations must state their source of authority at the outset, and a change in a statute automatically prompts a review of the implementing regulations.<sup>172</sup>

By contrast, it is exceedingly odd to think that a statute may be within the enumerated powers of Congress one day and beyond those powers the next. As a general matter, “[i]f [a] statute is unconstitutional, it is unconstitutional from the start,”<sup>173</sup> and, conversely, if it is constitutional when enacted, it generally can be *rendered* unconstitutional only by a constitutional amendment.<sup>174</sup> (When the Supreme Court declares a statute unconstitutional, it generally does not *render* the statute unconstitutional; rather, it *declares* that the statute was unconstitutional *ab initio*.<sup>175</sup>) While the preamble to a regulation usually

<sup>170</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637–38 (1952) (Jackson, J., concurring) (emphasis added). Just as Congress may decrease the power of the President by statute, it may also decrease the power of the judiciary. See U.S. CONST. art. III, § 2, cl. 2 (“In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, *with such Exceptions . . . as the Congress shall make.*” (emphasis added)).

<sup>171</sup> That is, inconsistent with the President’s duty to “take Care that the Laws be faithfully executed.” U.S. CONST. art. II, § 3.

<sup>172</sup> See OFFICE OF THE FED. REGISTER, NAT’L ARCHIVES & RECORDS ADMIN., FEDERAL REGISTER DOCUMENT DRAFTING HANDBOOK § 2.11, at 2-22 (1998) (“You must cite the authority that authorizes your agency to change the [Code of Federal Regulations]. . . . Your agency is responsible for maintaining accurate and current authority citations.”).

<sup>173</sup> The Attorney General’s Duty To Defend and Enforce Constitutionally Objectionable Legislation, 4A Op. Off. Legal Counsel 55, 59 (1980); see also *Newberry v. United States*, 256 U.S. 232, 254 (1921) (“[T]he criminal statute now relied upon antedates the Seventeenth Amendment and must be tested by powers possessed at the time of its enactment. An after-acquired power can not *ex proprio vigore* validate a statute void when enacted.”); 1 J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION 176 (John Lewis ed., 2d ed. 1904) (“[I]f an act is invalid when passed because in conflict with the constitution, it is not made valid by a change of the constitution which does away with the conflict.”).

<sup>174</sup> See Golove, *supra* note 1, at 1311 (“Of course, it is always possible to retract a power granted. The usual method, however, is constitutional amendment . . .”).

<sup>175</sup> See *Am. Trucking Ass’n v. Smith*, 496 U.S. 167, 201 (1990) (Scalia, J., concurring in the judgment) (“To hold a governmental Act to be unconstitutional is not to announce that *we* forbid



cites its source of statutory authority, the preamble to a statute often cites its source of constitutional authority. And while each change in a statute necessitates a review of the Code of Federal Regulations to see if some regulations have been rendered *ultra vires*, generally only a change in the Constitution requires a similar review of the United States Code. The authority for statutes is constitutional, and as a general rule only an amendment may render a constitutional statute unconstitutional.

A textual juxtaposition underscores the point. Article II provides that the President “shall take Care that the Laws be faithfully executed.”<sup>176</sup> This is the language of ongoing, dynamic obligation, consistent with the structural fact that Congress may shift the ground beneath the President’s feet. If the President promulgates a constitutional regulation today, he cannot then close the Code of Federal Regulations and pay it no further mind. Rather, he must “take Care” tomorrow that the regulation is *still* constitutional — that it has not been *rendered* unconstitutionally *ultra vires* by a subsequent act of Congress undermining its authority.

By contrast, Article I is not written in the language of ongoing, dynamic obligation. Rather, Congress is simply given the power to “make” certain types of laws.<sup>177</sup> Congress has an independent obligation to ensure that its laws are constitutional,<sup>178</sup> but that obligation exists only at the moment of the laws’ *making*. (The First Amendment deliberately mirrors the Necessary and Proper Clause in this respect:<sup>179</sup>

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it, but that the *Constitution* forbids it . . .”). Though Justice Stevens (joined by Justices Brennan, Marshall, and Blackmun) disagreed with Justice Scalia on the outcome of the case, *see id.* at 205 (Stevens, J., dissenting), he apparently agreed on this point, *see* 1 TRIBE, *supra* note 100, § 3-3, at 233 (“[I]n Justice Stevens’ judgment, the Arkansas flat highway use tax had in some sense *always* been illegal . . .”). In unusual circumstances, the scope of *rights* may perhaps expand to call an existing statute into doubt. *See, e.g.,* Chastleton Corp. v. Sinclair, 264 U.S. 543, 547–48 (1924). Whether this doctrine is sound is beyond the scope of this Article.

<sup>176</sup> U.S. CONST. art. II, § 3.

<sup>177</sup> *Id.* art. I, § 8, cl. 18; *see also id.* art. I, § 8, cls. 1, 11 (“The Congress shall have Power . . . To make Rules concerning Captures on Land and Water.” (emphasis added)); *id.* art. I, § 8, cls. 1, 14 (“The Congress shall have Power . . . To make Rules for the Government and Regulation of the land and naval Forces . . .” (emphasis added)); *id.* art. IV, § 3, cl. 2 (“The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . .” (emphasis added)).

<sup>178</sup> *See, e.g.,* City of Boerne v. Flores, 521 U.S. 507, 535 (1997) (“When Congress acts within its sphere of power and responsibilities, it has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution.”); H. Jefferson Powell, *The President’s Authority over Foreign Affairs: An Executive Branch Perspective*, 67 GEO. WASH. L. REV. 527, 530–31 (1999) (discussing executive and legislative branch duty to interpret the Constitution); Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2088 n.7 (2002) (“Each branch has an independent obligation to read the Constitution in the best way it knows how.”).

<sup>179</sup> *See* AKHIL REED AMAR, THE BILL OF RIGHTS 39 (1998) (“[T]he exact wording of the First Amendment — ‘Congress shall make no law’ — precisely tracked and inverted the exact

“Congress shall *make* no law.”<sup>180</sup>) Congress has no obligation to “take Care” that its prior acts *remain* within its enumerated powers (or consistent with the First Amendment) because even “[a] change or amendment of the constitution imposing new limitations upon the legislature does not affect existing laws.”<sup>181</sup> A fortiori, lesser political acts of political actors cannot render a statute unconstitutional as beyond the enumerated powers of Congress. So unlike the President, who must continually “take Care” that regulations *remain* constitutional, Congress can simply close the United States Code and pay its prior statutes no further mind; if statutes were within Congress’s enumerated power when *made*, then (absent a certain sort of amendment) they generally remain constitutional.<sup>182</sup> As the Supreme Court said in a different context, “once Congress makes its choice in enacting legislation, its participation ends.”<sup>183</sup>

The Supremacy Clause confirms the point: “This Constitution, and the Laws of the United States which shall be *made* in Pursuance thereof . . . shall be the supreme Law of the Land.”<sup>184</sup> Once a law is made in pursuance of the Constitution, it is the supreme law of the land from that moment forth, until it is repealed or the Constitution is amended. In other words, “[a] statute . . . must be tested by powers possessed at the time of its enactment.”<sup>185</sup>

The language of the Fourteenth Amendment sharpens the point still further, by way of contrast. It provides: “No State shall *make or enforce* any law which shall abridge the privileges or immunities of citizens of the United States.”<sup>186</sup> This language echoes both the Necessary and Proper Clause power to “make . . . law,” and the First

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wording of the Article I, section 8 necessary-and-proper clause: “*Congress shall* have power . . . to *make all laws* which shall be necessary and proper . . .” (internal quotation alterations in original)).

<sup>180</sup> U.S. CONST. amend. I (emphasis added).

<sup>181</sup> 1 SUTHERLAND, *supra* note 173, at 177.

<sup>182</sup> This analysis also implies that enumerated powers challenges and First Amendment challenges to statutes should be facial rather than as-applied. See Nicholas Quinn Rosenkranz, *The Subject of the Constitution* (forthcoming 2006); cf. Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1 (1998); Matthew D. Adler, *Rights, Rules, and the Structure of Constitutional Adjudication: A Response to Professor Fallon*, 113 HARV. L. REV. 1371 (2000); Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235 (1994); Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321 (2000); Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U. L. REV. 359 (1998). See generally *Janklow v. Planned Parenthood*, 517 U.S. 1174, 1175 (1996) (Stevens, J., concurring in denial of certiorari); *id.* at 1178–79 (Scalia, J., dissenting from denial of certiorari); *United States v. Salerno*, 481 U.S. 739 (1987).

<sup>183</sup> *Bowsher v. Synar*, 478 U.S. 714, 733 (1986).

<sup>184</sup> U.S. CONST. art. VI, cl. 2 (emphasis added).

<sup>185</sup> *Newberry v. United States*, 256 U.S. 232, 254 (1921).

<sup>186</sup> U.S. CONST. amend. XIV, § 1 (emphasis added).

Amendment injunction to “make no law” — but here the Constitution also includes the words “or enforce.” This clause thus illustrates that a power to “make” certain laws (as in the Necessary and Proper Clause) or an obligation not to “make” certain laws (as in the First Amendment) does not comprehend an ongoing, dynamic obligation to examine *prior* laws for *current* constitutionality. To impose such an obligation on states through the Fourteenth Amendment, it was necessary to include the words “or enforce”; absent those words, the states could plausibly have argued that their antebellum laws remained constitutional and enforceable because they were constitutional when made.

Again, though, Article I imposes no obligation to “take Care” that prior laws remain constitutional and provides no ongoing power to “enforce” prior laws or treaties or anything else. It bestows only the naked power to “make” certain laws — and implicitly to examine their constitutionality only once, at the time of their making.

Yet *Missouri v. Holland* creates an anomalous and discordant exception to this rule. Justice Holmes implied that because Congress has power “To make all Laws which shall be necessary and proper for carrying into Execution . . . [the] Power . . . to make Treaties,” it thus has power to make laws “necessary and proper for carrying into Execution” *any given treaty*. If this were so, then some exercises of the legislative power would derive their authority not from the Constitution alone, but also from specific treaties.

What happens, then, under *Missouri v. Holland*, if Congress enacts a statute pursuant to a treaty and the treaty is subsequently terminated? Two answers are possible, and neither one is satisfactory.<sup>187</sup>

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<sup>187</sup> Several scholars have criticized current doctrine regarding Section 5 of the Fourteenth Amendment on precisely these grounds:

Beneath the surface, the Court’s analysis of the requirement of means-ends tailoring [for Section 5 legislation] poses a tantalizing question: Must the prospect of purposeful discrimination be a continuing threat? That is, can an “enforcement” statute *become* unconstitutional if circumstances change? Justice Kennedy seemed to disclaim any requirement that Congress ensure that the legislation survives only as long as the danger of unconstitutional state action persists. Still, his discussion of RFRA’s legislative record at least raises the possibility of some kind of durational constraint. . . . The contrast [Justice Kennedy describes] between present circumstances and a history of discrimination suggests that there *might* have been a moment when Congress *might* have identified a level of persecution sufficient to justify *some* form of a Religious Freedom Act — perhaps one more closely targeted at particular jurisdictions or practices — even if that moment has now passed. But if the record today is inadequate to justify the exercise of congressional enforcement power, why does a previous exercise remain appropriate? There is something at least disquieting about the idea of continuing federal intervention if the grounds on which congressional action rest “have vanished long since, and the rule simply persists from blind imitation of the past.”

Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After Flores*, 39 WM. & MARY L. REV. 725, 730–31 (1998) (footnotes omitted) (quoting Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897)) (citing *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997)); see also Marcia L. McCormick, *Federalism Re-Constructed: The Elev-*

Perhaps nothing happens; even though the statute could not be enacted again once the treaty has been terminated, it nevertheless remains constitutional because it was constitutional when enacted. Or, second, perhaps the statute instantly *becomes* unconstitutional.

The first answer is textually and doctrinally plausible on the analysis above, but it would have bizarre ramifications if Justice Holmes were correct. It implies that a statute can persist as the supreme law of the land long after the treaty that justified it has become defunct; that an evaluation of the current constitutionality of a statute might turn on the interpretation of a treaty that has long since been repudiated; that the key to the constitutionality of a statute might be the date of its enactment; that the United States Code might be filled with un-dead statutes that are the supreme law of the land today but that Congress could not reenact or even amend tomorrow.

One suspects, therefore, that Justice Holmes would have favored the second possible answer: that the statute instantly *becomes* unconstitutional (and/or that Congress is instantly obliged to repeal it).<sup>188</sup>

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*enth Amendment's Illogical Impact on Congress' Power*, 37 IND. L. REV. 345, 363-64 (2004) ("One of the effects of the Court's maneuvering is that statutes that once enforced the Fourteenth Amendment might be found not to do so any longer when the Court decides that the people protected by that statute no longer need protection. In other words, it appears that the Court can change the national policy and decide that legislation that once enforced the Fourteenth Amendment ceases to do so once the legislation is successful enough that there is no widespread evidence that states continue systematically to violate the Constitution. And, once the Court finds that legislation has ceased to be remedial, it would be bound by its jurisprudence to find that legislation no longer valid under the Fourteenth Amendment, and thus no longer a valid abrogation of state sovereign immunity. The Court could also decide that since the validity of this type of legislation might expire, it might require all prophylactic legislation under the Fourteenth Amendment to be limited in time."); Daniel J. Meltzer, *Overcoming Immunity: The Case of Federal Regulation of Intellectual Property*, 53 STAN. L. REV. 1331, 1350 (2001) ("No doubt, when Section 1983 was enacted, violations of federal rights were widespread. Yet to make the validity of Section 1983 turn on whether violations are widespread would lead to some odd constitutional results. For what happens if and when constitutional violations are no longer widespread? One possibility is that a statute like Section 1983, fully constitutional when enacted, would become unconstitutional — perhaps as the consequence of its own efficacy. The result — that a statute remains valid only for so long as it is regularly defied — is surely an odd one. (It brings to mind the story of the inhabitants of a mountain village removing a sign warning of a dangerous curve because no one had recently driven off the road.) Equally odd is a different possibility — that the statute remains constitutional because there were widespread and persistent problems in the past. On that view, had the identical statute been passed years later, after the constitutional problems were less widespread, the same measure would be unconstitutional — thus making a statute's constitutionality at present depend on the date of its enactment.")

<sup>188</sup> Cf. White, *supra* note 24, at 234 ("Although international agreements such as the Western Convention and the Convention on Biological Diversity may support the [Endangered Species Act], they may also undermine such support. Justifications based on the Treaty Power are inherently less stable than justifications based on the Commerce Clause. Treaties can be amended either by . . . the United States or by foreign governments. . . . This instability suggests that although Treaty Power justifications could play an important part in protecting the ESA from constitutional attack, it would be preferable to find constitutional support in the Commerce Clause.")

This answer would eliminate the anomaly of undead statutes outliving the treaties that justify them. But it is flatly inconsistent with all the textual and structural analysis above. Once again, Congress has no ongoing obligation to “take Care” that its laws remain constitutional and no obligation not to “enforce” unconstitutional laws, because as a general matter, federal statutes cannot *become* unconstitutional with a change in the scope of legislative power. Congress’s only obligation is to ensure that it “make[s]” constitutional laws. And once a constitutional law is *made*, it is and remains supreme law until it is repealed or the Constitution is amended, because “the Laws of the United States which shall be *made* in Pursuance [of the Constitution] . . . shall be the supreme Law of the Land.” For this reason, “[a] statute . . . must be tested by powers possessed at time of its enactment.”<sup>189</sup>

This latter answer would also cause *Missouri v. Holland* to have strange consequences for the concept of constitutional blame. A claim that a statute is unconstitutional generally entails a claim that the political branches *violated the Constitution* by enacting the statute. Senators and representatives are “bound by Oath or Affirmation . . . to support [the] Constitution”<sup>190</sup> and the President likewise must swear or affirm that he will, to the best of his ability, “preserve, protect and defend the Constitution of the United States.”<sup>191</sup> Moreover, each branch has an independent obligation to make its own assessment of constitutional questions.<sup>192</sup> Thus, the blame for an unconstitutional statute can generally be laid at the door of the political branches; they have, deliberately or unwittingly, violated their oaths and violated the Constitution by enacting the statute.<sup>193</sup>

Under Justice Holmes’s presumptive view, though, a statute can become unconstitutional *without anyone behaving unconstitutionally*. The treaty could be unimpeachable; the statute implementing it could be beyond reproach; the repudiation of the treaty could be sound; and yet the result is an unconstitutional statute on the books with no one to blame for it. Surely it is odd to think that the Constitution creates a mechanism for the blameless creation of unconstitutional statutes.

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<sup>189</sup> *Newberry v. United States*, 256 U.S. 232, 254 (1921).

<sup>190</sup> U.S. CONST. art. VI, cl. 3.

<sup>191</sup> *Id.* art. II, § 1, cl. 7.

<sup>192</sup> See *United States v. Nixon*, 418 U.S. 683, 703 (1974) (“In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution . . .”); Powell, *supra* note 178, at 530–31 (“The Constitution places the textually unique duty on the President to ‘preserve, protect and defend the Constitution,’ and subordinate executive officers and members of Congress are under as solemn an obligation as judges ‘to support’ the Constitution. When the executive or legislative branch encounters constitutional issues in the course of its activities, as each invariably must, it acts within its own ‘province and duty’ in saying what the law of the Constitution is.” (footnote omitted)); Rosenkranz, *supra* note 178, at 2088 n.7.

<sup>193</sup> A statute that after its enactment is rendered unconstitutional by a *constitutional amendment* is the exception that proves the rule.

And if it is strange to think of a statute *becoming* unconstitutional, and if it is doubly strange to think of a statute becoming unconstitutional *with no one to blame*, it is surely stranger still to think that the President — consistent with his oath of office<sup>194</sup> and his obligation to take care that the laws are faithfully executed<sup>195</sup> — may render a statute unconstitutional *unilaterally and at his sole discretion*. Yet this is what follows from *Missouri v. Holland*. While the President only has power to make treaties “by and with the Advice and Consent of the Senate . . . provided two thirds of the Senators present concur,”<sup>196</sup> he nevertheless has power to renounce treaties unilaterally. As the Restatement explains:

Under the law of the United States, the President has the power (a) to suspend or terminate an agreement in accordance with its terms; (b) to make the determination that would justify the United States in terminating or suspending an agreement because of its violation by another party or because of supervening events, and to proceed to terminate or suspend the agreement on behalf of the United States; or (c) to elect in a particular case not to suspend or terminate an agreement.<sup>197</sup>

If Justice Holmes was right in *Missouri v. Holland*, then the President, by renouncing a treaty, could unilaterally and at his sole discretion render any implementing acts of Congress unconstitutional (unless they could be sustained under some other head of legislative power).

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<sup>194</sup> See U.S. CONST. art. II, § 1, cl. 7 (“I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.” (internal quotation marks omitted)).

<sup>195</sup> See *id.* § 3 (“[The President] shall take Care that the Laws be faithfully executed . . .”).

<sup>196</sup> *Id.* § 2, cl. 2.

<sup>197</sup> RESTATEMENT, *supra* note 4, § 339; see also *id.* cmt. a (“The Constitution does not expressly confer on the President authority to terminate or suspend an international agreement on behalf of the United States. The rules stated in this section are based on the constitutional authority of the President to conduct the foreign relations of the United States.” (citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936))); *id.* § 339 reporters’ note 1 (noting that the foreign affairs power, as characterized in *Curtiss-Wright*, “would seem to include the authority to decide on behalf of the United States to terminate a treaty that no longer serves the national interest, or is out of date, or which has been breached by the other side”). While the Supreme Court has declined to endorse this principle expressly, see *Goldwater v. Carter*, 444 U.S. 996, 1002–06 (1979) (Rehnquist, J., concurring in the judgment) (reasoning that the case presented a nonjusticiable political question); see also *id.* at 998 (Powell, J., concurring in the judgment), the executive branch has made clear that it believes it has power to terminate treaties unilaterally. See *Validity of Congressional-Executive Agreements That Substantially Modify the United States’ Obligations Under an Existing Treaty*, 20 Op. Off. Legal Counsel 389, 395 n.14 (1996) (“[T]he Executive Branch has taken the position that the President possesses the authority to terminate a treaty in accordance with its terms by his unilateral action.”); Defendants’ *Kucinich* Opposition, *supra* note 106, at 19–27 (defending the constitutionality of the President’s unilateral decision to withdraw from the anti-ballistic missile treaty); see also RESTATEMENT, *supra* note 4, § 339 reporters’ note 1 (“In 1979, President Carter terminated the Mutual Defense Treaty with the Republic of China (Taiwan). . . . In 1985, President Reagan gave notice terminating the declaration of the United States accepting the compulsory jurisdiction of the International Court of Justice, which had been made originally with the consent of the Senate.”).

This result is inconsistent with the basic proposition that “repeal of statutes, no less than enactment, must conform with [Article] I.”<sup>198</sup> Only seven years ago, the Supreme Court did not hesitate to strike down a statute that “authorize[d] the President himself to effect the repeal of laws, for his own policy reasons, without observing the procedures set out in Article I, § 7.”<sup>199</sup> As the Court said in that case, “[t]here is no provision in the Constitution that authorizes the President . . . to repeal statutes.”<sup>200</sup> Yet under *Missouri v. Holland*, legislation that reaches beyond enumerated powers to implement treaties is, in effect, subject to a different rule. Here, in essence, the President has a unilateral power “to effect the repeal of laws, for his own policy reasons.”<sup>201</sup> At his sole discretion and at the time of his choosing, he may abrogate a treaty and thus render any implementing legislation unconstitutional.<sup>202</sup>

Finally, if all this seems strange, consider that the President is not the only one who can terminate a treaty. Our treaty partners can likewise renounce treaties.<sup>203</sup> On Justice Holmes’s view, therefore, it is not only the President who can, at his own discretion, render certain statutes unconstitutional by renouncing treaties. *Foreign governments can do this too*. Surely the Founders would have been surprised to learn that a United States statute — duly enacted by Congress and signed by the President — may, under some circumstances, be rendered unconstitutional at the discretion of, for example, the King of England.<sup>204</sup> (After all, ending the King’s capricious control over American legislation was the very first reason given on July 4, 1776,

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<sup>198</sup> *INS v. Chadha*, 462 U.S. 919, 954 (1983).

<sup>199</sup> *Clinton v. City of New York*, 524 U.S. 417, 445 (1998).

<sup>200</sup> *Id.* at 438.

<sup>201</sup> *Id.* at 445.

<sup>202</sup> *Cf. Yoo*, *supra* note 10, at 815 (“[P]rovid[ing] the President with the heretofore unknown power of executive termination of statutes . . . would be tantamount to granting the President a direct share of the legislative power — a result . . . at odds with our understanding of the executive power.”).

<sup>203</sup> HENKIN, *supra* note 1, at 204 (“[A treaty] is not law of the land if it . . . has been terminated or destroyed by breach (whether by the United States or by the other party or parties).”).

<sup>204</sup> *Cf. Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 629 (1857) (Curtis, J., dissenting) (“If the President and the Senate alone possess the power to repeal or modify a law found in a treaty, inasmuch as they can change or abrogate one treaty only by making another inconsistent with the first, the Government of the United States could not act at all, to that effect, without the consent of some foreign Government. I do not consider, I am not aware it has ever been considered, that the Constitution has placed our country in this helpless condition.”); White, *supra* note 24, at 234 (“If the United States Secretary of the Interior is able to amend the Western Convention to include a new species, a different Secretary could easily re-amend the treaty to remove that species. Foreign nations could terminate the treaty for any reason, including reasons unrelated to environmental issues such as trade disagreements.” (footnote omitted)).

for the Revolution.<sup>205</sup>) Yet this too is a consequence of Justice Holmes's position.

All these paradoxes can be resolved only if Justice Holmes was wrong — if, in fact, the legislative power cannot be expanded or contracted by treaty.

### III. CONSTITUTIONAL HISTORY

Professor Golove, who has done the most comprehensive historical work on the treaty power, has remarked that “[t]he discussions in Philadelphia are notable for their paucity of material directly addressing the scope of the treaty power.”<sup>206</sup> Likewise, Professor Van Alstyne has written that there is “no sufficient evidence of any one ‘original understanding’ of the [Necessary and Proper] clause.”<sup>207</sup> Nevertheless, one argument has been made from the drafting history of the Constitution in support of Justice Holmes's position. It is ostensibly an extremely forceful argument, and one with inherent authority because it appears in the leading treatise on the constitutional law of foreign affairs. Indeed, it is the *only* argument on this point in that treatise.

Section II.B.1 relied on the textual and structural point that the legislative power, unlike the judicial power, does not expressly “extend to . . . Treaties made, or which shall be made.”<sup>208</sup> Rather, the legislative power is limited by the Constitution to those powers that it enumerates — those that are “herein granted.”<sup>209</sup> To this point, though, Professor Louis Henkin has an apparently devastating reply based on constitutional drafting history: “*The ‘necessary and proper’ clause originally contained expressly the power ‘to enforce treaties’ but it was stricken as superfluous.*”<sup>210</sup>

This argument is a sort of constitutional-history mirror of the interpretative presumption against constitutional superfluity. As a general matter, interpretations are disfavored if they would render a

<sup>205</sup> As the Declaration of Independence proclaimed:

The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world.

He has refused his Assent to Laws, the most wholesome and necessary for the public good.

He has forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them.

THE DECLARATION OF INDEPENDENCE paras. 2–4 (U.S. 1776).

<sup>206</sup> Golove, *supra* note 1, at 1134.

<sup>207</sup> Van Alstyne, *supra* note 66, at 133 n.100.

<sup>208</sup> U.S. CONST. art. III, § 2, cl. 1.

<sup>209</sup> *Id.* art. I, § 1.

<sup>210</sup> HENKIN, *supra* note 1, at 481 n.111 (emphasis added).



provision of the Constitution superfluous.<sup>211</sup> Henkin's argument from constitutional history is a logical corollary. If words were struck from the draft Constitution as superfluous during the Convention, then the words that remained must be interpreted to cover the ground of the words that were struck. It appears to follow that the final text of the Necessary and Proper Clause must convey the power to make laws "to enforce treaties."

There are, of course, those who reject arguments from the notes of the Convention altogether.<sup>212</sup> After all, the Convention debates were intended to be kept secret, and those who ratified the Constitution would not have been privy to this textual change and the rationale for it.<sup>213</sup> But for the majority who accept such arguments, this is the most powerful form of argument from constitutional history, because it is so specific and unambiguous. If the legislative power of the Necessary and Proper Clause once expressly included the power "to enforce treaties" — just as the judicial power now "extend[s] to . . . Treaties made, or which shall be made" — and if those words were struck as superfluous, this would strongly suggest that Justice Holmes was right. It would suggest that the Framers actually turned their attention to precisely the question at issue in *Missouri v. Holland*. It would suggest, in short, that they specifically considered whether the Necessary and Proper Clause — in its final form, without those crucial words — still signifies the power "to enforce treaties" beyond the other enumerated powers, and concluded that it does.

Unsurprisingly, this argument has proven quite influential. Many judges and scholars who have confronted this issue have, of course, contented themselves with a citation to *Missouri v. Holland* and nothing more. But for anyone who has wanted to go a step further, citation to Henkin and to this argument has generally marked the beginning and the end of the analysis.

In *United States v. Lue*,<sup>214</sup> for example, the Second Circuit held that Congress had power to pass a major piece of antiterrorism legislation,<sup>215</sup> the Act for the Prevention and Punishment of the Crime of

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<sup>211</sup> See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) (rejecting an interpretation that would make part of the Constitution "mere surplussage, . . . entirely without meaning" because "[i]t cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it").

<sup>212</sup> See Vasani Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1115–18 (2003) (cataloguing scholars who reject such arguments).

<sup>213</sup> See *id.*

<sup>214</sup> 134 F.3d 79 (2d Cir. 1998).

<sup>215</sup> See *id.* at 82–84; accord *United States v. Ferreira*, 275 F.3d 1020, 1027–28 (11th Cir. 2001).

Hostage-Taking,<sup>216</sup> reasoning that the power arose from the International Convention Against the Taking of Hostages.<sup>217</sup> Its entire analysis of Congress's power to legislate pursuant to treaty boiled down to citations to *Missouri v. Holland* and its predecessor *Neely v. Henkel*<sup>218</sup> — followed by the crucial citation to Henkin's argument.<sup>219</sup>

Scholars, too, have relied heavily on this argument. Just last year, for example, an article repeated it almost verbatim: "[T]he Necessary and Proper Clause originally outlined the explicit power 'to enforce treaties.' But it was stricken as deemed redundant," citing Henkin.<sup>220</sup> And *Lue*'s citation of this argument has further reinforced it, leading another recent article to cite *Lue* and Henkin, as well as *Missouri v. Holland*, for the proposition that treaties can expand the legislative power.<sup>221</sup>

Finally, when the Supreme Court itself reached out in dicta to reaffirm *Missouri v. Holland* last Term, it too cited only Henkin's treatise for support.<sup>222</sup> And while it is uncertain whether the Supreme Court would have reaffirmed *Missouri v. Holland* absent Henkin's analysis,<sup>223</sup> it is clear that Henkin's argument from constitutional history has greatly influenced — and foreshortened — the debate on this issue both in the academy and in the judiciary.

But Professor Henkin is mistaken.

To understand his error, it is necessary to consult his source, Max Farrand's *The Records of the Federal Convention of 1787*.<sup>224</sup> The passage that Professor Henkin cites, which records the journal of the Convention for August 23, reads as follows:

<sup>216</sup> Pub. L. No. 98-473, §§ 2001-2003, 98 Stat. 1837, 2186 (1984) (codified as amended at 18 U.S.C. § 1203 (2000)).

<sup>217</sup> *Adopted* Dec. 17, 1979, T.I.A.S. No. 11,081, 1316 U.N.T.S. 205.

<sup>218</sup> 180 U.S. 109 (1901).

<sup>219</sup> *Lue*, 134 F.3d at 82 ("[S]ee also Louis Henkin, *Foreign Affairs and the United States Constitution* 204 & n.111 (2d ed. 1996) ('The "necessary and proper" clause originally contained expressly the power "to enforce treaties" but it was stricken as superfluous.') (citing 2 M. Farrand, *The Records of the Convention of 1787*, at 382 (rev. ed. 1966)).").

<sup>220</sup> Merico-Stephens, *supra* note 22, at 306 & n.245.

<sup>221</sup> White, *supra* note 25, at 174 & n.297.

<sup>222</sup> *United States v. Lara*, 124 S. Ct. 1628, 1633-34 (2004) ("[A]s Justice Holmes pointed out, treaties made pursuant to [the treaty] power can authorize Congress to deal with 'matters' with which otherwise 'Congress could not deal.' *Missouri v. Holland* . . . ; see also L. Henkin, *Foreign Affairs and the U.S. Constitution* 72 (2d ed. 1996)).").

<sup>223</sup> The Court cited to a different page of the treatise from the one that sets forth the assertion about the drafting history of the Necessary and Proper Clause.

<sup>224</sup> THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., rev. ed. 1937) [hereinafter CONVENTION RECORDS].

It was moved and seconded to strike the following words out of the 18 clause of the 1st section 7 article

“enforce treaties”

which passed in the affirmative<sup>225</sup>

Moreover, this is Madison’s account of the matter:

The art IX — being waved — and art VII. sect I. resumed,

Mr Govr Morris moved to strike the following words out of the 18 clause “enforce treaties” as being superfluous since treaties were to be “laws” . . . . . which was agreed to nem: contrad.<sup>226</sup>

Professor Henkin is correct, therefore, that the words “enforce treaties” at one time appeared in what became Article I, Section 8. He is also correct that they were struck. (He has, though, erroneously added the word “to”; it is the phrase “enforce treaties,” not “to enforce treaties,” that was struck.) And he is correct to say that the words “enforce treaties” were struck “as superfluous.”

The only problem is, *those words were not struck from the Necessary and Proper Clause.*

Both the journal of the Convention and Madison’s notes agree that the clause under consideration was what at that time was Article VII, Section 1, Clause 18. The journal refers to “the 18 clause of the 1st section 7 article,” and Madison’s notes speak first of “art VII, sect I. resumed” and then of a motion to strike those words “out of the 18 clause.” But what — on August 23, 1787 — was Article VII, Section 1, Clause 18?

To answer this question, it is necessary, first, to turn back to August 6, 1787, when the Committee on Detail delivered its report. On that day, Article VII (misnumbered “VI”<sup>227</sup>), Section 1, which would become Article I, Section 8, began with the words “[t]he Legislature of the United States shall have the power,”<sup>228</sup> just as today Article I, Section 8, begins “[t]he Congress shall have Power.”<sup>229</sup> And just as Article I, Section 8 has eighteen clauses, the draft submitted by the Committee on Detail on August 6, 1787, likewise had eighteen clauses. Moreover, the eighteenth and final clause was indeed the Necessary and Proper Clause, just as it is today. *But it did not include the words “enforce treaties.”* It read as follows, almost exactly as it does today:

<sup>225</sup> 2 *id.* at 382.

<sup>226</sup> *Id.* at 389–90 (footnote omitted).

<sup>227</sup> *Id.* at 181 n.5. In the rest of this Part, this article is referred to as Article VII.

<sup>228</sup> *Id.* at 181.

<sup>229</sup> U.S. CONST. art. I, § 8, cl. 1.

And to make all laws that shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested, by this Constitution, in the government of the United States, or in any department or officer thereof;<sup>230</sup>

By contrast, on August 6, 1787, the *seventeenth* clause, which was the Militia Clause, *did* include the words "enforce treaties." It read as follows:

To call forth the aid of the militia, in order to execute the laws of the Union, *enforce treaties*, suppress insurrections, and repel invasions;<sup>231</sup>

Here, then, is the mystery: On August 23, 1787, the words "enforce treaties" were indeed struck from the eighteenth clause of Article VII, Section 1. But two and a half weeks before, on August 6, 1787, the eighteenth clause of Article VII, Section 1 — the precursor of the Necessary and Proper Clause — did not include those words. It was the seventeenth clause, the Militia Clause, that included the words "enforce treaties."

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<sup>230</sup> 2 CONVENTION RECORDS, *supra* note 224, at 182. Note that this draft is almost identical to the final version. The only changes were that the word "that" was replaced with the word "which," three commas and the word "And" were removed, and nouns were capitalized. See U.S. CONST. art. I, § 8, cl. 18 ("To make all Laws *which* shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." (emphases added)).

<sup>231</sup> 2 CONVENTION RECORDS, *supra* note 224, at 182 (emphasis added). Set forth below is the entirety of Article VII, Section 1, as reported by the Committee on Detail on August 6, 1787, with clause numbers inserted in brackets:

- The Legislature of the United States shall have the power [1] to lay and collect taxes, duties, imposts and excises;
- [2] To regulate commerce with foreign nations, and among the several States;
- [3] To establish an uniform rule of naturalization throughout the United States;
- [4] To coin money;
- [5] To regulate the value of foreign coin;
- [6] To fix the standard of weights and measures;
- [7] To establish Post-offices;
- [8] To borrow money, and emit bills on the credit of the United States;
- [9] To appoint a Treasurer by ballot;
- [10] To constitute tribunals inferior to the Supreme Court;
- [11] To make rules concerning captures on land and water;
- [12] To declare the law and punishment of piracies and felonies committed on the high seas, and the punishment of counterfeiting the coin of the United States, and of offences against the law of nations;
- [13] To subdue a rebellion in any State, on the application of its legislature;
- [14] To make war;
- [15] To raise armies;
- [16] To build and equip fleets;
- [17] To call forth the aid of the militia, in order to execute the laws of the Union, enforce treaties, suppress insurrections, and repel invasions;
- [18] And to make all laws that shall be necessary and proper for carrying into execution the foregoing 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 181-82.

The solution to the mystery is to be found in the journal of August 18, 1787 — twelve days after the report of the Committee on Detail and five days before the words “enforce treaties” were struck. On that day:

It was moved and seconded to insert the following as a 16th clause, in the 1 sect. of the 7 article

“To make rules for the government and regulation of the land and naval forces”

which passed in the affirmative<sup>232</sup>

This insertion made the Militia Clause the eighteenth clause rather than the seventeenth, and made the Necessary and Proper Clause the nineteenth rather than the eighteenth. So when, on August 23, 1787, Gouverneur Morris moved to strike the words “enforce treaties” as superfluous from the “18 clause of the 1st section 7 article,” he was referring to the Militia Clause, in which those words did appear (but do not anymore), and not to the Necessary and Proper Clause, in which they never did.

The point is confirmed by the very next journal entry of August 23, 1787:

It was moved and seconded to alter the first part of the 18 clause of the 1st section, 7 article to read

“To provide for calling forth the militia to execute the laws [of the Union, suppress insurrections, and repel invasions”

which passed in the affirmative<sup>233</sup>

Here, on the same day, in the very next motion on the floor, it is the Militia Clause, and not the Necessary and Proper Clause, that is referred to as the “18 clause of the 1st section, 7 article.” And indeed, this motion, like the last, was by Gouverneur Morris, so he undoubtedly understood to which clause he was referring. As Madison recounts this second motion:

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<sup>232</sup> *Id.* at 323.

<sup>233</sup> *Id.* at 382 (emphasis added). Previously, on August 6, 1787, the Militia Clause had provided: “To call forth the aid of the militia, in order to execute the laws of the Union, enforce treaties, suppress insurrections, and repel invasions.” *Id.* at 182. The prior motion on August 23 struck the words “enforce treaties,” so that the clause then would have read: “To call forth the aid of the militia, in order to execute the laws of the Union, suppress insurrections, and repel invasions.” This next motion “alter[ed] the first part of the 18 clause of the 1st section, 7 article,” *id.* at 382, by changing the words “To call forth the aid of the militia, in order to execute the laws” to “To provide for calling forth the militia to execute the laws.”

*Mr Govr Morris* moved to alter *1st. part. of 18. clause — sect. 1. art. VII* so as to read “to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions”. which was agreed to *nem: contrad*<sup>234</sup>

If any doubt remains, it is removed by a search for the words “necessary and proper” and for the words “enforce treaties” throughout *The Records of the Federal Convention of 1787*. The two phrases never appeared in the same clause.<sup>235</sup>

In short, the leading treatise on the law of foreign affairs makes exactly one argument in favor of *Missouri v. Holland*’s crucially important, unreasoned holding that Congress has automatic power to enforce non-self-executing treaties. This treatise, and this argument, have profoundly influenced — and short-circuited — debate on this question, both in the academy and in the judiciary. Yet Professor Henkin’s only argument on this point is based on a false premise.<sup>236</sup>

The words “enforce treaties” never appeared in the Necessary and Proper Clause. And there is no reason in constitutional history to believe that the clause as adopted entails power, beyond the other enumerated powers, to enforce treaties.<sup>237</sup>

<sup>234</sup> *Id.* at 390 (emphases added) (footnote omitted). Farrand himself agrees with this interpretation of which clause was at issue. See *id.* at 389 n.9 (“Article VII, Sect. 1 (clause 18). ‘To call forth the aid of the militia, in order to execute the laws of the Union, enforce treaties, suppress insurrections, and repel invasions;’”).

<sup>235</sup> These results were obtained by conducting a search on the Library of Congress’s “American Memory” database. See Library of Congress, Search: A Century of Lawmaking for a New Nation, at <http://memory.loc.gov/ammem/hlawquery.html> (last visited Mar. 13, 2005).

<sup>236</sup> It should be noted that this Article is not the first to interpret Gouverneur Morris’s motion to concern the Militia Clause. See, e.g., Flaherty, *supra* note 30, at 2123–24 & n.126; Yoo, *Treaties and Public Lawmaking*, *supra* note 30, at 2231 n.48. It is, however, the first to recognize Professor Henkin’s error on this point, and the first to show how this error has infected the doctrine and the scholarship on Congress’s power to legislate pursuant to treaty. Professor Henkin, in fact, may have believed that the words “enforce treaties” were stricken from *both* the Militia Clause and the Necessary and Proper Clause in the two successive motions discussed above. The leading treaty-power treatise of a century before, which Professor Henkin cites for this argument, appears to take this erroneous position. See 1 CHARLES HENRY BUTLER, *THE TREATY-MAKING POWER OF THE UNITED STATES* 318 (1902). It should also be said that Professor Henkin’s achievements in the constitutional law of foreign affairs are extraordinarily impressive. This error can hardly be said to diminish these achievements.

<sup>237</sup> This constitutional history actually tends to undermine *Missouri v. Holland* rather than support it. As discussed above, the Militia Clause at one time read: “To call forth the aid of the militia, in order to execute the laws of the Union, enforce treaties, suppress insurrections, and repel invasions.” This provision emphatically does not imply any felt need for Congress to execute treaties by legislation; here, treaties may be executed directly by the President as Commander-in-Chief of the militia. See U.S. CONST. art. II, § 2, cl. 1. This draft makes clear that the treaties the Founders had in mind were self-executing treaties, which could be enforced directly with no need for implementing legislation. Cutting the words “enforce treaties” as superfluous here simply underscores the point that self-executing treaties are “laws of the Union” for purposes of the Militia Clause just as they are “supreme Law of the Land” under the Supremacy Clause. Again, there is no implication that Congress does or should have power to execute treaties.

## IV. PUBLIC CHOICE AND PRACTICAL CONSEQUENCES

If Justice Holmes was wrong about the legislative power pursuant to treaty, but right about the rest of *Missouri v. Holland*, then the treaty power works as follows: The President may enter treaties with the advice and consent of the Senate. Those treaties may be self-executing, in which case they constitute supreme law of the land of their own force and raise no issue of legislative power. They may also be non-self-executing, in which case they call for the enactment of implementing legislation. In the usual case, this legislation will be within Congress's enumerated powers, and therefore Congress may enact it. But if treaty-makers should choose to enter into a non-self-executing treaty that calls for legislation beyond Congress's enumerated powers, then Congress would have no power to pass the implementing legislation.

In such a case, two options will remain for the implementation of the treaty. First, the federal government may rely on the states to implement it.<sup>238</sup> Or second, in extreme cases, the federal government

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<sup>238</sup> This is, in fact, the general rule in Canada. See *Attorney-Gen. for Can. v. Attorney-Gen. for Ont.*, [1937] A.C. 326 (P.C.) (appeal taken from Can.); PETER W. HOGG, *CONSTITUTIONAL LAW OF CANADA* 297-304 (4th ed. 1997). As the Privy Council explained:

It would be remarkable that while the Dominion could not initiate legislation, however desirable, which affected civil rights in the Provinces, yet its Government not responsible to the Provinces nor controlled by provincial Parliaments need only agree with a foreign country to enact such legislation, and its Parliament would be forthwith clothed with authority to affect Provincial rights to the full extent of such agreement. Such a result would appear to undermine the constitutional safeguards of Provincial constitutional autonomy.

*Attorney-General*, [1937] A.C. at 352. The Privy Council went on to reassure:

It must not be thought that the result of this decision is that Canada is incompetent to legislate in performance of treaty obligations. In totality of legislative powers, Dominion and Provincial together, she is fully equipped. But the legislative powers remain distributed, and if in the exercise of her new functions derived from her new international status Canada incurs obligations *they must, so far as legislation be concerned, when they deal with Provincial classes of subjects, be dealt with by the totality of powers, in other words by co-operation between the Dominion and the Provinces*. While the ship of state now sails on larger ventures and into foreign waters she still retains the water tight compartments which are an essential part of her original structure.

*Id.* at 353-54 (emphasis added).

Of course, the Framers of the United States Constitution chose to make treaties supreme law of the land under the Supremacy Clause precisely so that the federal government would not be required to rely on the states for execution of treaties, since such reliance had caused such embarrassment under the Articles of Confederation; instead, treaties could be made self-executing. See, e.g., Flaherty, *supra* note 30, at 2118, 2128-29. But this is not to say that the Constitution *forbids* such reliance on the states; the federal government *can* rely on the states to execute non-self-executing treaties if it so chooses. Indeed, in light of Congress's power to "encourage" states with conditional spending, see *South Dakota v. Dole*, 483 U.S. 203 (1987), this option might prove quite effective in some circumstances, as well as flexible and respectful of federalism. In this way, if a non-self-executing treaty potentially could be executed with a variety of legislative measures, then states may be left to experiment with the different possible measures — while encouraged by conditional spending to stay within the parameters of the treaty.

may seek a constitutional amendment. This Part considers whether this regime, this combination of choices, is somehow absurd or untenable, which would suggest, despite text and structure, that Justice Holmes was correct. This Part concludes, however, that this regime is eminently sensible, more sensible than the alternatives, and that Justice Holmes was wrong on pragmatism and public choice just as he was wrong on text and structure.

#### A. *The Prospect of Breach and the Possibility of Amendment*

As discussed above, Professor Golove devotes only two paragraphs of his treaty opus to a defense of Justice Holmes's position that the Necessary and Proper Clause gives Congress power beyond the other enumerated powers to pass legislation implementing treaties.<sup>239</sup> His central argument is the textual one addressed above,<sup>240</sup> in which he tacitly assumed, erroneously, that a law *implementing* a non-self-executing treaty *already made* is a "Law[] . . . for carrying into execution . . . [the] Power . . . to *make* Treaties."<sup>241</sup>

In addition, though, Professor Golove also suggests a structural/pragmatic argument in support of *Missouri v. Holland*:

If the President and Senate have the power to conclude treaties on subjects that are beyond the scope of Congress's legislative powers, then the Necessary and Proper Clause makes clear that Congress has the power to adopt legislation implementing the provisions of such treaties as domestic law. *Otherwise, the federal government could undertake, on behalf of the nation, binding obligations which it would find itself powerless to enforce.*<sup>242</sup>

Professor Golove's argument suggests that the thesis of this Article entails an anomaly. If current doctrine and scholarship are correct that treaties may extend beyond the subjects enumerated in Article I, Section 8, and if Justice Holmes was wrong that such treaties themselves can confer legislative power, then a treaty might commit the United States to enact legislation even though Congress would have no power to fulfill the promise.

This is true but not anomalous. To see why, consider an extreme but not fanciful hypothetical. Assume that the United States is defeated in a disastrous war, and the victorious country requires, as a term of a peace treaty, a concession that would violate the Bill of

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<sup>239</sup> See *supra* pp. 1888–89.

<sup>240</sup> See *id.*

<sup>241</sup> U.S. CONST. art. I, § 8, cl. 18, art. II, § 2, cl. 2 (emphasis added).

<sup>242</sup> Golove, *supra* note 1, at 1099 (emphasis added); see also Merico-Stephens, *supra* note 22, at 308 ("[T]he treaty power should permit Congress to adapt our laws to the changing exigencies of our international relations."). This same structural argument is implicit in Justice Story's brief dictum in *Prigg v. Pennsylvania*. See *supra* section II.A.3, p. 1892.



Rights. It proposes, for example, to allow the United States to maintain some military bases abroad, but insists that any crimes committed by people stationed there, including the spouses of soldiers, must be tried by military commission. Can the United States agree to the term and end the war?

In *Reid v. Covert*,<sup>243</sup> the Supreme Court held that if such an international agreement were non-self-executing, and Congress attempted to pass legislation pursuant to it, then the *legislation* would be unconstitutional.<sup>244</sup> (It also indicated that a self-executing treaty of this sort likewise would be unconstitutional.<sup>245</sup>) As the Court said in no uncertain terms: “There is nothing in [the Supremacy Clause] which intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution.”<sup>246</sup> But the logically prior question is whether a non-self-executing treaty to this effect — absent, for the moment, any implementing legislation — would *itself* be unconstitutional.

Professor Golove’s argument implies that his answer is yes. If the United States could enter into such a treaty, and if legislation pursuant to it would be unconstitutional (as *Reid* holds and as Professor Golove agrees<sup>247</sup>), then the proposition that he has rejected would be true: “[T]he federal government could undertake, on behalf of the nation, binding obligations which it would find itself powerless to enforce.”

But why should the answer be yes? *Reid* itself does not require this answer. While Professor Golove reads that case to strike down the non-self-executing international agreement at issue,<sup>248</sup> the Court in fact struck down not the agreement but only the implementing legislation as applied.<sup>249</sup> And indeed, it is hard to see how such a treaty, at least

<sup>243</sup> 354 U.S. 1 (1957).

<sup>244</sup> See *id.* at 16–17 (plurality opinion).

<sup>245</sup> See *id.*

<sup>246</sup> *Id.* at 16.

<sup>247</sup> Golove, *supra* note 1, at 1083 (“[A] provision in a treaty that contravenes any of the specific prohibitions on governmental conduct contained in the Bill of Rights, the Fourteenth Amendment, or elsewhere is unconstitutional and void as a matter of domestic law.”).

<sup>248</sup> See *id.* at 1277 (“[In *Reid*,] Justice Black . . . str[uck] down a treaty provision as inconsistent with the Fifth and Sixth Amendments.”).

<sup>249</sup> See *Reid*, 354 U.S. at 3 (plurality opinion) (noting that the case involved “the power of Congress” — rather than the power of the President and Senate by treaty — “to expose civilians to trial by military tribunals, under military regulations and procedures, for offenses against the United States thereby depriving them of trial in civilian courts, under civilian laws and procedures and with all the safeguards of the Bill of Rights” (emphasis added)). Justice Black observed:

[T]he Government contends that Art. 2(11) of [the Uniform Code of Military Justice], insofar as it provides for the military trial of dependents accompanying the armed forces in Great Britain and Japan, can be sustained as legislation which is necessary and proper to carry out the United States’ obligations under the international agreements made with those countries. The obvious and decisive answer to this, of course, is that

if concluded to end an unsuccessful war, could itself be unconstitutional. A peace treaty to end a disastrous war is within the very heartland of the treaty power.<sup>250</sup> And it cannot be said that such a treaty itself violates the Fifth and Sixth Amendments, because the treaty is non-self-executing; it has no force as domestic law.<sup>251</sup> What, then, prohibits the United States from entering into such a treaty, rather than pleading powerlessness and suffering a losing war to continue?<sup>252</sup>

Professor Golove might object that such a treaty would be pointless; no victorious nation would insist upon it or relent upon its ratification, because under *Reid*, Congress would be powerless to enforce it. But such a treaty would not be pointless. What it would do is commit the United States, as a matter of international law, to amend the Constitution.<sup>253</sup> Of course, this chain of events should be extremely unusual; as a general matter, the United States should avoid making promises that the federal government lacks present power to keep.<sup>254</sup> But the hypothetical itself posits exigent circumstances, and the power to ratify a treaty pledging to amend the Constitution could be essential in such circumstances. The alternative is to say that the United States must fight to the last man rather than agree to such a treaty, but of course it has been wisely said that the Constitution is not a suicide

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no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution.

*Id.* at 16 (emphases added); see also HENKIN, *supra* note 1, at 185 ("No provision in any treaty has been held unconstitutional by the Supreme Court . . ."); LAWSON & SEIDMAN, *supra* note 53, at 33 ("The Supreme Court has never invalidated a treaty provision as unconstitutional . . .").

<sup>250</sup> See *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 236 (1796) (opinion of Chase, J.) ("A right to make peace, necessarily includes the power of determining on what terms peace shall be made. A power to make treaties must of necessity imply a power, to decide the terms on which they shall be made: A war between two nations can only be concluded by treaty." (emphasis omitted)); LAWSON & SEIDMAN, *supra* note 53, at 35 ("[T]he President and the Senate can formalize the end of a war by treaty. . . . A treaty power that does not include the power to enter into peace treaties would be like an executive power that does not include the power to execute the laws; it would require overwhelming evidence (which does not exist) to attribute this understanding to a fully informed eighteenth-century audience.").

<sup>251</sup> See *supra* p. 1877.

<sup>252</sup> Cf. 5 ANNALS OF CONG. 525 (1796) (statement of Rep. Sedgwick) (quoting George Mason as saying, at the Virginia ratifying convention: "[i]f, in the course of an unsuccessful war, we should be compelled to give up part of our territories or undergo subjugation, if the General Government could not make a Treaty to give up such a part, for the preservation of the residue, the Government itself, and consequently the rights of the people must fall").

<sup>253</sup> See RESTATEMENT, *supra* note 4, § 111 cmt. a ("[F]ailure of the United States to carry out an obligation on the ground of its unconstitutionality will not relieve the United States of responsibility under international law.").

<sup>254</sup> See Swaine, *supra* note 24, at 474-76 (noting the possibility of "a gap between [the United States's] international treaty obligations and its ability to implement them," and concluding that "the principal solution, surely, is for the national government simply to avoid entering into treaties that it may not be able to keep").

pact.<sup>255</sup> It makes much more sense to say that the United States can enter into such a treaty; that the treaty creates a binding obligation under international law;<sup>256</sup> but that the treaty's domestic implementation will require the ordinary process for constitutional amendment.<sup>257</sup> (And, after making such an international legal commitment, the United States still may decide whether to honor it or to breach.<sup>258</sup>) If this analysis is correct, then the thesis of this Article cannot be rejected simply because it implies that "the federal government could undertake, on behalf of the nation, binding obligations which it would find itself powerless to enforce." The United States can undertake such obligations, and they can be enforced, but only by constitutional amendment.<sup>259</sup>

Of course, one might say that the Constitution is extremely difficult to amend, so this prospect cannot be within the contemplation of its foreign affairs structure. But the Article V amendment process is as much a part of the Constitution as the Article I legislative power. If a treaty can create an international legal commitment to exercise the latter, there is no reason in principle why it cannot create an international

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<sup>255</sup> See, e.g., *Haig v. Agee*, 453 U.S. 280, 309-10 (1981) (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963)).

<sup>256</sup> Under the Vienna Convention on the Law of Treaties, done May 23, 1969, 1155 U.N.T.S. 331, a treaty may be invalid if concluded in "manifest" violation of a party's "internal law regarding competence to conclude treaties." *Id.* art. 46(1), at 343 (emphasis added). By contrast, a "party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." *Id.* art. 27, at 339 (emphasis added). The United States is not a party to the Vienna Convention, but it is said to be declaratory of customary international law. See RESTATEMENT, *supra* note 4, § 102 cmt. f.

<sup>257</sup> Cf. Swaine, *supra* note 24, at 456 ("[T]reaty obligations are not limited by national constitutions. Nations with federal systems should consider the compatibility of treaties with their constitutional orders before concluding them, because any errors are almost certainly not a basis for extricating themselves afterward. Should they err, during the pendency of the treaty they are obliged to amend their constitutions or risk international default." (footnotes omitted)).

<sup>258</sup> See HENKIN, *supra* note 1, at 214.

<sup>259</sup> Gary Lawson and Guy Seidman see most of this point, but they ignore the possibility of a *non-self-executing* treaty that *promises* to amend the Constitution:

[I]magine that the United States just decidedly lost a war with Spain. Spanish troops are set to inflict serious damage on the country that will quite probably destroy the United States as a political entity. The Spanish negotiators uncompromisingly demand a noncitizen eligibility provision as a condition of peace. Is it . . . clear that the treaty power cannot override the Eligibility Clause [providing that only natural born citizens can serve as president]?

To a dedicated constitutionalist, the answer is straightforward: yes . . . That does not mean, as the saying goes, that the Constitution is therefore a suicide pact. The country could satisfy the Spanish demand by the "simple" expedient of amending the Constitution pursuant to Article V. Of course, if the Spanish were not willing to wait for the Article V events to run their course and instead demanded immediate concessions in the treaty, then we would have a problem.

LAWSON & SEIDMAN, *supra* note 53, at 58-59 (footnote omitted).

legal commitment to exercise the former.<sup>260</sup> As the Court remarked in *Reid* itself:

If our foreign commitments become of such nature that the Government can no longer satisfactorily operate within the bounds laid down by the Constitution, that instrument can be amended by the method which it prescribes. It may be said that it is difficult to amend the Constitution. To some extent that is true. Obviously the Founders wanted to guard against hasty and ill-considered changes in the basic charter of government. But if the necessity for alteration becomes pressing, or if the public demand becomes strong enough, the Constitution can and has been promptly amended.<sup>261</sup>

One might argue that no prospective treaty partner would ever be content with such an uncertain commitment. After all, a commitment to amend the Constitution turns on the subsequent decisions of independent political actors not involved in the making of the treaty — first, the House of Representatives or a federal amendment convention and, second, the state legislatures or state ratification conventions.<sup>262</sup> But the prospect of breach is an objection not just to those non-self-executing treaties that would require constitutional amendments; rather, it is an objection to *all* non-self-executing treaties.

All non-self-executing treaties rely on the subsequent acquiescence of the House of Representatives — something that our treaty partners can never be certain will be forthcoming. In such circumstances, the nature of the House of Representative's obligation — legal, moral, or chimerical — has been the subject of intense dispute since the Founding,<sup>263</sup> and “[this] constitutional debate[] . . . has not been authoritatively resolved in principle.”<sup>264</sup> But whatever position one takes on that issue, the point remains that all non-self-executing treaties pose some risk of non-execution. Indeed, currently “there is a category of

<sup>260</sup> See *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 272 (1796) (opinion of Iredell, J.) (“[W]hen a nation promises to do a thing, it is to be understood, that this promise is to be carried into execution, in the manner which the Constitution of that nation prescribes.”).

<sup>261</sup> *Reid v. Covert*, 354 U.S. 1, 14 & n.27 (1957) (plurality opinion).

<sup>262</sup> Compare U.S. CONST. art. II, § 2, cl. 2, with *id.* art. V.

<sup>263</sup> Compare Enclosure to Letter from Alexander Hamilton to George Washington (Mar. 29, 1796), in 20 THE PAPERS OF ALEXANDER HAMILTON 85, 98 (Harold C. Syrett ed., 1974) (“[T]he house of representatives have no moral power to refuse the execution of a treaty, which is not contrary to the constitution, because it pledges the public faith, and have no legal power to refuse its execution because it is a law — until at least it ceases to be a law by a regular act of revocation of the competent authority.”), with 5 ANNALS OF CONG. 493–94 (1796) (statement of Rep. Madison) and *id.* at 771 (proposed resolution of Rep. Blount) (“[W]hen a Treaty stipulates regulations on any of the subjects submitted by the Constitution to the power of Congress, it must depend, for its execution, as to such stipulations, on a law or laws to be passed by Congress. And it is the Constitutional right and duty of the House of Representatives, in all such cases, to deliberate on the expediency or in expediency of carrying such Treaty into effect, and to determine and act thereon, as, in their judgment, may be most conducive to the public good.”).

<sup>264</sup> See HENKIN, *supra* note 1, at 205.

[non-self-executing] treaties that the United States is obligated to make domestically effective, although it has not done so."<sup>265</sup> In the case of a non-self-executing treaty that would require a constitutional amendment, the risk of nonacquiescence by subsequent political actors is of course greater, but it is not qualitatively different.

In short, it is permissible for a non-self-executing treaty to require a constitutional amendment. Therefore, the holding of *Missouri v. Holland* is not required by the prospect that "[o]therwise, the federal government could undertake, on behalf of the nation, binding obligations which it would find itself powerless to enforce." This implication is correct, but not absurd. In fact, it is entirely consistent with *Reid*, with the doctrine of non-self-execution, and with the logic of constitutional foreign affairs.

It is clear that a non-self-executing treaty that calls for Congress to enact a statute in violation of enumerated constitutional *rights* — like the international agreement at issue in *Reid* — is itself constitutional and binding as a matter of international law; such a treaty would simply require a constitutional amendment for its execution. Similarly, there is no reason in principle why a non-self-executing treaty that calls for Congress to enact a statute beyond its enumerated *powers* — like the treaty at issue in *Missouri v. Holland* — is any different. This sort of treaty, too, is constitutional and binding as a matter of international law, but likewise would require a constitutional amendment for its execution. Just as Congress has no power to make laws abridging the freedom of speech, it likewise has no power to make laws regulating purely intrastate noncommercial activity. A treaty may commit the United States to enact either of these types of laws, but Congress has no power to fulfill the promise without a constitutional amendment. Justice Holmes could and should have held that the treaty at issue was

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<sup>265</sup> Detlev F. Vagts, *The United States and Its Treaties: Observance and Breach*, 95 AM. J. INT'L L. 313, 321 (2001); see also *Ware*, 3 U.S. (3 Dall.) at 240 (opinion of Chase, J.) ("The distinction is self-evident, between a thing that shall *not* happen, and an agreement that a third power shall prevent a certain thing being done. The *first* is obligatory on the *parties contracting*. The *latter* will depend on the will of *another*; and although the parties contracting, had power to lay him under a *moral* obligation for compliance, yet there is a very great difference in the two cases."); HENKIN, *supra* note 1, at 205–06 ("In general, Congress has responded to a sense of duty to carry out what the treaty-makers promised, to a reluctance to defy and confront the President (especially after he can no longer retreat), to an unwillingness to make the U.S. system appear undependable, even ludicrous. But the independence of the legislative process (subject only to the Presidential veto as provided in the Constitution) has given Congress opportunities to interpret the need for implementation and to shape and limit it in important details; Congress has not always given the President exactly the laws he asked for or as much money as he said a treaty required."); Vagts, *supra*, at 322 (noting the "conspicuous and persistent failure [of the United States, until recently,] to execute a commitment by agreeing to pay the arrearages of its United Nations dues").

constitutional, but that its implementation was beyond the power of Congress absent a constitutional amendment.

The Louisiana Purchase, which occurred just fifteen years after the Constitution was ratified, arguably implicated many of the themes in this section, because it was effected both by a treaty and by implementing legislation, each of which was subject to constitutional question.<sup>266</sup> The treaty provided that “[t]he inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States.”<sup>267</sup> One question was whether this treaty provision itself was constitutional, and the second question was whether any implementing legislation would be constitutional.

In the extensive debates over these questions, Senator Wilson Cary Nicholas, who had been a delegate to the Virginia ratifying convention,<sup>268</sup> offered especially clear-eyed analysis.<sup>269</sup> He first considered the constitutionality of the treaty: “If the . . . treaty is an *engagement* to incorporate the Territory of Louisiana into the Union of the United States, and to make it a State, it cannot be considered as an unconstitutional exercise of the treaty-making power; for . . . the territory is [not] incorporated as a State *by the treaty itself*.”<sup>270</sup> In other words, the treaty was non-self-executing, so any constitutional question arose not from the treaty itself but from the implementation of it. The question was not whether a *treaty* can make a new state, but whether Congress has *legislative* power to admit these new states.

As to that question, Nicholas explained:

In the third section of the fourth article of the Constitution it is said, “new States may be admitted by the Congress into this Union.” If Congress have the power, it is derived from this source; for there are no other words

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<sup>266</sup> See generally EVERETT SOMERVILLE BROWN, *THE CONSTITUTIONAL HISTORY OF THE LOUISIANA PURCHASE 1803-1812*, at 49-83 (1920); DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801-1829*, at 95-107 (2001); 1 WILLIAM M. GOLDSMITH, *THE GROWTH OF PRESIDENTIAL POWER: A DOCUMENTED HISTORY* 438-50 (1974); Letter from Thomas Jefferson to John C. Breckinridge (Aug. 12, 1803), in THOMAS JEFFERSON, *WRITINGS* 1136-39 (Merrill D. Peterson ed., 1984); Letter from Thomas Jefferson to Wilson Cary Nicholas (Sept. 7, 1803), in *WRITINGS*, *supra*, at 1139-41; 4 DUMAS MALONE, *JEFFERSON AND HIS TIME* 311-32 (1970); WILLIAM PLUMER, *MEMORANDUM OF PROCEEDINGS IN THE UNITED STATES SENATE: 1803-1807*, at 75-78 (Everett Somerville Brown ed., 1923).

<sup>267</sup> Treaty Between the United States of America and the French Republic, Apr. 30, 1803, art. III, 8 Stat. 200, 202.

<sup>268</sup> BIOGRAPHICAL DIRECTORY OF THE AMERICAN CONGRESS 1774-1996, at 1586 (Joel D. Treese ed., 1997).

<sup>269</sup> Many other views were expressed over the course of the Louisiana Purchase debate, but “[i]t is very doubtful if a saner interpretation of the constitutional provision for the treaty-making powers has been made than this by Nicholas.” BROWN, *supra* note 266, at 59 n.21.

<sup>270</sup> 13 ANNALS OF CONG. 70-71 (1803) (emphases added).

in the Constitution that can, by any construction that can be given to them, be considered as conveying this power.<sup>271</sup>

Thus, Nicholas insisted that if Congress were to implement the treaty, the power would have to be found in an ordinary enumerated power: Article IV, Section 3. There was no suggestion that the treaty itself somehow increased the legislative power, à la *Missouri v. Holland*. “[N]o other words in the Constitution” — including the Necessary and Proper Clause plus the Treaty Clause — conveyed to Congress the power to implement the treaty.<sup>272</sup>

Finally, what if Article IV, Section 3 was insufficiently broad? Might Congress be left powerless to fulfill an international legal commitment that the President and Senate had made? Is it absurd, as Professor Golove suggests, to imagine that “the federal government could undertake, on behalf of the nation, binding obligations which it would find itself powerless to enforce”? Nicholas’s answer is the one given above: “If Congress have not this power, the Constitutional mode would be by an amendment to the Constitution.”<sup>273</sup> In other words, a non-self-executing treaty within the treaty power may promise any sort of legislation, but the power to enact the legislation must be found in the enumerated powers of Congress, and if it cannot be found there, then the treaty simply requires a constitutional amendment.

In short, the structural argument that has been advanced in support of Justice Holmes’s position has no force, while the textual and structural arguments against it remain. Treaties cannot confer new legislative powers on Congress.

### B. Flexibility and Incentives

The previous section’s argument from absurdity might be recast as a simple pragmatic argument: Even if some non-self-executing treaties — those requiring implementing legislation that would violate enumerated rights — may call for a constitutional amendment, why must non-self-executing treaties that go beyond enumerated powers likewise require a constitutional amendment? Is it not more practical for Congress automatically to gain power to implement such treaties, at least

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<sup>271</sup> *Id.* at 71.

<sup>272</sup> Secretary of the Treasury Albert Gallatin likewise relied on Article IV, Section 3 — not the Treaty Clause plus the Necessary and Proper Clause — for the power of Congress to admit territory acquired by treaty into the Union. See Letter from Albert Gallatin to Thomas Jefferson (Jan. 13, 1803), in 1 THE WRITINGS OF ALBERT GALLATIN 111 (Henry Adams ed., 1879).

<sup>273</sup> 13 ANNALS OF CONG. 71 (1803); see also *id.* at 67 (statement of Sen. Adams); Letter from Albert Gallatin to Thomas Jefferson (July 9, 1803), in 1 THE WRITINGS OF ALBERT GALLATIN, *supra* note 272, at 127 (implying that a constitutional amendment would be required to execute another aspect of the treaty).

so long as the implementing legislation does not entrench on constitutional rights?

The short answer is the structural one given above:<sup>274</sup> However practical such a regime may be, it entails that treaties may expand the legislative power. And if the Restatement is correct that there are no subject-matter limitations on the treaty power, then it entails that treaties may expand the legislative power *virtually without limit*. This result would have been so unthinkable to the Founders that they would not have entertained pragmatic arguments in its favor. Whatever infirmity or inflexibility results from the rule contended for in this Article, the Founders happily would have borne it rather than be subject to an infinitely expandable legislative power.<sup>275</sup>

But the truth is that no infirmity or inflexibility results — even setting aside the possibility of treaty interpretation by states<sup>276</sup> or by constitutional amendment<sup>277</sup> — because a treaty that goes beyond enumerated powers may always be self-executing.<sup>278</sup> 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.<sup>279</sup> Moreover, our treaty partners will

<sup>274</sup> See *supra* section II.B, pp. 1892–1903.

<sup>275</sup> Cf. *INS v. Chadha*, 462 U.S. 919, 944–45 (1983) (“[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives — or the hallmarks — of democratic government . . . .”); Tribe, *supra* note 81, at 1250 (“Weak constitutional analysis cannot be justified by impatience with formal limits on the conduct of international affairs . . . . Careful constitutional interpretation with regard to the separation of powers — not petty formalism, but strict attention to considerations of text and context without which words lose their meaning and arguments their sense — is both legitimate and appropriate even in the setting of foreign relations, especially as modern economic and political trends blur the distinction between domestic and international life.”).

<sup>276</sup> See *supra* note 238 and accompanying text.

<sup>277</sup> See *supra* section IV.A, pp. 1920–27.

<sup>278</sup> The conventional wisdom is that “[a]n international agreement cannot take effect as domestic law without implementation by Congress if the agreement would achieve what lies *within the exclusive law-making power of Congress*.” RESTATEMENT, *supra* note 4, § 111 cmt. i (emphasis added). On this view, in other words, there are certain things that a self-executing treaty may not do of its own force, because those things are within the exclusive province of Congress. Common examples include appropriating money and declaring war. See *Edwards v. Carter*, 580 F.2d 1055, 1058 & n.7 (D.C. Cir. 1978). There is, however, “no definitive authority” for this rule, RESTATEMENT, *supra* note 4, § 111 reporters’ note 6, and it has been subject to serious criticism, see, e.g., Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT’L L. 760, 760 (1988). But whatever the validity of this rule, it is entirely consistent with the proposition that any treaty *beyond the enumerated powers of Congress* may be self-executing.

<sup>279</sup> See, e.g., HENKIN, *supra* note 1, at 201 (“What seems clear, from the language of the Constitution and of John Marshall, is that in the United States the strong presumption should be that a treaty or a treaty provision is self-executing, and that a non-self-executing promise is highly exceptional. A tendency in the Executive branch and in the courts to interpret treaties and treaty provisions as non-self-executing runs counter to the language, and spirit, and history of Article VI of the Constitution.”); Flaherty, *supra* note 30, at 2099 (endorsing the “self-execution orthodoxy”);



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.<sup>280</sup> So non-self-executing treaties do not give the United States additional *foreign affairs* flexibility, and the rule proposed here does not hamstring the foreign affairs power.<sup>281</sup>

The additional flexibility is entirely domestic. Such flexibility is harmless, and perhaps useful, in cases in which the treaty power overlaps with Congress's enumerated powers. It is sensible, in that context, to say that the greater power to make self-executing treaties includes the lesser power to leave the implementation of a treaty to Congress, if Congress already has the requisite legislative power. But it is quite another thing to say that the "greater power" to make self-executing treaties does or should include the "lesser power" to make non-self-executing treaties *and thus empower Congress to implement them*. In fact, the latter is the far greater — and more insidious — power.

This domestic "flexibility" afforded by non-self-executing treaties that reach beyond enumerated powers will of course be tempting to the President and the Senate — after all, they, plus the House of Representatives, will be the beneficiaries of the increased legislative power. Indeed, this prospect will constitute a powerfully perverse incentive to enter into non-self-executing treaties that go beyond enumerated powers. This is just the sort of self-aggrandizing "flexibility" that the Constitution was designed to prohibit. As Professor Walter Dellinger wrote as Assistant Attorney General for the Office of Legal Counsel: "Although the founders were concerned about the concentration of governmental power in any of the three branches, their primary fears were directed toward congressional self-aggrandizement."<sup>282</sup>

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Vázquez, *supra* note 30, at 2173 ("[O]ur Constitution should be read to establish a presumption that treaties are self-executing . . ."). *But see* Yoo, *Globalism and the Constitution*, *supra* note 30, at 2092–93 ("A presumption of non-self-execution enforces the distinction between the power to make treaties and the power to legislate . . . . If anything, early constitutional history falls on the side of the arguments in favor of non-self-execution, rather than self-execution."); Yoo, *Treaties and Public Lawmaking*, *supra* note 30.

<sup>280</sup> See RESTATEMENT, *supra* note 4, § 111 reporters' note 5 ("Since generally the United States is obligated to comply with a treaty as soon as it comes into force for the United States, compliance is facilitated and expedited if the treaty is self-executing. . . . [W]hen Congressional action is required but is delayed, the United States may be in default on its international obligation."); Detlev F. Vagts, *The Exclusive Treaty Power Revisited*, 89 AM. J. INT'L L. 40, 41 (1995) ("Nothing is gained by routing an agreement once over a two-thirds Senate hurdle and then again through both Houses for a vote on implementing legislation.")

<sup>281</sup> See RESTATEMENT, *supra* note 4, § 111 reporters' note 5 (noting that "whether or not a treaty or provision will be self-executing for a particular state party . . . ha[s] generally not been [a] consideration[] when states enter into treaty obligations, whether multilateral or bilateral").

<sup>282</sup> Separation of Powers, *supra* note 151, at 131 (citing *Mistretta v. United States*, 488 U.S. 361, 411 n.35 (1989)); *see also* sources cited *supra* note 151.

To see the point in practice, assume that the federal government desires power that it would otherwise lack over some subject matter — say, for example, family law.<sup>283</sup> One option would be to make a self-executing treaty with the prolixity of a family law code, which would, of its own force, constitute the family law of the United States. This option is unlikely to be very tempting, however, because it would require that the President and two-thirds of the Senate agree on a particular family law code, to be frozen into the treaty (and arguably beyond the power of Congress to amend or supersede<sup>284</sup>). But if Justice Holmes were correct, there would be a second option: the United States could enter into a *non-self-executing* treaty that simply promised (to attempt)<sup>285</sup> to regulate family law in the United States “in a manner that best protects the institution of the family.” This treaty would be far more tempting to the treatymakers on the American side, because it would require the President and two-thirds of the Senate to agree on only one thing: *that they want power over family law*. This second treaty does not freeze a family law code into the supreme law of the land of its own force; rather, it gives Congress plenary power to enact and amend and repeal family law at will — at least until the President, or the foreign treaty partner, should see fit to eliminate that power.<sup>286</sup>

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<sup>283</sup> See *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979) (“The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.” (quoting *In re Burrus*, 136 U.S. 586, 593–94 (1890)) (internal quotation marks omitted)).

<sup>284</sup> See William E. Mikell, *The Extent of the Treaty-Making Power of the President and Senate of the United States* (pt. 2), 57 U. PA. L. REV. 528, 536–37 (1909) (“If . . . a treaty were made which affected the reserved rights of the states, it is, to say the least, doubtful if such a treaty could be abrogated at all without the consent of the President, for Congress having no power to pass a law, affecting the reserved rights of the states, could enact no law either in affirmance or derogation of the treaty.”).

<sup>285</sup> Under *Missouri v. Holland*, a promise to *enact* implementing legislation is not required to expand the legislative power; if the treaty at issue in *Missouri v. Holland* is a guide, then apparently a mere promise to *attempt* to enact legislation will suffice. See Convention Between the United States and Great Britain for the Protection of Migratory Birds, Aug. 16, 1916, art. VIII, 39 Stat. 1702, 1704 (“The High Contracting Powers agree themselves to take, or *propose* to their respective appropriate law-making bodies, the necessary measures for insuring the execution of the present Convention.” (emphasis added)). This little-noted aspect of *Missouri v. Holland* renders the doctrine substantially broader than it first appears. Here, the international legal obligation is fulfilled by the mere proposal of legislation; the actual enactment of it is gratuitous. Yet under *Missouri v. Holland*, such a treaty empowers Congress to pass the legislation.

<sup>286</sup> Even if these two options — a self-executing treaty or a non-self-executing treaty followed by implementing legislation — were functionally the same, that fact would not undercut the formal distinction between the two. Congress’s powers are limited by formal rules, and these rules govern even when a different procedural route could evade the rule entirely. Consider, for example, the line item veto. If Congress wishes for the President to have power to veto proposed legislation section by section, it can simply pass each section as a separate bill; that way, the President may sign some sections and veto others. See *Clinton v. New York*, 524 U.S. 417, 471 (1998) (Breyer, J., dissenting). But it does not follow that Congress may skip this formality and give the President power to veto specific sections of a single bill. See *Clinton*, 524 U.S. at 421 (holding the

The example is a caricature, but not much of one.<sup>287</sup> Under current doctrine, “[i]t is not difficult to hypothesize possible abuses of the treaty power.”<sup>288</sup> There is, in fact, a trend toward non-self-executing treaties<sup>289</sup> and another trend toward treaties that encroach on the traditional domains of the states.<sup>290</sup> These treaties can be very vague,<sup>291</sup> and even if they are not so vague, current doctrine provides that implementing legislation need only bear a “rational relationship” to the treaty that it is ostensibly designed to execute.<sup>292</sup> In practice, this can amount to an almost plenary power of legislative implementation.<sup>293</sup>

The point here is not that the federal government should not regulate family law, although the notion that it might do so would surely have been surprising to the Founders. And nor is the point that no

Line Item Veto Act unconstitutional). Likewise, the fact that the President and Senate may create domestic law beyond the enumerated powers of Congress by self-executing treaty does not mean that Congress can likewise create such law by a statute implementing a non-self-executing treaty.

<sup>287</sup> As noted by Professor Curtis Bradley:

[The Convention on the Rights of the Child] — which the United States has signed but has not yet ratified — contains a number of provisions that may be inconsistent with current U.S. family law. This inconsistency has prompted federalism concerns because family law is a subject that largely has been regulated in this country at the state rather than federal level.

Similar concerns have been raised with respect to the Convention on the Elimination of All Forms of Discrimination Against Women . . . .

Bradley, *supra* note 7, at 402–03 (footnotes omitted) (citing Convention on the Rights of the Child, *supra* note 8; and Convention on the Elimination of All Forms of Discrimination Against Women, *supra* note 8); see also Knowles, *supra* note 8, at 753; Yoo, *supra* note 10, at 828 n.297.

<sup>288</sup> Golove, *supra* note 1, at 1298 n.756.

<sup>289</sup> See, e.g., Merico-Stephens, *supra* note 22, at 305 (“In recent years, the trend has been to declare all treaties non-self-executing . . .”).

<sup>290</sup> See sources cited *supra* note 8.

<sup>291</sup> See Bradley, *supra* note 7, at 443 (“[T]reaties, especially multilateral treaties, may be more likely than domestic legislation to contain vague and aspirational language, making their effect on state prerogatives harder to anticipate during the ratification process.”).

<sup>292</sup> *United States v. Lue*, 134 F.3d 79, 84 (2d Cir. 1998). But see Virginia H. Johnson, *Application of the Rational Basis Test to Treaty-Implementing Legislation: The Need for a More Stringent Standard of Review*, 23 CARDOZO L. REV. 347, 376–92 (2001) (arguing that the Necessary and Proper Clause requires that legislation implementing a non-self-executing treaty be subject to a standard of review more stringent than rational basis).

Moreover, even if a treaty may be implemented using ordinary enumerated powers, that fact does not appear to obviate the rule of *Missouri v. Holland*. Imagine a vague treaty that could plausibly be implemented in ten ways, nine of which are within the ordinary enumerated powers of Congress. Under *Missouri v. Holland* and its progeny, Congress nevertheless may choose the tenth way. In other words, the test apparently is not whether a treaty obligation *must* be fulfilled by a statute beyond enumerated powers; rather, the test seems to be whether a treaty obligation *may* be fulfilled by a statute beyond enumerated powers. If the answer is yes, *Missouri v. Holland* is triggered and the treaty increases the legislative power. Cf. *supra* note 285.

<sup>293</sup> See, e.g., *United States v. Eramdjian*, 155 F. Supp. 914, 920 (S.D. Cal. 1957) (“Although no mention of marihuana is made in the treaties, marihuana is definitely related to the drug problem and the evils that flow from the use of drugs. A statute which has its impact on both the drugs named in the treaty and on marihuana, related as it is to the drug addiction problem, would seem to us a valid statute to implement a valid treaty.” (footnote omitted)).

aspect of family law could ever become a bona fide issue of international concern; it is possible to imagine aspects of it that might. The point is that the Constitution should not be construed to create this doubly perverse incentive — an incentive to enter “entangling alliances”<sup>294</sup> merely to attain the desired side effect of increased legislative power.<sup>295</sup>

Were Justice Holmes’s *ipse dixit* rejected, the President would still have ample power to conclude treaties on all appropriate subjects.<sup>296</sup> And if a particular treaty went beyond the enumerated powers of Congress, but were of real value to the international relations of the United States, then the treaty could be made self-executing. (Alternatively, the treaty could be made non-self-executing and dependent on the states or a constitutional amendment for its execution.) The only thing that would change is that the President and the Senate would lack the power — and thus the perverse incentive — to undertake additional international legal commitments in order to increase the legislative power.<sup>297</sup>

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<sup>294</sup> Thomas Jefferson, First Inaugural Address (Mar. 4, 1801), in WRITINGS, *supra* note 266, at 492, 494 (calling for “peace, commerce, and honest friendship with all nations, entangling alliances with none”); see also George Washington, Farewell Address (Sept. 17, 1796), in PRESIDENTIAL DOCUMENTS 18, 24 (J.F. Watts & Fred L. Israel eds., 2000) (“It is our policy to steer clear of permanent alliances with any portion of the foreign world . . .”).

<sup>295</sup> Indeed, the treatymakers apparently succumbed to just this temptation in *Missouri v. Holland* itself: “If ever the federal government could be charged with bad faith in making a treaty, this had to be the case.” Golove, *supra* note 1, at 1256.

<sup>296</sup> See *Geoffroy v. Riggs*, 133 U.S. 258, 266 (1890) (“[T]he treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations . . .”).

<sup>297</sup> It is true that even self-executing treaties create a sort of perverse incentive in this sense. The political branches may use self-executing treaties to effect domestic regulation that would otherwise be beyond their power. They may be tempted, therefore, to enter into self-executing treaties not for bona fide foreign affairs reasons but rather to effect the corresponding change in domestic law. This problem, though, if it is a problem, is likely to be far less substantial than the perverse incentive to enter into non-self-executing treaties to enhance legislative power. Effecting domestic regulation by self-executing treaty is unlikely to be very tempting because of the inflexibility of self-executing treaties. The domestic legal effects of a self-executing treaty are likely to be viewed as a cost rather than as a benefit, which is as it should be: the change in domestic law is not what the United States bargains *for, to get*; it is what the United States bargains *with, to give*. Self-executing treaties may empower the federal government to enter a new policy space, but because the domestic legal effect is on a one-off, frozen basis, this is unlikely to prove to be the dominant motive of treatymakers. By contrast, under *Missouri v. Holland*, non-self-executing treaties may give Congress an *open-ended option* to enter a new policy space, at any time and in whatever form Congress sees fit. Here the ostensible *cost* of the treaty, the change in domestic law, becomes an extraordinarily tempting *benefit* to politicians: an unrestricted grant of new legislative power.

### C. Impermissible Motives

Even the most enthusiastic proponents of an expansive treaty power seem troubled by this perverse incentive. But rather than lead them to question *Missouri v. Holland*, this problem has prompted them simply to declare that increasing power over domestic regulation is an impermissible  *motive*  for a treaty.<sup>298</sup> This solution is unsatisfactory for a number of reasons.

First, the very concept of collective motivation is arguably incoherent. Trying to assess whether the President and the Senate collectively possessed an impermissible motive, and whether that motive predominated over their other motives, is a quixotic inquiry.<sup>299</sup>

Second, this view is inconsistent with the emphatic position of the Restatement:

The references in the Constitution presumably incorporate the concept of treaty and of other agreements in international law. . . . States may enter into an agreement on any matter of concern to them, and international law  *does not look behind their motives or purposes in doing so* . Thus, the United States may make an agreement on any subject suggested by its national interests in relations with other nations.<sup>300</sup>

Finally, it is impossible to see how the line between permissible and impermissible motives could be drawn or policed. Professor Golove, for example, has described two such possible lines, which he calls

<sup>298</sup> See, e.g., HENKIN, *supra* note 1, at 185 (arguing that "there must be an agreement, a bona fide agreement, between states, not a 'mock-marriage'"); Golove, *supra* note 1, at 1090 n.41 ("[I]n my view, the President and Senate may not constitutionally enter into a treaty for the sole purpose of making domestic legislation . . . . [For example, in the hypothetical case of a divorce law treaty with Canada,] even if Canada agreed reciprocally to impose the same uniform divorce law on itself, the treaty would still be unconstitutional if the President and Senate's motivation for making the treaty was unrelated to our relationship with Canada or our foreign affairs more generally but was solely to override Congress and the states and impose what they believed was a particularly worthy divorce code on the United States."); Louis Henkin, *The Constitution, Treaties, and International Human Rights*, 116 U. PA. L. REV. 1012, 1024-25 (1968) (concluding that "the Constitution would bar some mala fide use of the form of a treaty, in conspiracy with a foreign power, for the sole purpose of making domestic law in the United States"); see also 1 TRIBE, *supra* note 100, § 4-4, at 646 n.16 ("It is generally accepted that the Treaty Clause procedure is legitimate only for international agreements related genuinely, and not just pretextually, to foreign relations.").

<sup>299</sup> See, e.g., Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547 (1983) ("Although legislators have individual lists of desires, priorities, and preferences, it turns out to be difficult, sometimes impossible, to aggregate these lists into a coherent collective choice." (citing KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d ed. 1963))). It is true, of course, that purpose tests abound in constitutional doctrine. But whether they are generally sound or not, see 1 TRIBE, *supra* note 100, § 5-3, at 802-04, in this context such a test poses a qualitatively different problem. To ask legislators to remove, for example, racism from their legislative calculus seems eminently reasonable. But to ask them to remove their *desire for power* seems Panglossian in a way that is flatly inconsistent with the basic premises of Madison and the Framers. See THE FEDERALIST NO. 51, *supra* note 140.

<sup>300</sup> RESTATEMENT, *supra* note 4, § 302 cmt. c (emphasis added).

“strict” and “broad” conceptions of permissible treaty motivations.<sup>301</sup> The broad conception says simply that domestic regulation cannot be the sole motivation for the treaty.<sup>302</sup> The strict conception requires, in addition, that treaty-makers “consider the degree of divergence between the treaty obligations and the ideal domestic law baseline in determining the cost of the treaty from the U.S. perspective” while “think[ing] of themselves as agents of the legislative branch.”<sup>303</sup> Neither conception satisfactorily addresses the potential perverse incentive.

The “broad” conception appears to constitute no constraint on the treaty power whatsoever, because there will almost always be a plausible foreign policy rationale for the treaty.<sup>304</sup> For example, Professor Golove suggests that “demonstrating [the] good faith and willingness [of the United States] to undertake reciprocal obligations” would count as a plausible, indeed “[p]erhaps most important[,]” foreign policy rationale for entering human rights treaties.<sup>305</sup> This, of course, could be said of any treaty at all.<sup>306</sup>

The “strict” conception has a different flaw. Its innovation is to require treaty-makers to “think of themselves as agents of the legislative branch” in evaluating the domestic legal effects of a treaty. But this requirement would do nothing to alleviate the perverse incentive of treaty-makers to enter treaties in order to enhance the legislative power. Indeed, the tendency of treaty-makers (the President and Senate) to think of themselves as agents of lawmakers (the President, Senate, and House) in this way is precisely the problem. When deciding whether to enter a treaty at all, or whether to draft it with precision, or whether to make it self-executing, treaty-makers have every incentive to opt for more treaties rather than fewer, vague treaties rather than specific ones, non-self-executing treaties rather than self-executing ones — because vague, non-self-executing treaties increase their own power. Treaty-makers will inevitably do just as Golove’s strict conception would require: act as faithful agents of the legislature. And as faithful agents, they will take every opportunity to increase the power of their principals.

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<sup>301</sup> See Golove, *supra* note 81, at 582.

<sup>302</sup> See *id.* at 604 (“[T]reaties may not be made solely to achieve changes in domestic law . . .”); *id.* at 611 (“[T]here [must be] a significant foreign policy reason for ratification . . .”).

<sup>303</sup> *Id.* at 596.

<sup>304</sup> See Yoo, *supra* note 10, at 825 (“With the growing internationalization of domestic affairs, merely asserting a foreign relations link or the need to comply with a multilateral international agreement would prove too large a loophole for expansive congressional powers.”).

<sup>305</sup> See Golove, *supra* note 81, at 606; see also Golove, *supra* note 1, at 1302 n.771.

<sup>306</sup> See Epstein, *supra* note 52, at 668 (“So long . . . as the desire to lead by example in international affairs counts as a serious justification for signing treaties, then the treaty power becomes plenary de facto, so little can be done to prevent the treaty power from mounting an end-run around federalism limitations contained in the Constitution.”).

Finally, even if Golove's model were reconfigured to disfavor rather than favor such power-grabbing treaties, it would remain unsatisfactory, because it would still turn on political actors self-consciously assessing their own desire for more power and discounting that motivation from their calculus. The Founders were not satisfied with such a solution, which is why Madison did not say "self-restraint must be made to counteract ambition."<sup>307</sup> The proper check is not self-restraint; it is constitutional structure.<sup>308</sup> This is why the Constitution denies each branch the power to increase its own subject-matter jurisdiction, and why treaty-makers (the President and Senate) should not be able to increase the power of lawmakers (the President, Senate, and House).

#### D. *Stare Decisis*

At first glance, *Missouri v. Holland* might appear to present the strongest possible case for application of stare decisis. It is eighty-five years old. It was written by Justice Holmes. It is canonical. And, perhaps most importantly, its holding affirms a power of the political branches in an area related to foreign affairs. Under these circumstances, one might expect the Court to think long and hard before overruling *Missouri v. Holland* and restricting Congress's power to pass legislation implementing non-self-executing treaties.

But the argument for stare decisis is not nearly as compelling as it may first appear.<sup>309</sup> The opinion is canonical and it was written by Justice Holmes, but on the point at issue — Congress's power to legislate pursuant to treaty — it is also utterly unreasoned.<sup>310</sup> The stare

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<sup>307</sup> See THE FEDERALIST NO. 51, *supra* note 140, at 322 ("Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place."); see also *supra* note 299.

<sup>308</sup> See Epstein, *supra* note 52, at 669 ("On structural, not motivational grounds, these treaties should not be accepted."); see also *United States v. Morrison*, 529 U.S. 598, 616 (2000) ("Under our written Constitution, . . . the limitation of congressional authority is not solely a matter of legislative grace."); *id.* at 616 n.7 ("[T]he Framers adopted a written Constitution that . . . divided authority at the federal level so that the Constitution's provisions would not be defined solely by the political branches nor the scope of legislative power limited only by public opinion and the Legislature's self-restraint."); Thomas Jefferson, Kentucky Resolutions of 1798 and 1799, *reprinted in 4 THE DEBATES IN THE SEVERAL STATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 540, 543 (photo. reprint 1987) (Jonathan Elliot ed., New York, Burt Franklin, 2d ed. 1888) ("[F]ree government is founded in jealousy, and not in confidence; it is jealousy, and not confidence, which prescribes limited constitutions to bind down those whom we are obliged to trust with power; . . . our Constitution has accordingly fixed the limits to which, and no farther, our confidence may go . . .").

<sup>309</sup> See Bradley, *supra* note 7, at 458–60.

<sup>310</sup> See *supra* pp. 1873–74, 1879–80.

decisive force of an opinion turns, in part, on the quality of its reasoning and should diminish substantially if it provides no reasoning at all.<sup>311</sup>

Second, while *Missouri v. Holland* is eighty-five years old, its holding concerning legislative power pursuant to treaty has been all but irrelevant for most of that time. From 1937 to 1995, the Court did not strike down a single statute as beyond the enumerated powers of Congress. Throughout the decades when the Commerce Clause power was construed to be essentially limitless, the question of expanding Congress's legislative power by treaty was almost entirely hypothetical. During those years, any legislation that Congress enacted to enforce a non-self-executing treaty could almost certainly have been sustained under the Commerce Clause or some other enumerated power as well.<sup>312</sup> Only after the Court's 1995 decision in *United States v. Lopez*<sup>313</sup> did *Missouri v. Holland*'s holding on the scope of legislative power pursuant to treaty recover even potential practical significance. Thus, any supposed reliance of the political branches on this holding must be dated from 1995, not 1920.

Even since 1995, the Supreme Court has struck down only three statutes as beyond the enumerated powers of Congress.<sup>314</sup> It can hardly be said, therefore, that the conduct of foreign affairs by the political branches has been undertaken in substantial reliance on the rule that federal legislative power may be increased by treaty. Scholars only now are discovering *Missouri v. Holland*'s potential for evading the limits on congressional powers that the Court has set in the last decade. If the political branches should move to act on the proposals of these scholars, *that* would present an unfortunate situation of reliance, in the foreign affairs realm, on erroneous constitutional doctrine. But right now — while these proposals are in the law reviews and not in *Treaties in Force* or the *Statutes at Large* — *Missouri v. Holland* may be overruled on this point without any dislocation of American foreign relations.

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<sup>311</sup> See *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (“[W]hen governing decisions are . . . badly reasoned, ‘this Court has never felt constrained to follow precedent.’” (quoting *Smith v. Allwright*, 321 U.S. 649, 665 (1944))).

<sup>312</sup> See 1 *TRIBE*, *supra* note 100, § 4-4, at 646 (“The importance of treaties as independent sources of congressional power has waned substantially in the years since *Missouri v. Holland* . . . [;] the Supreme Court [in the intervening period has] so broadened the scope of Congress’ constitutionally enumerated powers as to provide ample basis for most imaginable legislative enactments quite apart from the treaty power.”).

<sup>313</sup> 514 U.S. 549 (1995).

<sup>314</sup> See *Morrison*, 529 U.S. at 627 (invalidating part of the Violence Against Women Act); *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (invalidating the Religious Freedom Restoration Act); *Lopez*, 514 U.S. at 567–68 (invalidating the Gun-Free School Zones Act).



In short, *Missouri v. Holland* may be canonical, but it does not present a strong case for the application of stare decisis. It is wrongly decided, and it should be overruled.

### CONCLUSION

In 1920, Justice Holmes wrote the following sentence for the Court: "If the treaty is valid there can be no dispute about the validity of the [implementing] statute under Article I, § 8, as a necessary and proper means to execute the powers of the Government."<sup>315</sup> The point was not expressly at issue in the case, and Justice Holmes declined to offer any supporting analysis or citation.

The proposition is extraordinarily important both as a theoretical matter and as a practical one. It is of enormous theoretical import, because it implies that the subject matter of the legislative power is not fixed by the Constitution but may be expanded by treaty. And it is of increasing practical import because it lies at the intersection of two of the most important trends in United States law: the recent explosion of treaties and other international agreements on matters of distinctly local concern and the increasing willingness of the Supreme Court to police the limits of Congress's enumerated powers. These two trends, in combination, have created an increasing gap between what Congress is called upon to do by treaty and what it otherwise has enumerated power to do.

Unsurprisingly, recent scholarship has noted the growing significance of *Missouri v. Holland* in light of these trends. Recent articles have rushed to embrace it as the possible savior of statutes that the Court has held to be beyond Congress's power, like the Religious Freedom Restoration Act and the Violence Against Women Act, as well as many other statutes that may be in danger of the same fate, including foundational environmental statutes like the Endangered Species Act.<sup>316</sup>

The academy, like Justice Holmes himself, seems to have taken the proposition that treaties can expand the legislative power to be self-evident. In short, until now, it has been "the least controversial portion of Justice Holmes's opinion in *Missouri*."<sup>317</sup> And so, in the entire, rich literature on the treaty power, one finds only the briefest arguments in its support — one textual, one structural, and one historical.

The textual argument is unpersuasive because it fails to account for the correct grammatical conjunction of the Necessary and Proper Clause and the Treaty Clause, which together grant Congress power

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<sup>315</sup> *Missouri v. Holland*, 252 U.S. 416, 432 (1920).

<sup>316</sup> See sources cited *supra* notes 19–25 and accompanying text.

<sup>317</sup> Golove, *supra* note 1, at 1100.

only "To make all Laws which shall be necessary and proper for carrying into Execution . . . [the] Power . . . to *make* Treaties."<sup>318</sup> The structural argument is unconvincing because it is in irreconcilable tension with the deep principle, evident in the text, history, and structure of the Constitution, that the legislative power is fixed by Article I and can only be expanded pursuant to the Article V amendment process. And the historical argument — which *is* ostensibly extremely persuasive, and which has been quite influential — is based on a factual premise that is simply false.

The results of rejecting Justice Holmes's proposition are profound but not revolutionary. The President can still make treaties concerning a vast range of subjects. He may even make treaties that reach beyond the enumerated powers of Congress. Such treaties may be self-executing, in which case they will be domestic law of their own force pursuant to the Supremacy Clause and will require no implementing legislation whatsoever. Or such treaties may be non-self-executing and may rely for their execution on the states or on constitutional amendment.

In short, the treaty power remains a formidable and ample tool for a vigorous foreign policy. Treaties may do many things. But what they may not do is increase the legislative power of Congress.

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<sup>318</sup> U.S. CONST. art. I, § 8, cl. 18, art. II, § 2, cl. 2 (emphasis added).