

CONGRESS'S TREATY-IMPLEMENTING POWER IN HISTORICAL PRACTICE

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ABSTRACT

Historical practice strongly influences constitutional interpretation in foreign relations law, including most questions relating to the treaty power. Yet it is strikingly absent from the present debate over whether Congress can pass legislation implementing U.S. treaties under the Necessary and Proper Clause. Drawing on previously unexplored sources, this Article considers the historical roots of Congress's power to implement U.S. treaties between the Founding Era and the seminal case of Missouri v. Holland in 1920. It shows that time after time, members of Congress understood the Necessary and Proper Clause to provide a constitutional basis for a congressional power to implement treaties. Notably, both supporters and opponents of a strong treaty power accepted Congress's power to implement treaties under the Necessary and Proper Clause, even though they did so for quite different reasons. This consensus helped lead to the growing practice of treaty non-self-execution, a practice that in turn has led Congress to play an increased role in treaty implementation. The historical practice revealed here strongly supports the conclusion that Congress has the power to pass legislation implementing treaties under the Necessary and Proper Clause, even when no other Article I power underlies this legislation.

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INTRODUCTION

For a long time, it was settled law that Congress could pass legislation that would otherwise be beyond its enumerated powers in order to implement treaties. The Supreme Court in *Missouri v. Holland* held this in 1920, when Justice Holmes wrote that if “the treaty is valid, there can be no dispute about the validity of [the statute implementing it] as a necessary and proper means to execute the powers of the Government.”¹ As the Supreme Court interpreted the reach of Congress’s enumerated powers more broadly during the New Deal Era, the importance of *Missouri v. Holland*’s holding dwindled but remained unquestioned as a doctrine of constitutional law.

This is no longer the case. Following the federalist resurgence in other areas of constitutional law, *Missouri v. Holland*’s holding is being reexamined. Professor Nicholas Rosenkranz initiated this reconsideration, arguing in an important article that *Missouri v. Holland* should be overruled.² In his view, the text of the Necessary and Proper Clause only permits Congress to pass legislation necessary and proper for the formation of treaties, and not for their implementation. The Supreme Court considered this issue last term in *Bond v. United States*.³ Although the majority of the Court disposed of the case on statutory grounds, two justices embraced Professor Rosenkranz’s approach,⁴ and the issue may well return in the future.

The question of Congress’s power to implement treaties under the Necessary and Proper Clause thus joins two other important treaty power issues as the subject of constitutional controversy. One issue is the extent to which treaty provisions are self-executing or non-self-executing. Scholars have fiercely debated this issue; it has shaped practice by the political branches; and it is the subject of a recent Supreme Court decision.⁵ The other issue is the extent to

1. 252 U.S. 416, 432 (1920).

2. Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867, 1868 (2005).

3. 134 S. Ct. 2077 (2014).

4. *Id.* at 2098-2102 (Scalia, J., concurring in the judgment) (joined by Thomas, J.).

5. *Medellin v. Texas*, 552 U.S. 491 (2008). A self-executing treaty automatically becomes

which treaties can address issues not otherwise within the constitutional reach of the federal government. This issue received some attention in *Bond*, although it was not properly before the Court,⁶ and it has also received substantial consideration in both scholarship and in the practice of the political branches.⁷ Both issues are closely entangled with Congress's power to pass legislation otherwise outside its reach in order to implement treaties. Indeed, both issues are practical prerequisites for the exercise of this power, for there would be little need for this power if all treaties were self-executing or if they all dealt only with subjects otherwise within the purview of the federal government.

Yet there is a curious difference in how these constitutional questions are approached. So far, the debate about Congress's power to implement treaties has focused on textual and structural arguments. Justice Holmes's holding in *Missouri v. Holland* was a textualist one. The challenges raised to this holding by Professor Rosenkranz and the concurring justices in *Bond* have similarly relied mostly on textualism, but with additional reference to structural principles.⁸ By contrast, the debates on self-execution and on the scope of the treaty power include substantial consideration of other principles of constitutional interpretation, most notably the historical practice of the political branches and precedents based upon this practice.

The absence of historical practice from the debate over Congress's power to implement treaties is problematic for at least two reasons. First, historical practice is a well-recognized and important

part of judicially enforceable U.S. domestic law upon its ratification, whereas a non-self-executing treaty can only become part of judicially enforceable U.S. domestic law through the further passage of congressional legislation. *See id.* at 504-05.

6. 134 S. Ct. at 2103 (Thomas, J., concurring in the judgment) (writing separately to express his views on this issue with an eye to an "appropriate case," although acknowledging that "the parties have not challenged the constitutionality of the particular treaty at issue here"); *cf. id.* at 2111 (Alito, J., concurring in the judgment) (concluding that the treaty at issue exceeded the scope of the treaty power to the extent that it called for the criminalization of Ms. Bond's conduct).

7. *See infra* note 27 and accompanying text.

8. *Bond*, 134 S. Ct. at 2098-2102 (Scalia, J., concurring in the judgment). *See generally* Rosenkranz, *supra* note 2. Some of the amicus briefs in *Bond* do address historical practice, most notably the Brief for Professors David Golove, Martin S. Lederman, and John Mikhail as Amici Curiae in Support of Respondent, *Bond*, 134 S. Ct. 2077 (No. 12-158), 2013 WL 4737189.

principle of constitutional interpretation. As Justice Frankfurter famously wrote, “It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them.”⁹ A debate over Congress’s power to implement treaties that does not consider historical practice will be uninformed and inconsistent with deep-rooted constitutional norms. Second, the need to consider historical practice with regard to Congress’s power to implement treaties is especially pressing because this practice has proved so important to the prerequisite issues of self-execution and the scope of the treaty power. Given that the need for Congress to implement treaties in the first place is largely grounded in historical practice, it would be anomalous to overlook this important interpretive tool.

This Article considers what historical practice offers to the question of Congress’s constitutional power to implement treaties through the Necessary and Proper Clause, which I refer to as “Congress’s treaty-implementing power.” I examine Congress’s treaty-implementing power both when it overlaps with other enumerated powers of Congress and when it is the sole constitutional basis for legislation. I focus on the practice of Congress during the time between the Founding Era and *Missouri v. Holland*, as this is the period when one might expect any relevant controversies to have emerged.

Significantly, during this period there was no serious controversy about the existence of Congress’s treaty-implementing power. Instead, this period shows a powerful consensus that the Necessary and Proper Clause authorized Congress to implement treaties, although there were differences of opinion about what legislation was in fact necessary and proper for treaty implementation. Intriguingly, this consensus was based on conflicting motivations related to questions of self-execution and of the scope of the treaty power. Both opponents and supporters of a strong treaty power

9. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring). The Supreme Court affirmed the importance of historical practice in an important decision earlier this year. *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014) (observing that in interpreting the Recess Appointments Clause, “we put significant weight upon historical practice”).

embraced Congress's treaty-implementing power because they saw it as advancing their agendas in relation to the other issues.¹⁰

Those who were wary of a strong treaty power embraced Congress's treaty-implementing power because they saw it as an argument against treaty self-execution. Starting with the debate in the House of Representatives over the Jay Treaty in 1796, Congressmen concerned about self-execution cited the Necessary and Proper Clause as a reason to understand treaty provisions to be non-self-executing as a matter of constitutional law, at least when these provisions dealt with subjects within Congress's Article I powers. For them, the Necessary and Proper Clause signaled that Congress was intended to have a role in treaty implementation and thus served, in the words of one Representative, as a "shield" against the power of the President and the Senate to create domestic law obligations through treaties.¹¹ This view recurred throughout the nineteenth century and likely contributed to the growing practice of understanding treaties as non-self-executing.

Those who favored a strong treaty power also embraced Congress's treaty-implementing power, but they did so because it offered a justification for legislation that otherwise lay outside Congress's power. They cited Congress's treaty-implementing power as authorizing legislation in areas from territorial governance to trademarks, areas in which Congress's other enumerated powers were not thought to authorize legislation or there was at least doubt as to whether they did so. They argued that this legislation could reach into areas traditionally thought to be matters of state concern. In addition, although the evidence is more nuanced on this issue, examination of legislation passed solely under Congress's treaty-implementing power shows that this legislation was often broader than what was strictly necessary to implement treaty obligations.

This historical practice supports the constitutionality of Congress's treaty-implementing power. It is a powerful gloss on the meaning of the Necessary and Proper Clause in relation to treaties,

10. I use the terms "strong" and "weak" to refer to multiple dimensions of treaty making, including both the possible scope of treaties and the extent to which they are self-executing. Although these two dimensions are logically distinct, it was (and is) often the case that those who favor a broad treaty power also favor self-execution, and those who favor a narrow treaty power also favor non-self-execution.

11. 5 ANNALS OF CONG. 590-91 (1796) (statement of Rep. Findley).

demonstrating a consistent congressional understanding that this clause authorizes treaty-implementing legislation. The fact that both opponents and supporters of a strong treaty power accepted Congress's treaty-implementing power is telling in light of their disagreements about self-execution and the scope of the treaty power. Indeed, acceptance of this power in historical practice helped foster reliance on the use of non-self-executing treaties within our constitutional structure.

The rest of this Article expands on these themes. Part I describes the current debate over Congress's treaty-implementing power. It shows that this debate focuses narrowly on constitutional text and structure, in contrast to other key constitutional debates on the treaty power that draw heavily on historical practice. Part II considers what historical practice from the Founding Era to *Missouri v. Holland* suggests as to Congress's treaty-implementing power. It shows the impressively strong consensus among both supporters and opponents of a strong treaty power that Congress did indeed have the treaty-implementing power. Part III considers the implications of these findings for constitutional law, both for *Missouri v. Holland* in its time and for the debate raised in *Bond* today.

I. THE CURRENT DEBATE OVER THE TREATY-IMPLEMENTING POWER

The conventional account of Congress's treaty-implementing power focuses on *Missouri v. Holland* and its textual reading of the Necessary and Proper Clause in relation to the Treaty Clause. This Part first describes this account and the recent challenges to it that have appeared in the scholarship of Professor Rosenkranz and in Justice Scalia's concurrence in *Bond*. This Part then considers what is missing from the debate. I show that this debate is surprisingly limited in comparison to two other important and related constitutional questions regarding the treaty power—the extent to which treaties are self-executing and the permissible scope of treaties. Most strikingly, although historical practice features heavily in the constitutional analysis applied to the other two questions, it is almost entirely absent from the current debate over the treaty-implementing power.

A. Missouri v. Holland ... *and Now* Bond v. United States

In 1913, Congress took up the protection of migratory birds. Congressmen who favored protection followed a two-fold political strategy. First, they passed an act that placed migratory birds “within the custody and protection” of the federal government and penalized their hunting out of season.¹² But they understood that this act might fall outside the enumerated powers of Congress, with its Senate sponsor acknowledging, “frankly ... that I did not myself find authority for it in any express clause of the Constitution.”¹³ Accordingly, Senators simultaneously pursued a second strategy of encouraging the President to negotiate a treaty with neighboring countries that would provide for the protection of migratory birds.¹⁴ This strategy could succeed even if the 1913 Act were held unconstitutional because the treaty-making power was understood to encompass issues otherwise outside the reach of Congress’s enumerated powers.¹⁵

Shortly thereafter, several federal district courts did find the 1913 legislation to exceed Congress’s enumerated powers, concluding that bird protection was a matter for the states.¹⁶ The United States then

12. Act of Mar. 4, 1913, ch. 145, 37 Stat. 828, 847-48 (1913) (authorizing fines of up to \$100 and prison sentences of up to ninety days for violations of the act), *repealed by* Migratory Bird Treaty Act, ch. 128, § 9, 40 Stat. 755 (1918).

13. 49 CONG. REC. 1493 (1913) (statement of Sen. McLean) (arguing that the Act would be constitutional based upon a broader conception of Congress’s sovereign powers).

14. Senator Elihu Root, a former Secretary of State and a founder of the American Society of International Law, proposed a resolution to this effect in January 1913, while the 1913 Act was pending. *See id.* at 1494. The Senate did not pass this resolution before the congressional session ended, but did pass such a resolution a few months into the next session. *See* 50 CONG. REC. 2339-40 (1913) (approving S. Res. 25, 63d Cong. (1913)).

15. *See* 49 CONG. REC. 1489 (1913) (statement of Sen. McLean) (“I take it for granted that should Great Britain and Mexico invite the United States to enter into a treaty agreement for the protection of migratory birds ... the United States would have the right to accept this invitation.”); *id.* at 1494 (1913) (statement of Sen. Root) (“It may be that under the treaty-making power a situation can be created in which the Government of the United States will have constitutional authority to deal with this subject.”).

16. *United States v. McCullagh*, 221 F. 288, 291 (D. Kan. 1915) (considering the argument that the legislation fell within Congress’s Commerce Clause power to be so “foreclosed ... as to leave nothing more to be said”); *United States v. Shauver*, 214 F. 154 (E.D. Ark. 1914); *State v. McCullagh*, 153 P. 557 (Kan. 1915). The United States appealed *Shauver* to the Supreme Court, but withdrew its appeal after the Migratory Bird Treaty Act was passed. *United States v. Shauver*, 248 U.S. 594, 595 (1919) (mem.); *see also* *State v. Sawyer*, 94 A. 886 (Me. 1915).

entered into the Migratory Bird Treaty with Great Britain—which was sovereign over Canada—providing for the mutual protection of migratory birds.¹⁷ This treaty expressly required that the parties would “take, or propose to their respective appropriate law-making bodies, the necessary measures for insuring the execution of the present Convention.”¹⁸ Congress then passed the Migratory Bird Treaty Act of 1918. This Act prohibited actions that violated the treaty¹⁹—and indeed went noticeably beyond what the treaty required in providing criminal penalties for violations.²⁰ Opponents complained bitterly that this Act was “a radical interference with the rights of the State” and that “[t]he real purpose of the treaty was to make constitutional a law which otherwise would not have been constitutional.”²¹ Nonetheless, the Act was promptly upheld as constitutional by several federal district judges, including one who had struck down the 1913 Act as outside Congress’s power.²² In 1920, its constitutionality reached the Supreme Court in the case of *Missouri v. Holland*.

Writing for the Court, Justice Holmes upheld the Migratory Bird Treaty Act. His decision rested on two key legal conclusions. One was that the Migratory Bird Treaty was valid even if it addressed

17. Convention for the Protection of Migratory Birds, U.S.-U.K., Aug. 16, 1916, 39 Stat. 1702.

18. *Id.* art. VIII.

19. Migratory Bird Act, ch. 128, 40 Stat. 755, 755-76 (1918) (codified as amended at 16 U.S.C. §§ 703-712 (2012)) (providing that violations could be penalized by fines of up to \$500 and six months in jail).

20. The treaty did not expressly require that criminal penalties attach to violations of its prohibitions. *See* Convention for the Protection of Migratory Birds, *supra* note 17. The statute also went beyond the treaty in terms of elaborating on the process by which implementation was to occur, including provisions related to warrants and seizures. *See* 40 Stat. at 756.

21. 56 CONG. REC. 7363 (1918) (statements of Reps. Tillman and Huddleston, respectively); *see also id.* at 7370 (statement of Rep. Towner) (“I do not think a treaty could give the power to Congress to legislate in a case where the effect of the legislation would be to deprive the States of their constitutional powers.”).

22. *See* *United States v. Rockefeller*, 260 F. 346 (D. Mont. 1919); *United States v. Selkirk*, 258 F. 775 (S.D. Tex. 1919) (having “no hesitancy” in finding the Act constitutional as implementing an exercise of the treaty power, despite having “no doubt” that Congress could not have passed the Act simply based on its enumerated powers); *United States v. Samples*, 258 F. 479 (W.D. Mo. 1919) (reaching a similar conclusion); *United States v. Thompson*, 258 F. 257 (E.D. Ark. 1919) (reaching a similar conclusion). Judge Trieber, the federal district judge in Arkansas who had previously been the first judge to strike down the 1913 Act in *United States v. Shaver*, 214 F. 154 (1914), was the first judge to uphold the Act in *Thompson*, 258 F. at 257.

a matter “that an act of Congress could [otherwise] not deal with” and despite claims that it interfered with the rights of the states.²³ The other was that Congress could constitutionally pass legislation implementing the treaty. Notably, Justice Holmes discussed the first point much more than the second one. On this first point—the scope of the treaty power—he relied on many different forms of constitutional reasoning:

[W]hen we are dealing with words that are also a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters.... The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.²⁴

In finding that the Migratory Bird Treaty was constitutional, Justice Holmes drew not only on the text of the Constitution, but also on prior precedents and on functionalist considerations about the difficulty of protecting migratory birds through a state-by-state approach.²⁵ In contrast, his reasoning on the second point—Congress’s power to implement the treaty through the Migratory Bird Treaty Act—was terse and textual. He stated simply, “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.”²⁶

Missouri v. Holland has become the seminal case for both of these constitutional holdings. But scholars approach these two holdings in quite different ways, mirroring Justice Holmes’s differential treatment of the issues. Like Justice Holmes, scholars have devoted considerable attention to the scope of the treaty power.²⁷ Notably,

23. *Missouri v. Holland*, 252 U.S. 416, 433-34 (1920) (“No doubt the great body of private relations usually fall within the control of the State, but a treaty may override its power.”).

24. *Id.* at 433.

25. *See id.* at 434-35.

26. *Id.* at 432. The Court did not reach whether the Migratory Bird Treaty Act might have fallen within other enumerated powers of Congress. *See id.* at 430-35.

27. Notable articles in the last fifteen years include Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390 (1998) [hereinafter Bradley, *The Treaty Power I*]; Curtis A. Bradley, *The Treaty Power and American Federalism, Part II*, 99 MICH. L. REV. 98 (2000) [hereinafter Bradley, *The Treaty Power II*]; David M. Golove, *Treaty-Making*

their work typically acknowledges that while *Missouri v. Holland* is a landmark in the constitutional development of this issue, it does not stand alone. Rather, *Missouri v. Holland* rests within a rich constitutional history regarding the scope of the treaty power. This history includes: evidence from the Founding Era; positions taken by leading political figures in the new republic, most prominently Alexander Hamilton and Thomas Jefferson; extensive practice by the President and the Senate in treaty making; starting with *Ware v. Hylton*, Supreme Court precedents upholding treaty provisions protecting the interest of noncitizens as to issues like land ownership that were otherwise thought to be traditionally state concerns;²⁸ Supreme Court dicta in cases such as *Geofroy v. Riggs* embracing a broad conception of the treaty power;²⁹ developments in the international practice of treaty making since *Missouri v. Holland*; and the implications of the Supreme Court's recent jurisprudence on federalism for the scope of the treaty power.³⁰

By contrast, the issue of Congress's treaty-implementing power has received relatively little attention. Prior to Professor Rosenkranz's article, scholars mostly repeated Justice Holmes's textualist reasoning and cited to *Missouri v. Holland*'s holding on this point.³¹

and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power, 98 MICH. L. REV. 1075 (2000); Oona Hathaway et al., *The Treaty Power: Its History, Scope, and Limits*, 98 CORNELL L. REV. 239 (2013); Duncan Hollis, *Executive Federalism: Forging New Federalist Constraints on the Treaty Power*, 79 S. CALIF. L. REV. 1327 (2006); Gary Lawson & Guy Siedman, *The Jeffersonian Treaty Clause*, 2006 U. ILL. L. REV. 1; Michael D. Ramsey, *Missouri v. Holland and Historical Textualism*, 73 MO. L. REV. 969 (2008); Peter J. Spiro, *Treaties, International Law, and Constitutional Rights*, 55 STAN. L. REV. 1999 (2003); Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 COLUM. L. REV. 403 (2003); Carlos Manuel Vazquez, Breard, Printz, and the Treaty Power, 70 U. COLO. L. REV. 1317 (1999).

28. 3 U.S. (3 Dall.) 199, 284 (1796).

29. 133 U.S. 258, 266-67 (1889).

30. Between them, the articles by Curtis Bradley and David Golove engage with all of these themes, and each of the other articles cited in that footnote engages with at least two of these themes. See *supra* note 27.

31. See Rosenkranz, *supra* note 2, at 1874 (noting the absence of consideration of this issue). Indeed, Professor Rosenkranz claims that "[t]hroughout the vast literature of the treaty power generally ... one finds only a single truly compelling argument in favor of Justice Holmes's crucial sentence" on Congress's power to implement treaties. *Id.* at 1875. The argument Professor Rosenkranz points to is a two-sentence footnote by Louis Henkin in his treatise on foreign affairs and the Constitution that, if correct, would have shown explicit support from the Constitution's drafting for the proposition that Congress can implement treaty obligations under its necessary and proper power. See LOUIS HENKIN, FOREIGN AFFAIRS

At most, thorough accounts also noted that in *Neely v. Henkel*, a unanimous opinion written by Justice Harlan in 1901,³² the Supreme Court also held that the Necessary and Proper Clause “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.”³³ This absence of attention

AND THE UNITED STATES CONSTITUTION 204 n.111 (2d ed. 1996). Professor Rosenkranz makes a strong case that this footnote erroneously misreads the drafting history. See Rosenkranz, *supra* note 2, at 1912-18; see also Martin Flaherty, *History Right? Historical Scholarship, Constitutional Understanding, and Treaties as “Supreme Law of the Land,”* 99 COLUM. L. REV. 2095, 2123-34 & n.126 (1999) (reading the drafting history similarly to how Professor Rosenkranz subsequently reads it, although not discussing Professor Henkin’s footnote). Accordingly, I view this aspect of the drafting history as silent on Congress’s power to implement treaties under the Necessary and Proper Clause.

32. 180 U.S. 109. *Neely* involved the extradition of a U.S. citizen to Cuba pursuant to legislation that Justice Harlan interpreted as implementing a provision of a treaty between the United States and Spain. *Id.* at 116, 121. At the time, the United States occupied Cuba, and the treaty by which Spain had surrendered its claim to Cuba required that the United States would “assume and discharge the obligations that may under international law result from the fact of its occupation, for the protection of life and property.” *Id.* at 116 (citations omitted).

33. *Id.* at 121; see also *id.* at 122 (not reaching whether Congress could have passed the legislation in question under its enumerated powers in light of its authority to do so under the Necessary and Proper Clause). For work recognizing *Neely* on this point, see, for example, CONG. RESEARCH SERV., S. PRT. 106-71, TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 76 & n.53 (2001); Bradley, *The Treaty Power I, supra* note 27, at 400 n.53; Golove, *supra* note 27, at 1311 & n.801. Several other Supreme Court cases prior to *Missouri v. Holland* have language suggesting that Congress may have a treaty-implementing power. See *Keller v. United States*, 213 U.S. 138, 147 (1909) (observing, in holding that a certain criminal statute fell outside Congress’s powers, that “there is no suggestion in the record or in the briefs of a treaty ... under which this legislation can be supported”); *In re Trademark Cases*, 100 U.S. 82, 99 (1879) (“L[eaving] untouched the whole question of the treaty-making power over trade-marks, and ... the duty of Congress to pass any laws necessary to carry treaties into effect.”); *Prigg v. Pennsylvania*, 41 U.S. (1 Pet.) 539, 618-19 (1842) (observing that “[Congress] has, on various occasions, exercised powers which were necessary and proper as means to carry into effect rights expressly given and duties expressly enjoined thereby,” and shortly afterwards observing that Congress has the power to implement treaties even though this “power is nowhere in positive terms conferred upon Congress”).

Professor Rosenkranz argues that dicta in *Mayor of New Orleans v. United States*, 35 U.S. (10 Pet.) 662, 736 (1836), supports his approach. See Rosenkranz, *supra* note 2, at 1899-1900. The Court stated that “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.” *Mayor of New Orleans*, 35 U.S. at 736. I do not think that this language supports Professor Rosenkranz’s reading of the Necessary and Proper Clause. This language

reflected the fact that scholars with as widely different views on the scope of the treaty power as Curtis Bradley and David Golove have agreed that *Missouri v. Holland*'s holding as to Congress's treaty-implementing power is its "least controversial" aspect.³⁴

In his article, Professor Rosenkranz challenges Justice Holmes's and Justice Harlan's conclusion that the Necessary and Proper Clause authorizes Congress to implement treaty obligations. His primary argument is textual. The Necessary and Proper Clause gives Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution ... all other Powers vested by this Constitution in the Government of the United States."³⁵ One such power is the President and the Senate's "Power to make Treaties."³⁶ Parsing this language finely, Professor Rosenkranz concludes that Congress only has the necessary and proper power to facilitate the *making* of treaties—by which he seems to mean their negotiation, ratification, and possibly their entry into force—and that this power does not cover the *implemen-tation* of treaty obligations.³⁷ Accordingly, Professor Rosenkranz argues that treaty obligations that go beyond Congress's Article I powers can only become domestic law if one of three conditions are met: the treaty obligations are self-executing; the United States passes a constitutional amendment implementing these obligations; or individual states pass laws implementing them.³⁸ But by his account, Congress does not have the power to pass legislation implementing a non-self-executing treaty unless Congress could have passed that legislation under its Article I powers in the absence of the treaty.

In *Bond v. United States*, the Supreme Court had the opportunity to reconsider *Missouri v. Holland* along the lines proposed by

seems to address the scope of the treaty power, not Congress's power to implement treaties. As discussed above, the scope of the treaty power has been a much more contested subject, and the dicta in this case appears to take the narrow view that federal jurisdiction cannot be increased through the treaty power. *Id.*

34. CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW 535 (2011); Golove, *supra* note 27, at 1100.

35. U.S. CONST. art. I, § 8.

36. *Id.* art. II, § 2.

37. Rosenkranz, *supra* note 2, at 1892.

38. *Id.* at 1938.

Professor Rosenkranz.³⁹ The facts of *Bond* are extraordinary. The petitioner, Carol Bond, discovered that her husband had impregnated her good friend.⁴⁰ Seeking revenge, she stole toxic chemicals from her employer, a chemical manufacturer, and ordered others from Amazon.⁴¹ She then smeared these chemicals on the mailbox and door handles of the home of her former friend, and did so on at least twenty-four occasions.⁴² She was charged and convicted of several federal crimes, including violating a federal statute that appears to criminalize the possession or use of toxic chemicals except for certain limited purposes.⁴³ This statute was passed to implement a provision of a major multilateral treaty known as the Chemical Weapons Convention, which required nations to enact penal legislation criminalizing certain uses of toxic chemicals.⁴⁴ Its language tracks that of the treaty closely.⁴⁵ Ms. Bond argued that the statute should not be construed to apply to her conduct.⁴⁶ She further argued that if the statute did apply to her conduct, it would have been outside the constitutional powers of Congress to enact, despite the statute's role in implementing the Chemical Weapons

39. *Bond* was previously before the Supreme Court on the issue of whether Ms. Bond had standing to argue that the statute violated the federalism protections of the Constitution. *Bond v. United States*, 131 S. Ct. 2355, 2360 (2011). The Supreme Court unanimously held that she did have standing, but expressed no view on the merits of her claim. *Id.* at 2360, 2367.

40. *Bond v. United States*, 134 S. Ct. 2077, 2085 (2014).

41. *Id.*

42. *Id.*

43. *Id.*; 18 U.S.C. § 229(a)(1).

44. 143 CONG. REC. 5812 (1997); Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (Convention), opened for signature Jan. 13, 1993, 1974 U.N.T.S. 45. Between them, Articles I and II of the Convention bar nations that are party to the treaty from the possession and use of toxic chemicals except for “peaceful” and certain other purposes; and Article VII(1)(a) requires these nations to adopt “penal legislation” that “[p]rohibit[s] natural and legal persons anywhere on [their] territory ... from undertaking any activity prohibited to” a nation that is a party to the treaty. *Id.* art. I, art. II § 9(a), art. III.

45. The statute makes it unlawful for persons to possess or use chemical weapons, 18 U.S.C. § 229(a)(1), with “chemical weapons” defined as “toxic chemical[s] and [their] precursors, except where intended for a purpose not prohibited under this chapter,” *id.* § 299F(1)(A), with purposes not prohibited including “peaceful” purposes, *id.* § 299F(7)(a).

46. See Brief of Petitioner at 42-57, *Bond v. United States*, 134 S. Ct. 2077 (2014) (No. 12-158), 2013 WL 1963862, at *42-57.

Convention.⁴⁷ Several amicus briefs supporting her side emphasized Professor Rosenkranz's textual argument.⁴⁸

The Court ultimately ruled for Ms. Bond on statutory grounds. Chief Justice Roberts's opinion for the six-Justice majority concluded that the Congressional statute implementing the Chemical Weapons Convention did not criminalize "purely local crimes" like Ms. Bond's bizarre attacks on her former friend.⁴⁹ The Court's statutory interpretation relied on a presumption that Congress does not intend to legislate in areas of traditionally state concern.⁵⁰ Because the Court decided *Bond* on statutory grounds, it did not reach the constitutional question of whether *Missouri v. Holland*'s holding should be overturned or narrowly interpreted to limit Congress's treaty-implementing power.⁵¹ In a concurrence in the judgment joined by Justice Thomas, Justice Scalia whole-heartedly embraced Professor Rosenkranz's argument that the Necessary and Proper Clause does not authorize Congress to pass legislation implementing treaties.⁵² Describing *Missouri v. Holland*'s holding on Congress's treaty-implementing power as "unreasoned and citation-less" and citing to Professor Rosenkranz, Justice Scalia read the text of the Necessary and Proper Clause as giving Congress "a power to help the President make treaties" and "not a power to

47. *Id.* at 29, 2013 WL 1963862, at *29.

48. *See, e.g.*, Brief of Amici Curiae Cato Institute et al. in Support of Petitioner at 22-28, *Bond*, 134 S. Ct. 2077 (No. 12-158), 2013 WL 2279455, at *22-28 (on which Professor Rosenkranz was counsel of record); Brief for Commonwealth of Virginia et al. as Amici Curiae in Support of Petitioner at 22-23, *Bond*, 134 S. Ct. 2077 (2014) (No. 12-158) 2013 WL 2152519, at *22-23.

49. *Bond*, 134 S. Ct. at 2090.

50. *Id.* at 2089.

51. *See id.* at 2086-87. The Court did not discuss whether the implementing legislation could be sustained as an exercise of Congress's power under the Commerce Clause; instead, it merely noted that the lower court had concluded that the United States had waived that argument. *Id.* at 2087.

52. *Id.* at 2098-102 (Scalia, J., concurring in the judgment). Justice Scalia reached this constitutional question after concluding that the statute implementing the Chemical Weapons Convention clearly criminalized Ms. Bond's conduct. *Id.* at 2094. In addition to Justice Scalia's opinion, Justice Thomas wrote a concurrence in the judgment (joined by Justice Scalia and for the most part by Justice Alito) suggesting that the scope of the treaty power should be interpreted narrowly. *Id.* at 2102-11 (Thomas, J., concurring in the judgment). Justice Alito wrote a short concurrence in the judgment, concluding that if the Chemical Weapons Convention required the criminalization of local poisonings, then it exceeded the scope of the treaty power. *Id.* at 2111 (Alito, J., concurring in the judgment).

implement treaties already made.”⁵³ He also expressed structural concerns at the prospect of the Necessary and Proper Clause allowing Congress to pass legislation implementing treaties that it could not have passed otherwise.⁵⁴

The Supreme Court thus chose not to revisit *Missouri v. Holland*'s holding on the treaty-implementing power, despite the urging of Justices Scalia and Thomas. But the issue is clearly a live one, and may return to the Court in due course. This is especially true because two other developments in constitutional doctrine have resurrected the importance of Congress's treaty-implementing power. The first is the renewed emphasis on the limits of Congress's enumerated powers. The broader view of Congress's Article I powers taken since the New Deal Era reduced the need for reliance on its treaty-implementing power, but now that the Rehnquist and Roberts Courts have been cutting back on the scope of these other powers, the treaty-implementing power may well regain importance.⁵⁵ The second is the Supreme Court's 2008 decision in *Medellin v. Texas*.⁵⁶ *Medellin* raised the bar for concluding that treaties are self-executing as opposed to non-self-executing, and therefore it likely increased the need for implementing legislation. Between them, these developments suggest that Congress's treaty-implementing power will increase in importance as a constitutional basis for legislation.

B. The Limits of the Current Debate

So far, the debate over Congress's treaty-implementing power has focused on a limited set of constitutional principles. For the most part, the debate has primarily turned on the text of the Constitution,

53. *Id.* at 2098-99.

54. *Id.* at 2099-102.

55. This is true despite the turn towards congressional-executive agreements as a replacement for treaties made through the Article II process, as it is unclear whether congressional-executive agreements can deal with issues beyond the scope of Congress's Article I powers. See Oona Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 *YALE L.J.* 1238, 1338, 1343 (2008) (arguing that congressional-executive agreements should generally replace Article II treaties, but acknowledging an exception where an international agreement addresses matters otherwise outside the reach of the powers granted to Congress).

56. 552 U.S. 491, 498-99 (2008).

with some additional consideration paid to other evidence from the time of the Framing, to structural issues, and to the precedential value of *Neely v. Henkel* and *Missouri v. Holland*. This is evident from Professor Rosenkranz's article, which spurred the current reconsideration of this issue. Professor Rosenkranz's main focus is textual (as was the adoption of his approach by Justice Scalia). Professor Rosenkranz's article does include a section on "Constitutional History," but this section engages only with the Constitution's *drafting* history.⁵⁷ He is mostly silent on the two hundred plus years of constitutional history that have followed the Constitution's ratification. The two articles that have most engaged with Professor Rosenkranz's argument—one by Edward Swaine and one by Carlos Vazquez—have focused mainly on responding to his arguments and therefore relied on text, structure, and original intent.⁵⁸

The text of the Constitution and evidence from the time of the Framing do provide considerable grounds for constitutional analysis of Congress's treaty-implementing power. One can form an opinion from the text alone as to whether the Necessary and Proper Clause authorizes Congress to implement treaties. In concluding that it does not, Professor Rosenkranz and Justice Scalia rely on two interpretive moves. The first is a very precise reading of the text: Congress can only do what is necessary and proper to facilitate the *making* of treaties rather than treaty-related issues generally. The appropriateness of this precision is questionable. As Edward Swaine has pointed out, "it is unlikely that the Necessary and Proper Clause was drafted with the rigor this analysis assumes" and "[t]he whole enterprise seems to have been debated in vastly simpler terms."⁵⁹ The precision advocated by Professor Rosenkranz and now

57. Rosenkranz, *supra* note 2, at 1912-18. More specifically, Professor Rosenkranz engages here with the *absence* of material in the drafting history. See *supra* note 31 and accompanying text.

58. See generally Edward T. Swaine, *Putting Missouri v. Holland on the Map*, 73 MO. L. REV. 1007 (2008); Carlos Manuel Vazquez, *Missouri v. Holland's Second Holding*, 73 MO. L. REV. 939, 960-63 (2008). The amicus brief in *Bond* submitted by Professors David Golove, Marty Lederman, and John Mikhail does focus on historical practice in relation to Congress's treaty-implementing power. Brief for Professors David M. Golove, Martin S. Lederman, and John Mikhail as *Amici Curiae* in Support of Respondent, *Bond*, 134 S. Ct. 2077 (No. 12-158), 2013 WL 4737189, at *10. Their research and mine were pursued independently for the most part. After we became aware of each others' work, an initial draft of this Article was cited to in the brief, see *id.* at 10, and this Article now similarly cites to the brief.

59. Swaine, *supra* note 58, at 1013-14.

embraced by Justice Scalia would lead to all sorts of other outcomes that seem unlikely to have been intended by the pragmatic Framers, such as the conclusion that the Necessary and Proper Clause only justifies legislation that facilitates the “establish[ing]” of post offices and postal roads, as opposed to matters like their maintenance, or that facilitates the “constitut[ing]” of inferior federal courts, as opposed to matters like their operation.⁶⁰

The second interpretive move made by Professor Rosenkranz, and also by Justice Scalia, is to read this precise text narrowly so as to conclude that the passage of implementing legislation cannot be necessary and proper for the “making” of treaties. Again, this reasoning is questionable. First, it fails to account for the possibility that some treaties may require implementing legislation in order to be “made”—that is, to be ratified or to enter into force. As I discuss at more length later, historically, U.S. practice sometimes required that the implementation of treaties occur prior to their ratification or entry into force.⁶¹ Indeed, today, “[i]n reality, the U.S. government has a policy and practice of not joining a treaty until it has determined U.S. domestic law comports with whatever international law obligations the treaty imposes.”⁶² Second, this reasoning does

60. See U.S. CONST. art. I, § 8; cf. Vazquez, *supra* note 58, at 960 (making a similar point and also noting tensions between Professor Rosenkranz’s approach and other textual provisions in the Constitution). In practice, the Supreme Court has held that Congress has broader powers in these matters than the kind of analysis advocated by Professor Rosenkranz would support. *E.g.*, *Jinks v. Richland Cnty.*, 538 U.S. 456, 462 (2003) (Scalia, J.) (holding that the Necessary and Proper Clause gives Congress the power to pass a statute allowing federal courts to toll state law claims); *Hanna v. Plumer*, 380 U.S. 460, 473 (1965) (holding that Congress has a power “to prescribe housekeeping rules for federal courts”). Justice Scalia’s concurrence in *Bond* was silent on the implications of his approach for these other areas of law.

61. As discussed in Part II.A, some nineteenth-century treaties expressly required that Congress pass implementing legislation before these treaties could enter into force. In the present era, the Senate occasionally conditions its advice and consent on the requirement that implementing legislation be passed prior to the U.S. ratification of the treaty at issue. See, e.g., S. Res. of Feb. 19, 1986, 99th Cong., 132 CONG. REC. 2349-50 (1986) (enacted) (advising and consenting to the Genocide Convention but requiring “[t]hat the President will not deposit the instrument of ratification until after the implementing legislation ... has been enacted”).

62. Duncan B. Hollis, *Treaties—A Cinderella Story*, 102 AM. SOC’Y INT’L L. PROC. 412, 413 (2008). In some instances, this is satisfied by a treaty’s self-executing status, but when implementing legislation is needed “the Executive almost always waits for Congress to enact that legislation *before* joining the treaty.” *Id.* at 414. The Chemical Weapons Convention is a rare instance in modern times where the implementing legislation came after the ratification of the treaty. *Bond*, 134 S. Ct. at 2083, 2085 (noting that the United States ratified

not account for the possibility that implementing legislation might in fact facilitate the making of treaties. Justice Scalia did not address this issue, and Professor Rosenkranz dismisses it out of hand. Professor Rosenkranz considers it “speculative” that U.S. treaty partners would be reluctant to enter into treaties with the United States if they thought non-self-executing obligations could only be implemented in the United States via a constitutional amendment or legislation by each of the fifty states.⁶³ This assertion is contrary to basic accounts of treaty negotiation, which recognize that treaty negotiators take the likelihood of compliance into account and may demand stiffer terms or decline to negotiate with countries known to have past difficulties complying with treaties.⁶⁴ Third, as Professor Swaine has explained, the approach taken by Professor Rosenkranz (and now also Justice Scalia) “underplays evidence that the Framers were wholly convinced of the need to systemically develop a compliance capacity precisely in order to sustain the U.S. treaty power.”⁶⁵

More generally, it is anomalous to focus the constitutional debate over Congress's treaty-implementing power on such a limited set of interpretive principles. One crucial principle that is thereby overlooked is the historical practice of the political branches. This principle has a long pedigree as an important source of constitutional interpretation. As Justice Frankfurter wrote in his concurrence in *Youngstown Sheet & Tube Company v. Sawyer*:

The Constitution is a framework for government. Therefore the way the framework has consistently operated fairly establishes that it has operated according to its true nature. Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them. It is an inadmissibly

the Convention in 1997 and passed the implementing legislation in 1998).

63. Rosenkranz, *supra* note 2, at 1889-90.

64. Andrew T. Guzman, *The Design of International Agreements*, 16 EUR. J. INT'L L. 579, 596 (2005) (explaining that when a state with past compliance problems “seeks to enter into agreements in the future, its potential partners will take into account the risk that the agreement will be violated, and will be less willing to offer concessions of their own in exchange for promises from that country. If there is enough suspicion, potential partners may simply refuse to deal with the state”).

65. Swaine, *supra* note 58, at 1016; *see also* Vazquez, *supra* note 58, at 960-61.

narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them.⁶⁶

The Supreme Court most recently reaffirmed the importance of historical practice to constitutional interpretation in *NLRB v. Noel Canning*⁶⁷—decided just a few weeks after *Bond*. In that case, which involved the interpretation of the Recess Appointments Clause, the Court put “*significant weight upon historical practice*”⁶⁸ and deemed it an “important interpretive factor even when the nature or longevity of that practice is subject to dispute, and even when that practice began after the Founding Era.”⁶⁹

Reliance on historical practice in constitutional interpretation advances multiple values. It can inform understandings of original intent, particularly where early instances of historical practice are concerned. More significantly, as Curtis Bradley and Trevor Morrison have recently explained, it advances “the Burkean preference for long-standing traditions and understandings,” and furthers consistency, efficiency, predictability, and reliance interests in ways similar to our system of reliance on judicial precedents.⁷⁰ Although claims of historical practice should be carefully scrutinized to ensure that they support the arguments made,⁷¹ they play a valuable role in constitutional interpretation.

The omission of historical practice from the current debate over Congress’s treaty-implementing power is particularly striking in light of the central role of historical practice to foreign relations law. As Professors Bradley and Morrison observe, “Invocations of

66. 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring). Justice Holmes makes a similar point in *Missouri v. Holland* in discussing the scope of the treaty power, where he describes the Constitution as “a being the development of which could not have been foreseen completely by the most gifted of its begetters.” 252 U.S. 416, 433 (1919).

67. 134 S. Ct. 2550 (2014).

68. *Id.* at 2559.

69. *Id.* at 2560. Writing separately for four justices, Justice Scalia expressed skepticism about how strongly historical practice should count in constitutional interpretation. See *id.* at 2593-95 (Scalia, J., concurring). He nonetheless engaged in extensive discussion of historical practice in his separate opinion. See *id.* at 2600-06, 2610-18.

70. Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 424-28 (2012).

71. See Jean Galbraith, *International Law and the Domestic Separation of Powers*, 99 VA. L. REV. 987, 1042-45 (2013).

historical practice are particularly common in constitutional controversies implicating foreign relations.⁷² Indeed, in the foreign relations context, by the time of his second term in office George Washington was already remarking on the relevance of historical practice to constitutional interpretation.⁷³ Similarly, cases construing the Necessary and Proper Clause have also drawn on historical practice. Chief Justice Marshall emphasized early on in his 1819 opinion in *McCullough v. Maryland* that the question of whether the federal government could establish a bank “can scarcely be considered as an open question, unprejudiced by the former proceedings of the nation respecting it.”⁷⁴

By way of comparison, historical practice also plays an important role in the two constitutional debates over the treaty power that are most closely related to the question of Congress’s treaty-implementing power: the extent to which treaties are self-executing and the permissible scope of the treaty power.⁷⁵ The current constitutional understandings of these issues owe a great deal not only to developments in the courts, but also to the past practice of the political branches. This is particularly true with regard to the question of treaty self-execution.⁷⁶ Based on the text of the Constitution, there

72. Bradley & Morrison, *supra* note 70, at 420. *See generally* Galbraith, *supra* note 71 (describing how past practice is the dominant principle of constitutional interpretation in three important areas of foreign relations law).

73. George Washington, Message to the House of Representatives, Declining to Submit Diplomatic Instructions and Correspondence (Mar. 30, 1796), *available at* <http://perma.cc/PYX5-9CSK> (defending his constitutional position in the dispute with the House of Representatives over the Jay Treaty in part on the grounds that “[i]n this construction of the Constitution every House of Representatives has heretofore acquiesced; and until the present time, not a doubt or suspicion has appeared to my knowledge that this construction was not the true one”).

74. 17 U.S. (4 Wheat.) 316, 401 (1819) (“The principle now contested was introduced at a very early period of our history, has been recognised by many successive legislatures, and has been acted upon by the judicial department, in cases of peculiar delicacy, as a law of undoubted obligation.”).

75. While I only focus on these two issues, historical practice plays an important role in virtually all other treaty-related issues, including the rise of congressional-executive agreements, the rise of sole executive agreements, and treaty termination. *See, e.g.*, Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 805-08 (1995) (describing the uses and misuses of historical practice in establishing the constitutionality of congressional-executive agreements); Curtis Bradley, *Treaty Termination and Historical Gloss*, 92 TEX. L. REV. 773, 789-96 (2014) (describing how historical practice led to dramatic changes in the allocation of the constitutional power to terminate treaties).

76. With regard to the scope of the treaty power, historical practice also matters

is a strong argument that all treaties should be considered self-executing,⁷⁷ but practice adopted a different path. Early on, the political branches began moving towards non-self-execution on certain issues, believing it to be constitutionally required or at least constitutionally permissible, and this practice has continued over time.⁷⁸ In addition, the Supreme Court has long accepted that treaties can be non-self-executing,⁷⁹ and its 2008 decision in *Medellin v. Texas* raised the bar for concluding that treaties are self-executing as opposed to non-self-executing.⁸⁰ Even Justices Scalia and Thomas, the staunchest textualists on the Court, have embraced a

significantly in the debates. *See supra* notes 27-30 and accompanying text; *see also* *Missouri v. Holland*, 252 U.S. 416, 433 (1920) (observing the need to consider the issue “in the light of our whole experience”). There is, however, a stronger textual basis for concluding that the scope of the treaty power can reach beyond the other enumerated powers of the federal government than there is for accepting treaty non-self-execution. *See Ramsey, supra* note 27, at 969-70.

77. *See* U.S. CONST. art. VI (stating that treaties are the “supreme law of the land”). The weight of scholarship accepts that, as a textualist and originalist matter, treaties were generally meant to be self-executing. *See, e.g.*, Flaherty, *supra* note 31, at 2099; Michael Ramsey, *Towards a Rule of Law in Foreign Affairs*, 106 COLUM. L. REV. 1450, 1470-73 (2006); David Sloss, *Non-Self-Executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. DAVIS L. REV. 1, 49 (2002); Carlos Manuel Vazquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154, 3156-57 (1999). *But see* John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 1959 (1999) (claiming that non-self-execution is consistent with the Supremacy Clause and “the Framers’ notions of democratic self-government and popular sovereignty”).

78. *See* 1 CHARLES HENRY BUTLER, *THE TREATY-MAKING POWER OF THE UNITED STATES* 431-33 (1902) (describing some areas over the nineteenth century in which congressional implementation was used); Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 407-10 (2000) (describing what they consider to be nineteenth century precursors to non-self-executing conditions in Senate resolutions of advice and consent); Louis Henkin, *U.S. Ratification of Human Rights Convention: The Ghost of Senator Bricker*, 89 AM. J. INT’L L. 341, 346-48 (1995) (describing the practice of the Senate of attaching declarations of non-self-execution to resolutions advising and consenting to human rights treaties); *see also infra* Part II.B.2 (describing part of the history of the rise of non-self-execution). For purposes of this Article, I do not closely parse the extent to which this shift happened because non-self-execution was thought to be constitutionally required, as opposed to being a constitutionally permissible option that treaty-makers could elect to use.

79. *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829).

80. *See generally* *Medellin v. Texas*, 552 U.S. 491 (2008). For a few examples of the developing literature on *Medellin* and its meaning, *see generally* David J. Bederman, *Medellin’s New Paradigm for Treaty Interpretation*, 102 AM. J. INT’L L. 529 (2008); Curtis A. Bradley, *Self-Execution and Treaty Duality*, 2008 SUP. CT. REV. 131; Carlos Manuel Vazquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599 (2008); Ernest A. Young, *Treaties as “Part of Our Law,”* 88 TEX. L. REV. 91 (2009).

distinction between non-self-executing treaties and self-executing treaties despite the fact that “the Constitution does not distinguish between the two.”⁸¹

The constitutional developments in these two related areas are important for the constitutional question of Congress’s treaty-implementing power, not merely as a matter of comparison, but also because these developments have had important effects on the treaty-implementing power. If treaties today were self-executing, as the original understanding suggested, then there would be little need for Congress to exercise its treaty-implementing power;⁸² moreover, if treaties could not reach subjects beyond the other enumerated powers of the federal government, then there would be little ground for concern about whether legislation implementing treaties is beyond Congress’s power.

These connections make it particularly important to examine what historical practice suggests about Congress’s treaty-implementing power. In the next Part, I look at such historical practice, considering evidence both from the views of members of Congress (as expressed in speeches and committee reports) and from legislation passed by Congress to implement treaties.

II. THE TREATY-IMPLEMENTING POWER IN CONGRESS FROM THE FRAMING TO *MISSOURI V. HOLLAND*

In the years between the Constitution’s ratification and *Missouri v. Holland*, the relationship between the Necessary and Proper Clause and the treaty power came up frequently in congressional debates. Interestingly, both supporters *and* opponents of a strong treaty power backed the position that the Necessary and Proper Clause authorized Congress to pass legislation implementing treaty obligations, but they relied on this determination in two very different ways. First, starting as early as the 1796 debates over the

81. *Bond v. United States*, 134 S. Ct. 2077, 2099 (2014) (Scalia, J., concurring in the judgment).

82. See Swaine, *supra* note 58, at 1017-18 (noting that the “sea-change” in the rise of treaty non-self-execution has raised the importance of Congress’s treaty-implementing power); Vazquez, *supra* note 58, at 962 (describing it as “bizarre to resort to a close reading of the text of the Necessary and Proper Clause to determine Congress’s power to implement non-self-executing treaties,” given that the text of the Constitution favors self-execution).

Jay Treaty, congressmen who opposed a strong treaty power used the Necessary and Proper Clause to support their claims that treaty obligations should be understood to be non-self-executing,⁸³ at least when they overlapped with Congress's Article I powers, and therefore required affirmative legislation from Congress in order to have effect as domestic law. Second, starting somewhat later, congressmen who backed a strong treaty power relied on the Necessary and Proper Clause as the basis for Congress's power to pass legislation implementing treaty obligations when the power for this legislation otherwise lay beyond Congress's scope, including instances where this legislation appeared to encroach on matters traditionally seen as states' issues.

This Part describes these two very different uses of the Necessary and Proper Clause. The first use has had only a modest effect on constitutional doctrine *per se*, but it helped shape a strong practice of greater reliance on congressional implementation of treaties than suggested by the original constitutional structure. The second use shows that, long before *Neely v. Henkel* and *Missouri v. Holland*, members of Congress were relying on the Necessary and Proper Clause in implementing treaties through legislation that might otherwise have been beyond their power. Both of these uses show strong support in historical practice for the conclusion that Congress possesses the treaty-implementing power. By contrast, I have not discovered any members of Congress in this period who clearly expressed the textual reading of the relationship between the Necessary and Proper Clause and the Treaty Clause made by Professor Rosenkranz and Justice Scalia, and I have seen little that even hints at this approach. To the extent that it was considered, Congress's power to implement treaties was the subject of strong consensus, unlike the more controversial issues of self-execution and the scope of the treaty power. This consensus on Congress's treaty-implementing power is evident in major treatises on treaty-making published in the years leading up to *Missouri v. Holland*.

83. Although the terms "non-self-executing" and "self-executing" did not develop until later in constitutional history, for convenience I use them in describing the views of congressmen where these views roughly correspond to our current use of these terms.

A. Congress's Necessary and Proper Power as a Justification for Treaty Non-Self-Execution

The first discussion in Congress over the relationship between the treaty power and Congress's Article I powers considered their potential overlap. If the President and the Senate made treaties that dealt with matters that fell within Congress's Article I powers, did these treaties need congressional implementation in order to take effect as domestic law? This issue first arose with the Jay Treaty and continued to recur in congressional debates through the nineteenth century. Congressmen who believed that congressional implementation was constitutionally required for treaties that dealt with matters within Congress's Article I powers frequently claimed that the Necessary and Proper Clause supported their position because it gave Congress the power to implement treaties. Although they drew this link in the context of treaties dealing with matters already within Congress's Article I powers, their view turned on the textual conclusion that the Necessary and Proper Clause does in fact authorize Congress to pass legislation implementing treaty obligations.

1. The Jay Treaty Debate

After the 1796 ratification of the Jay Treaty, a highly controversial commercial treaty with Great Britain, its opponents in the House of Representatives initiated a great debate about the relationship between the treaty power and the powers of Congress.⁸⁴ They argued that despite the provision in the Supremacy Clause that treaties are “the supreme law of the land,”⁸⁵ the treaty could not take effect as domestic law without congressional approval because Congress was entrusted with the constitutional power to regulate foreign commerce. In advancing this position, the treaty's opponents primarily emphasized Congress's commercial powers and

84. This debate nominally took place in relation to a resolution requesting negotiating papers. My coverage of this debate is necessarily selective and excludes many issues. One such issue is the question of whether Congress was obligated—as opposed to simply authorized—to implement treaties, an issue that recurs in nineteenth century treaty implementation debates but that I do not further address in this Article.

85. U.S. CONST. art. VI.

other structural considerations. A few of these opponents additionally pointed to the Necessary and Proper Clause as signaling that congressional approval was needed for the treaty's implementation. The treaty's proponents responded that congressional action was not needed to implement the commercial aspects of the treaty because the treaty had already been made and therefore had become the law of the land under the Supremacy Clause. But they did acknowledge that under certain conditions Congress could play a role in relation to treaties.

To several of the treaty's opponents, the Necessary and Proper Clause supported the case in favor of non-self-execution. John Page of Virginia argued:

I cannot conceive that when Congress is authorized to make all laws necessary and proper to carry into effect all the powers granted by the Constitution, the Treaty-making power as well as others ... how it can possibly be supposed that the President and the Senate, without their concurrence, can make regulations of commerce, which may be injurious to the general welfare, ruinous to the commerce of certain, and even the largest, States.⁸⁶

Page understood the Necessary and Proper Clause as giving Congress the power to implement treaties, presumably through means such as commercial laws. In this respect, his approach resembled that of Justices Harlan and Holmes but not that of Professor Rosenkranz and Justice Scalia.⁸⁷ In a further, dubious interpretive move (not adopted by Justices Harlan and Holmes), Page then inferred that commercial treaties could not take effect on their own, but instead required congressional implementation.

Several of his colleagues made similar arguments. William Findley of Pennsylvania observed that although the Necessary and Proper Clause was sometimes thought to reach too broadly, in this case it acted as a "shield" because it "would go far to prove the right of Congress to exercise a formal negative over Treaties of every description, before they become the law of the land."⁸⁸ John Milledge

86. 5 ANNALS OF CONG. 560 (1796).

87. See *supra* Part I.A.

88. 5 ANNALS OF CONG. 590-91 (1796). Findley had been a prominent anti-Federalist in

of Georgia felt that “[t]reaties ought to be bottomed on a law before they can have any binding influence.”⁸⁹ He then read the Necessary and Proper Clause and asked rhetorically: “What is the President and two-thirds of the Senate? The Treaty-making department. Therefore, being a *department*, whatever powers are vested in them by the Constitution cannot be carried into execution but by a law, otherwise the [Necessary and Proper] clause in the Constitution means nothing.”⁹⁰ John Swanwick of Pennsylvania made similar remarks.⁹¹

Proponents of the Jay Treaty generally resisted arguments that congressional implementation was needed for its commercial provisions.⁹² They did not directly respond to the arguments about the Necessary and Proper Clause, nor dispute the claim that it authorized Congress to pass legislation implementing treaties. But, observing that the Constitution did not give the House of Representatives any role in making treaties, they denied that any Congressional action was needed in order to implement the commercial provisions of the treaty. In modern parlance, they viewed these treaty provisions as self-executing. Chauncy Goodrich of Connecticut observed that the word “make” in the Treaty Clause “denotes a full completion of the act to be done ... a perfect ... act.”⁹³ His colleague James Hillhouse insisted that a treaty did not need “any concurrence of th[e] House, or Legislative sanction, to make it the law of the land.”⁹⁴

Pennsylvania during the Constitution’s ratification. See Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 612 (2004).

89. 5 ANNALS OF CONG. 651 (1796).

90. *Id.*

91. *Id.* at 449 (“If, then, Congress have the power to pass laws to carry into execution all powers vested by the Constitution in the Government of the United States ... how is it possible that there can be any authority out of the purview of this general and extensive Legislative control? Is the Treaty-making power not a power vested by the Constitution in the Government of the United States, or in a department or officer thereof?”).

92. More proponents accepted that Congress would need to appropriate any money required for expenditures needed to fulfill treaty obligations. *E.g.*, *id.* at 656 (statement of Rep. Coit); see also *id.* at 661 (statement of Rep. Hillhouse) (“Treaties may sometimes require Legislative aid to carry them into effect; so may laws, and they were constantly in the habit of making laws to carry into effect laws heretofore made.”). Congress ultimately appropriated the funds needed to carry out the obligations in the Jay Treaty. 1 Stat. 459 (1796).

93. 5 ANNALS OF CONG. 720 (1796); see also *id.* at 657 (statement of Rep. Coit).

94. *Id.* at 660-61.

Interestingly, proponents of the Jay Treaty did accept that there might be certain circumstances in which Congress might play a role in treaty formation. In making the case against self-execution, opponents of the Jay Treaty cited the Treaty of Utrecht between various European powers in 1713 as an example of a treaty that required parliamentary approval to implement,⁹⁵ but proponents pointed out that the text of the Treaty of Utrecht had *expressly* provided that the treaty would only take effect if it received such parliamentary approval and was therefore a “conditional” treaty.⁹⁶ This discussion signaled that perhaps a treaty could be made contingent on approval by Congress by the treaty’s express terms. Such a treaty would in essence bind congressional implementation up into the “making” of the treaty because the treaty itself would require that such legislation be passed before the treaty became binding under international law.

The opponents of the Jay Treaty ultimately failed to block its implementation. Congress appropriated the funds needed to fulfill certain treaty obligations, and the rest of the treaty was applied as self-executing in practice, in keeping with the best reading of the Supremacy Clause.⁹⁷ But their opposition significantly influenced

95. *See id.* at 543 (statement of Rep. Holland); *id.* at 607, 634 (statements of Rep. Livingston). This treaty was also cited by Thomas Jefferson in his later manual on parliamentary practice, in which he took the view that the House of Representatives needed to ratify any treaties that touched upon subjects otherwise entrusted to Congress. *See* THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE § 52 (1801).

96. 5 ANNALS OF CONG. 617 (statement of Rep. Tracy); *see also id.* at 752 (statement of Rep. Harper); *id.* at 1253 (statement of Rep. Ames). More precisely, these exchanges refer mainly to a commercial treaty between Great Britain and France that was one component of the broader Treaty of Utrecht. *See id.* at 752, 1253.

97. The House of Representatives passed a resolution stating that:
the House of Representatives do not claim any agency in making Treaties; but,
that when 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.

Id. at 771-72. The only statute passed to implement the treaty, however, was the appropriations statute. 1 Stat. 459 (1796). The commercial provisions of the treaty were treated as the law of the land without further implementing legislation, as were the extradition provisions of the treaty and the provision providing that British subjects who owned land in the United States would not be subject to forfeiture. *See* *Fairfax’s Devisee v. Hunter’s Lessee*, 11 U.S. (7 Cranch) 603, 627 (1812) (holding that the Jay Treaty, “being the supreme law of the land,” protected a British landholder in Virginia from Virginia law aimed at seizing his land); John T. Parry, *Congress, the Supremacy Clause, and the Implementation of Treaties*, 32 *FORDHAM INT’L L.J.* 1209, 1295-03 (2009) (describing President John Adams’s

the practice going forward—so much so that, as the next Section details, congressional implementation of commercial treaties became embedded in nineteenth-century practice.

2. The Necessary and Proper Clause and Treaty Non-Self-Execution in the Nineteenth Century

Over the course of the nineteenth century, the political branches shifted increasingly towards congressional involvement in the implementation of treaties. Two themes relevant to the Necessary and Proper Clause's role in treaty implementation that had emerged in the Jay Treaty debates continued to mark the self-execution debate. First, as in the Jay Treaty debate, opponents of self-execution invoked the Necessary and Proper Clause in arguing that commercial treaties should require congressional implementation, rather than be deemed self-executing.⁹⁸ This argument presumed that the Necessary and Proper Clause did in fact provide Congress with a treaty-implementing power—consistent with the later conclusions of Justices Harlan and Holmes and contrary to the position taken by Professor Rosenkranz and Justice Scalia.⁹⁹ Second, as foreshadowed in the discussion of the Treaty of Utrecht during the Jay Treaty debate, the terms of treaties negotiated by the United States would sometimes expressly require congressional approval for these treaties to take effect—thus effectively giving Congress a role in the “making” of treaties.¹⁰⁰ This demonstrates how the sharp line between treaty making and treaty implementation drawn by Professor Rosenkranz and Justice Scalia is often blurred in practice.

Here, I describe these trends by focusing on two important instances in their application: first, the debate surrounding an 1815 commercial treaty with Great Britain; and second, the debate surrounding an 1875 commercial treaty with Hawaii and its later extension in 1887.

court-sanctioned extradition of Jonathan Robbins to Great Britain under the Jay Treaty despite objections by some members of the House that implementing legislation was required).

98. See *infra* note 103 and accompanying text.

99. See *supra* Part I.A.

100. See *infra* note 110 and accompanying text.

a. The 1815 Commercial Treaty with Great Britain

After the conclusion of the War of 1812, the United States entered into a commercial treaty with Great Britain that further reduced trade barriers between the two countries. Reprising arguments from the Jay Treaty, the House of Representatives debated a bill that they claimed would implement aspects of the treaty, such as its provisions reducing certain duties on imports.¹⁰¹ Some members argued that there was no need for such a bill; after ratification a treaty “is made—it is complete; and no act of the House of Representatives can add anything to its validity.”¹⁰² In response, a few members who felt that congressional implementation was needed invoked the Necessary and Proper Clause as supporting their claim, just as had been done in the Jay Treaty debate. For example, Representative King of Massachusetts argued that the Necessary and Proper Clause “strengthened” the claim that congressional implementation was needed because this clause provided “for carrying into execution the treaty-making power.”¹⁰³ The position of King and other members of the House who favored non-self-execution carried the day in the House and led to the passage of a bill implementing the commercial provisions of the treaty.

The House bill in turn led to a debate in the Senate over whether congressional legislation was necessary to implement the treaty. Some senators agreed with the House majority. Senator Roberts of Pennsylvania claimed that legislative sanction was needed for treaties and invoked the Necessary and Proper Clause as supporting the conclusion that “all power to make laws, for carrying into execution every power vested in the Government, or any department thereof, (most obviously the treaty-making power is here included), is by the Constitution vested in Congress.”¹⁰⁴ A majority of the

101. *See, e.g.*, 29 ANNALS OF CONG. 565 (1816) (statement of Rep. Pinkney).

102. *Id.* at 613 (statement of Rep. Pickering); *see also id.* at 641 (statement of Rep. Hopkinson); *id.* at 565-70 (statement of Rep. Pinkney). Richard Stanford of North Carolina argued in favor of self-execution except “where the treaty itself should stipulate for some legislative provision in fulfillment of its views,” but noted that there was no such need for legislation here. *Id.* at 609.

103. *Id.* at 538-39; *cf. id.* at 550-51 (statement of Rep. Easton) (citing the Necessary and Proper Clause in arguing that for a treaty dealing with subjects within Congress’s Article I powers to be made, it must receive congressional confirmation).

104. *Id.* at 65-66.

Senate nonetheless resisted the House bill, considering that the treaty was self-executing, although it would be helpful to have a declaratory statute specifying which prior laws were repealed in light of the treaty.¹⁰⁵ The matter went to a conference.¹⁰⁶ In the end, the sides agreed that there would be some instances where treaties were self-executing and others where they required legislation for execution, although they did not resolve whether this was one of those instances.¹⁰⁷ Instead, they passed a bill which the House members of the conference considered amounted to implementing legislation and the Senate members viewed merely as declaratory.¹⁰⁸ Although this resolution was inconclusive, it was still a step forward for supporters of non-self-execution relative to 1796, when the Jay Treaty's commercial provisions had been treated as the law of the land without even any arguable implementing legislation.¹⁰⁹

b. The 1875 Commercial Treaty with Hawaii and Its Extension

An 1875 commercial treaty with Hawaii towards the end of the nineteenth century exemplifies the growing role of the House in treaty implementation. This treaty expressly provided that it would not take effect “until a law to carry it into operation shall have been passed by the Congress of the United States of America.”¹¹⁰ In other words, this treaty brought Congress expressly into the treaty-making process by conditioning its entry into force on congressional implementation—just as the Treaty of Utrecht had been conditioned on parliamentary approval. When, in 1887, the Senate advised and consented to a new treaty with Hawaii that extended the terms of this prior treaty *without* including a provision requiring congressional implementation, members of the House signaled their severe displeasure.¹¹¹ They were led by John Randolph Tucker, a member

105. See 2 ASHER C. HINDS, HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES 977 (1907).

106. See *id.*

107. See *id.*

108. See *id.* at 977-79.

109. See *supra* note 97 and accompanying text.

110. Convention between the United States of America and His Majesty the King of the Hawaiian Islands, Commercial Reciprocity, U.S.-Haw., art. V, June 3, 1875, 19 Stat. 625.

111. See 4 CONG. REC. 3031-32 (1876) (statement of Rep. Tucker).

of a prominent Virginia family whose constitutional interpretations tended to favor states' rights over nationalism.¹¹²

In March 1887, Tucker produced a House Report that contained a narrow constitutional understanding of the treaty power. This report took a restrictive view of the scope of the Treaty Clause (claiming that the Tenth Amendment limited its reach) and of treaty self-execution (claiming that treaties that dealt with matters within Congress's Article I powers required congressional implementation).¹¹³

Yet Tucker had no doubt that the Necessary and Proper Clause authorized congressional legislation implementing treaties.¹¹⁴ Indeed, like his predecessors in the Jay Treaty debate and in the 1815 commercial treaty mentioned above, he went even further and concluded that the Necessary and Proper Clause strongly supported the case against self-execution:

This clause is most pertinent to this discussion....

This clause declares that "Congress shall have power to pass all laws necessary and proper for carrying into execution all powers vested by this Constitution in the Government of the United States or in any Department or officer thereof."

This language makes it clear that while the *executory* agreement is in the treaty-making power, the power of *execution* is vested in Congress.... The treaty is thus made to depend for its consummate obligation on the action of Congress, not of constraint, but of independent will; and therefore no such treaty can bind the country's faith until the power which makes the executory stipulations of a treaty obtains concurrence from the power which alone can carry the agreement into execution.¹¹⁵

112. Tucker was the grandson of St. George Tucker, an early constitutional commentator with a strong states' rights slant, and the father of Henry St. George Tucker. *See infra* note 174 and accompanying text. He had opposed the original Hawaii treaty. *See* 4 CONG. REC. 3031-32 (1876) (statement of Rep. Tucker) (arguing, among other things, that the Necessary and Proper Clause entrusted the treaty's implementation to Congress and that Congress should decline to implement the treaty).

113. H.R. Rep. No. 49-4177, at 2, 5 (1887).

114. *See id.* at 7.

115. *Id.* Similar language can be found in H.R. Rep. No. 48-2680, at 6-7 (also written by Tucker).

Despite Tucker's objections, the extension came into effect without further implementing legislation.¹¹⁶ His views, however, would be recognized for decades afterwards as "the best representative of the school which would enforce limitations upon [the treaty-making] power."¹¹⁷

As these examples reveal, members of Congress who were wary of the treaty power used the Necessary and Proper Clause to claim that treaties require congressional implementation in order to become the law of the land. These debates generally took place when overlap occurred between treaties and Congress's Article I powers, especially its commercial powers. Accordingly, these members of Congress relied on the Necessary and Proper Clause not as the basis for the exercise of powers that Congress did not already possess, but rather as a shield against treaty self-execution when Congress already had power over the subject matter. But the textual interpretation made here cannot be readily limited to the context of concurrent powers. Opponents of self-execution clearly interpreted the Necessary and Proper Clause to apply to legislation passed to implement treaties, as opposed to legislation passed simply to facilitate the negotiation of treaties. As a matter of logic, this textual interpretation should also apply to the implementation of treaties when Congress has no basis for legislating other than its treaty-implementing power. There is no textual basis for interpreting the Necessary and Proper Clause to authorize treaty implementation only for treaties dealing with subjects otherwise within Congress's powers. This is especially true as the Necessary and Proper Clause itself makes expressly clear that it applies not only to the "foregoing" Article I powers of Congress, but also to "all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."¹¹⁸

These examples are also significant because they relate to the broader historical practice of having some treaties be non-self-executing, which continues to this day. Efforts like those of the congressmen discussed above to make non-self-execution doctrinally

116. See UNITED STATES TARIFF COMMISSION, RECIPROCITY AND COMMERCIAL TREATIES 107-20 (1919) (discussing the original treaty, its implementing legislation, and the extension at length).

117. 1 BUTLER, *supra* note 78, at 413-14.

118. U.S. CONST. art. I, § 8, cl. 18.

required has for the most part proved unsuccessful: non-self-execution is now deemed to be constitutionally required only for a few particular subjects at most.¹¹⁹ Yet non-self-execution is not uncommon in the practice of the political branches. The Senate today sometimes signals an understanding that particular treaties are non-self-executing;¹²⁰ and major trade agreements are now done in ways that bypass the Treaty Clause process entirely.¹²¹ Indeed, commentators who defend the modern use of resolutions of non-self-execution in human rights treaties have cited requirements of congressional approval, like the one written into the 1875 commercial treaty with Hawaii, as constitutional precursors to these resolutions.¹²² The story of the rise of non-self-execution in the

119. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111 cmt. i (1987) (concluding that an appropriation of money requires congressional implementation; that it is “commonly assumed” that a treaty, standing alone, cannot bring the United States into a war; that “it has been assumed” that penal provisions in a treaty require implementing legislation; and that “[i]t has also been suggested” that revenue-raising portions of a treaty require implementing legislation). I think the evidence is uncertain on at least some of these points, but some commentators understand the constitutional need for congressional implementation on these issues to be clear. See, e.g., Young, *supra* note 80, at 121 (noting that “commentators agree” that congressional legislation is required for appropriations in relation to treaties and that “[m]ost likewise concede” this with regard to penal provisions). Professors Bill Dodge and Sarah Cleveland have recently argued that independent of the Necessary and Proper Clause, Congress has the power to pass legislation providing criminal penalties for treaty violations under its define and punish power. Sarah H. Cleveland & William S. Dodge, *Defining and Punishing Offenses Under Treaties*, 124 YALE L.J. (forthcoming).

120. See Henkin, *supra* note 78, at 346-48 (discussing this practice in the context of human rights treaties). For few recent examples of treaties in other areas of law, see, for example, 152 CONG. REC. 18,397-98 (2006) (including a provision that most articles of the U.N. Convention Against Corruption are non-self-executing in advising and consenting to this treaty); 146 CONG. REC. 18,766-67 (2000) (including a non-self-execution provision in the resolution advising and consenting to the Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption); *id.* (not including a non-self-executing provision in advising and consenting to the Inter-American Convention for the Protection and Conservation of Sea Turtles but nonetheless stating that “existing federal legislation provides sufficient legislative authority to implement United States obligations under the Convention ... [and a]ccordingly no new legislation is necessary ... to implement the Convention”). The trend towards non-self-execution has received a further boost from the Supreme Court’s willingness to interpret treaty obligations as non-self-executing. See *Medellin v. Texas*, 552 U.S. 491, 505, 518-20 (2008).

121. See JEANNE J. GRIMMETT, CONG. RESEARCH SERV., 97-896, WHY CERTAIN TRADE AGREEMENTS ARE APPROVED AS CONGRESSIONAL-EXECUTIVE AGREEMENTS RATHER THAN AS TREATIES 1 (2012) (noting that NAFTA, the WTO Agreement, and bilateral trade agreements are approved through congressional-executive agreements).

122. Bradley & Goldsmith, *supra* note 78, at 407-08 & n.42.

practice of the political branches is a longer one than this Article can fully tell, but as shown above, arguments based on the Necessary and Proper Clause played a role in encouraging this rise.

B. Legislation Otherwise Beyond Congress's Powers When Necessary and Proper to Implement Treaty Obligations

The nineteenth century also saw invocations of the Necessary and Proper Clause as the basis for passing legislation that might otherwise be beyond Congress's power when this legislation would implement treaty obligations.¹²³ As in the self-execution debate, members of Congress understood the Necessary and Proper Clause to give Congress the power to implement treaties.¹²⁴ But unlike in the self-execution debate, in which congressmen had invoked the Necessary and Proper Clause to try to rein in the treaty power through the doctrine of non-self-execution, congressmen who invoked the Necessary and Proper Clause in this debate were supporters of an expansive national government. They cited the Necessary and Proper Clause in arguing for legislation related to territorial governance and trademark, and the Clause likely formed the basis for congressional legislation in other areas as well. Their opponents did not dispute that the Necessary and Proper Clause authorized the implementation of treaties, although they sometimes questioned the extent to which proposed congressional legislation was actually necessary and proper for implementing treaties.

1. Territorial Governance

Territorial expansion and governance proved an early trigger for constitutional debate over the scope of the treaty power and for acknowledgement of Congress's treaty-implementing power. The principle that the United States could acquire territory by treaty—even if no other constitutional power authorized the peaceable acquisition of territory¹²⁵—was established by the

123. For discussion of the extensive back-and-forth on the scope of the treaty power that went on during this period in the courts, political branches, and academic commentary, see Bradley, *The Treaty Power I*, *supra* note 27, at 418-22; Golove, *supra* note 27, at 1149-255.

124. Golove, *supra* note 27, at 1099.

125. Supporters of territorial expansion argued that the United States had the power to

Louisiana Purchase, as Thomas Jefferson's doubts over the constitutionality of such an acquisition gave way to the practical incentives in favor of it. But such acquisitions raised questions about the governance of new territories and especially where the power lay to determine the status of slavery.

The Necessary and Proper Clause came up increasingly during these debates as a source of treaty-implementing power that justified legislation regulating the territories. At the time of the Louisiana Purchase, it was referenced only as an argument against self-execution,¹²⁶ but in the debates related to the Oregon Territory,

acquire territory under the treaty making power and, when the United States was at war, under the war powers of Article I. *E.g.*, 13 ANNALS OF CONG. 49-50 (1803) (statement of Rep. Taylor); *id.* at 481-82 (statement of Rep. Mitchell). They also sometimes pointed to background principles of sovereignty under international law as supporting these arguments or as an independent source for constitutional authority to acquire territory. *E.g.*, *id.* at 447 (statement of Rep. Elliot). Occasionally, other constitutional clauses were invoked as well. *E.g.*, *id.* at 473-74 (statement of Rep. Rodney) (claiming that Congress's power to purchase territory from the states implied a power to purchase territory from elsewhere).

126. 13 ANNALS OF CONG. 473-74 (1803) (statement of Rep. Rodney) (asserting, during the debates over the Louisiana Purchase, that "[i]t is certainly not the right of the President and Senate to make a cessation [of territory] conclusively binding; when it shall embrace powers within the pale of those delegated to this House, it will require our sanction. Have we not also vested in us every power necessary for carrying such a treaty into effect, in the words of the Constitution which gives Congress the authority to 'make all laws which shall be necessary and proper for carrying into execution' [the powers of the federal government]?").

Professor Rosenkranz reads the remarks of Senator Nicholas of Virginia as supporting his reading of the Necessary and Proper Clause. Rosenkranz, *supra* note 2, at 1926-27. Senator Nicholas observed that the treaty with France states that "the inhabitants [of the Louisiana 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." *See* 13 ANNALS OF CONG. 71 (1803) (statement of Sen. Nicholas) (citations omitted) (quoting Treaty Between the United States and the French Republic, U.S.-Fr., art. III, Apr. 30, 1803, 8 Stat. 200). He stated that if this provision "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 it will not be asserted by any rational man that the territory is incorporated as a State by the treaty itself." *Id.* at 70-71. He then went on to observe that the only arguable congressional source of power to make a new state is the provision in the Constitution giving Congress the power to admit new states to the Union. *Id.* at 71. Senator Nicholas does not mention the Necessary and Proper Clause, and therefore, there is no direct support here for Professor Rosenkranz's argument. Professor Rosenkranz infers such support because, in his view, if Senator Nicholas thought the Necessary and Proper Clause could implement treaty obligations then he would have mentioned it as a source of congressional power. In my view, however, Senator Nicholas's comments seem premised on a position regarding the scope of the treaty power—namely, that it would be unconstitutional for a treaty to create a state. Given this, Senator Nicholas could well have omitted mention of the Necessary and Proper Clause because he did not think it could be used

the Compromise of 1850, and the Kansas-Nebraska Act, several members of Congress cited it as a source of treaty-implementing authority for actions that might otherwise lie outside of Congress's power.¹²⁷ Senator Badger of North Carolina, for example, took the position that:

It seems, therefore, to follow necessarily, as well from the express grant of power as from the practice of the Government, that the President and Senate, by treaty; may acquire territory for the United States. When that acquisition is made, by the exercise of the power thus granted, the Constitution confers expressly upon Congress the power to legislate for the government of the territory so acquired. For it confers on Congress the power "to make all laws necessary and proper for carrying into execution" the "powers vested by this Constitution in the Government of the United States, or in any department or officer thereof." To my understanding it is therefore plain, that, by the treaty-making power, we have express authority to acquire territory; and, by the provision I have cited, Congress has express authority to legislate for it when acquired.¹²⁸

to implement obligations that would, if done through self-executing treaties, have been "unconstitutional exercise[s] of the treaty-making power." *Id.* at 71.

127. I draw here on materials from the appendix to the *Congressional Globe*, as well as from the *Congressional Globe* itself. Prior to 1851, the *Congressional Globe* did not have verbatim reporting to the same extent as later, see generally Richard J. McKinney, *Congressional Globe*, L. LIB. SOC'Y OF WASHINGTON D.C. (Oct. 2011), <http://www.llsdc.org/congressional-record-overview#G> [<http://perma.cc/V379-WFZD>], and so is especially helpful to draw from the speeches submitted by the members. It is not clear whether these speeches in the appendix were delivered in full on the floor, but these speeches presumably reflect the views of the congressmen who submitted them.

128. CONG. GLOBE APP., 30th Cong., 1st Sess. 1174 (1848) (Oregon Territory debate). To the dismay of other Southerners, Senator Badger concluded that Congress had the power to determine whether the territory should be slave or free. See *id.* For similar remarks on the Necessary and Proper Clause, see also CONG. GLOBE, 33rd Cong., 1st Sess. 688 (1854) (statement of Sen. Badger) (observing during the Kansas-Nebraska Act debates that the Constitution provides "Congress [with] the power to pass all laws necessary to carry into execution, to complete, to give full operation and effect to the power of acquiring territory by treaty"); CONG. GLOBE APP., 33rd Cong., 1st Sess. 533 (1854) (statement of Rep. Phillips) (observing during the Kansas-Nebraska Act debates that "[u]nder [the] provisions of the Constitution conferring the war and treaty making power, I believe that territory may be acquired. The right to govern it is an incident provided for in the clause authorizing 'all laws necessary and proper'"); CONG. GLOBE APP., 31st Cong., 1st Sess. 562-63 (1850) (statement of Rep. Clark) (observing during the Compromise of 1850 debates that "[t]he power to make treaties implies the power to buy territory.... Sovereignty and ownership combined, [then] give the power to exclude or admit inhabitants, and to govern the territory acquired. Besides,

Congressmen who took the other side of the issue—who argued that Congress lacked a comprehensive power of legislation over the territories and therefore that the issue should be left to popular sovereignty—did not dispute that the Necessary and Proper Clause *could* be used for implementing treaties. Rather, they denied that legislation governing the territories was in fact necessary and proper to implement the treaties at issue because in their view, the treaties were already implemented. By way of example, Senator Cass of Michigan cited the Necessary and Proper Clause and then argued:

To bring [legislation governing the territories] within this [Necessary and Proper C]lause, it must be assumed that acquisition cannot be complete without political legislation; and that the latter is not merely an auxiliary by which the territory acquired may be better used or improved for every proper purpose, after being attained, but that it is “necessary and proper” to the attainment itself. Certain it is, that the moment a treaty of cessation is ratified the act of acquisition is complete, and the territory becomes *ipso facto* a part of the United States. Legislation cannot change its tenure, nor make it more nor less than the treaty has made it. The treaty-making power has performed its function, and accomplished the purpose for which it was destined. The disposition of the territory acquired is quite another question, and must be determined by other provisions of the Constitution.¹²⁹

Senator Cass’s remarks highlight once again the connection between the question of treaty self-execution and the Necessary and Proper Clause. In essence, he suggests that legislation is never

Congress has power to make all laws necessary and proper to carry into execution any powers vested in the Government”); *cf.* Message of President Polk to the House of Representatives regarding the Treaty of Guadalupe Hidalgo, CONG. GLOBE, 30th Cong., 2d Sess. 486 (1849) (noting that after the ratification of this treaty, by which Mexico ceded territory to the United States, he had “communicated to Congress the ratified treaty ... to the end that Congress might adopt the legislation necessary and proper to carry the treaty into effect”).

129. CONG. GLOBE APP., 31st Cong., 1st Sess. 63 (1850) (statement of Rep. Cass); *see also* CONG. GLOBE APP., 33d Cong., 1st Sess. 596 (statement of Rep. Taylor) (acknowledging that the treaty power authorizes the United States to acquire territory and further acknowledging that the Necessary and Proper Clause can be used to “[carry] into execution the power to acquire territory,” but arguing that detailed governance by Congress of the territories is not necessary and proper to the acquisition and holding of the territories).

needed to execute a self-executing provision of a treaty—here, the provision granting territory to the United States—because this provision has already been executed. His remarks imply, however, that the Necessary and Proper Clause would be appropriate for use when treaty ratification does not immediately trigger implementation of the treaty's terms.

As shown here, during the debates over territorial governance, those members of Congress who discussed the Necessary and Proper Clause seemed to accept that it could be used as a basis for legislation implementing treaties that lacked another basis under Article I, although they debated what the treaties made it necessary and proper to implement. It is hard to tell, however, how important this argument about the Necessary and Proper Clause was to the ultimate passage of legislation on the issue. Supporters of congressional governance of the territories had other strong constitutional arguments on which to ground their legislation¹³⁰ and could well have relied on these arguments rather than on the Necessary and Proper Clause.

2. Trademark

Although the power to implement treaties under the Necessary and Proper Clause was only one of several possible bases for Congress to enact legislation overseeing territorial governance, the Clause was accepted as the central justification for trademark legislation that occurred later in the century. Confronted with a Supreme Court decision that suggested that trademark legislation lay beyond its Article I powers, Congress responded by relying on its necessary and proper power to implement treaties in passing trademark legislation in 1881.

By 1870, trademark protections had developed in the United States in the common law, in a handful of state statutes, and in recent treaties with Russia, Belgium, and France that provided

130. This included Congress's power to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States," U.S. CONST. art. IV, § 3, although some argued that this power only extended to preexisting U.S. territories. *Compare* *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 436-38 (1856) (reading this clause to apply only to preexisting U.S. territories), *with* *Sere v. Pitot*, 10 U.S. (6 Cranch) 332, 336-37 (1810) (finding that this clause gave Congress the power to govern the acquired territories).

reciprocal protections for citizens of one country doing business in the other country.¹³¹ In 1870 and 1876, Congress passed legislation that sought, among other things, to provide trademark protection for U.S. citizens.¹³² In November 1879, however, the Supreme Court struck down this legislation as outside the constitutional powers of Congress.¹³³ It reasoned that trademark was a property right ordinarily to be protected under state law; that the Intellectual Property Clause of the Constitution did not extend to trademarks; and that the Commerce Clauses might not cover trademark and, even if they did, the legislation swept far more broadly than they would justify.¹³⁴ The Court emphasized, however, that it “wish[ed] to be understood as leaving untouched the whole question of the treaty-making power over trade-marks, and of the duty of Congress to pass any laws necessary to carry treaties into effect.”¹³⁵

Congress’s reaction to this decision signaled some divide over the question of its treaty-implementing power. Spurred by a dismayed business community, within a month of the decision Representative McCoid of Iowa introduced and sped through his Committee on Manufactures a proposed constitutional amendment providing that “Congress, for promotion of trade and manufacture, and to carry into effect international treaties, shall have power to grant, protect, and regulate the exclusive right to adopt and use trade-marks.”¹³⁶ His committee report urged Congress to pass this amendment by

131. See Zvi S. Rosen, *In Search of the Trade-Mark Cases: The Nascent Treaty Power and the Turbulent Origins of Federal Trademark Law*, 83 ST. JOHN’S L. REV. 827, 831-36 (2009).

132. An Act to Punish the Counterfeiting of Trade-mark Goods and the Sale or Dealing in of Counterfeit Trade-mark Goods, ch. 274, 19 Stat. 141 (1876) (criminalizing the fraudulent use of trademarks); An Act to Revise, Consolidate, and Amend the Statutes Relating to Patents and Copyrights, ch. 230, 16 Stat. 198, 210-12 (1870) (providing for the recording of trademarks by U.S. citizens and civil remedies for trademark violations). These Acts also served to implement U.S. trademark treaties, to the extent such implementation was needed, because they applied to the trademarks of foreign citizens where the United States had a reciprocal trademark treaty with these citizens’ country of nationality. For a discussion of the legislative history of these Acts (including the absence of consideration of the constitutional issues), see Rosen, *supra* note 131, at 839-46.

133. See *In re Trademark Cases*, 100 U.S. 82, 93-99 (1879).

134. *Id.*

135. *Id.* at 99. Treaty implementation questions were arguably before the Court in at least one of the consolidated cases, see Rosen, *supra* note 131, at 857-72, but the Court chose not to address them, see *id.* at 872.

136. H.R. REP. NO. 46-3, at 1 (2d Sess. 1879).

the Christmas holiday—then less than two weeks away.¹³⁷ While this proposed amendment swept more broadly than treaty implementation, its inclusion of the phrase “carry into effect international treaties” could be read to suggest that McCoid doubted Congress had a treaty-implementing power. This reading offers mild support for Professor Rosenkranz’s approach, but other remarks by McCoid suggest that his concern was not that Congress lacked a treaty-implementing power, but rather that he did not think the terms of the relevant treaties authorized Congress to provide trademark protections. Specifically, McCoid asserted that the treaties provided only that the trademarks of foreigners be protected *to the same extent* as the trademarks of citizens, and concluded that because the treaties did not expressly authorize affirmative protections for the trademarks of U.S. citizens, “the power to enforce these treaties would not give us the power to protect these trade-marks.”¹³⁸

But if McCoid’s proposed amendment offers a touch of support for Professor Rosenkranz’s views, other reactions demonstrate the constitutional case for the treaty-implementing power, as well as the impracticality of relying on constitutional amendments for treaty implementation and the risks in doing so to U.S. policy interests. McCoid was quickly confronted with the reality that it was “perfectly sure” that there would be no swift supermajority in the House favoring a constitutional amendment,¹³⁹ let alone much hope for the other hurdles that a constitutional amendment must surmount. Meanwhile, members of the U.S. and international business community were dismayed by the absence of trademark protections.¹⁴⁰ Indeed, the response of foreign nations suggests that it is far from “speculative” that the presence or absence of Congress’s treaty-implementing power will affect the ease with which the United States can enter into treaties.¹⁴¹ As Zvi Rosen observes, “Not a single nation entered into a trademark treaty with the U.S. in 1879 or 1880.”¹⁴² It was not until the passage of the congressional legislation discussed below that nations were sufficiently

137. *Id.* at 3.

138. 10 CONG. REC. 147 (1880).

139. *Id.* at 148 (statement of Rep. Cox).

140. See Rosen, *supra* note 131, at 874, 879-80.

141. See Rosenkranz, *supra* note 2, at 1889-90.

142. Rosen, *supra* note 131, at 889.

“reassure[d]” to conclude new trademark treaties with the United States.¹⁴³

Not long after McCoid’s proposed amendment, congressmen began to consider whether the treaty-implementing power might justify at least limited congressional legislation on trademark.¹⁴⁴ The House referred McCoid’s proposed amendment—as well as other proposals for trademark legislation—to the Judiciary Committee, where Representative Hammond of Georgia took the lead in reviewing the issue.¹⁴⁵ Ultimately, the Committee on the Judiciary recommended against a constitutional amendment, but proposed legislation based on Congress’s treaty-implementing power.¹⁴⁶ The Committee concluded that Congress did not have the power to regulate trademarks under any of the Commerce Clauses because, in its view, trademarks were “not necessary to commerce.”¹⁴⁷ Nonetheless, it concluded that Congress could pass a bill providing protections for trademarks used in foreign commerce and commerce with the Indian tribes—though not interstate commerce—based on the treaty-making power.¹⁴⁸ The Committee Report cited the Treaty Clause and explained briefly that:

[If treaties are] complete in themselves, they are self-operative. If they need legislative aid, Congress can give it under its power “to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, *and all other powers* vested by the Constitution in the Government of the United States, *or in any department or officer thereof.*”¹⁴⁹

143. *Id.* at 888-89 (noting that four European nations signed treaties with the United States within two years of the passage of the 1881 Act).

144. An editorial in the *New York Tribune* also considered this constitutional question, asserting without citation that “it [would] be a new discovery in constitutional law that the President and Senate can, by making a treaty, enlarge the power of Congress to legislate affecting [domestic] affairs.” Editorial, *Trade Trademark Treaties*, N.Y. TRIB., Dec. 8, 1879, at 4. It went on to suggest that “any legislation which rests on treaties must run within very narrow limits.” *Id.*

145. H.R. REP. 46-561, at 1 (1880).

146. *Id.* at 5-6.

147. *Id.* at 5.

148. *Id.* at 6. The inclusion of commerce with Indian tribes is puzzling because after 1871, the United States no longer used Article II treaties in dealing with the Indian tribes. See Indian Appropriation Act, ch. 120, 16 Stat. 544, 566 (1871) (codified at 25 U.S.C. § 71 (2012)).

149. H.R. REP. NO. 46-561, at 6.

Hammond repeated these positions on the House floor, citing the Necessary and Proper Clause and stating that “Congress, though powerless [to legislate as to foreign trademarks] under the commerce clause, may so legislate in the aid of the treaty-making power.”¹⁵⁰

Among other issues, Hammond considered the extent to which trademark legislation was in fact necessary and proper for the trademark treaties. For the most part, the existing trademark treaties simply provided for reciprocity: the United States committed to protecting the trademarks of citizens of treaty partners to the same extent as the trademarks of its own citizens were protected.¹⁵¹ But the trademark treaty with Belgium had prohibited the counterfeiting in each country of the other country’s trademarks and called for damages as a civil remedy.¹⁵² The bill proposed by Hammond provided for the registration of trademarks used in foreign or Indian commerce for those domiciled in countries or tribes “which by treaty, convention or law” afforded reciprocal protections to U.S. citizens.¹⁵³ It also spelled out some particulars about the registration process and provided a remedy against counterfeited trademarks.¹⁵⁴ So far, the provisions of the bill closely tracked what the Belgium treaty required, and Hammond opposed the inclusion of provisions criminalizing counterfeiting, which he observed were demanded by “[n]o treaty obligation.”¹⁵⁵ Yet in other ways, the bill went noticeably beyond what was narrowly necessary to implement treaty obligations. For one thing, its prohibition on counterfeiting applied not only to the Belgium treaty, but also to all other trademark

150. 10 CONG. REC. 2703 (1880). Hammond further noted the connection between non-self-execution and congressional implementation, citing *Foster v. Neilson* for the proposition that some treaties are non-self-executing and observing that “all that is desirable [in terms of domestic implementation] may be done by the treaty-making power alone, or by it and Congress together.” *Id.*

151. *See id.* at 2703-04. Hammond noted that these provisions were already largely being implemented as self-executing. *See id.* at 2704.

152. *See id.* at 2703. An earlier version of a trademark treaty with Russia had similar provisions, although later amendments may have bound this up in the scope of protections afforded to each country’s own citizens. *See id.*

153. *Id.* at 2701.

154. *See id.* This section also provided for registration for “owners ... domiciled in the United States.” *See id.*

155. *See id.* at 2704.

treaties.¹⁵⁶ For another, it prohibited fraudulent obtainment of trademarks, although no treaty required this provision.¹⁵⁷ Finally, it allowed U.S. citizens to register their trademarks for purposes of obtaining foreign trademark registration—a provision not required by treaty obligations, although helpful in enabling U.S. citizens to gain the benefits of existing treaties.¹⁵⁸

Hammond's approach prevailed. With little further discussion, the House passed his proposed bill, and the Senate followed suit in the following session, with the bill becoming law in 1881.¹⁵⁹ Although the statute itself is silent on the constitutional source of its authority, this legislative history makes clear that the sole justification offered for it by its chief proponent was Congress's treaty-implementing power.

3. *Other*

Territorial governance and trademark are the areas in which, based on my review, nineteenth-century members of Congress most explicitly discussed the issue of Congress's power to implement treaties under the Necessary and Proper Clause in the absence of any other constitutional basis for the legislation at issue. But other legislation may be attributed to Congress's treaty-implementing power as well—legislation that Congress passed without much consideration of its constitutionality, but which seems likely based solely on Congress's treaty-implementing power.¹⁶⁰

156. *See id.* at 2701 (showing that the registration provisions of the bill provided for trademark registration by domiciles of any country that allowed for U.S. citizens to register trademarks; and the counterfeiting protection provisions were available to anyone with a registered trademark).

157. *See id.*

158. *See id.*

159. *See Rosen, supra* note 131, at 887-88; *see also* An Act to Authorize the Registration of Trade-Marks and to Protect the Same, ch. 138, 21 Stat. 502 (1881), *repealed by* 60 Stat. 444 (1946).

160. There are also instances of unpassed legislative efforts that were apparently based solely on Congress's treaty-implementing power, although these efforts were not always explained in these terms. During the late nineteenth and early twentieth century, for example, Congress considered—but never passed—legislation giving federal courts the power to try crimes against aliens protected by treaty rights. *See, e.g.*, S. REP. NO. 56-392 (1900). Proponents of this legislation did not always expressly invoke the Necessary and Proper Clause. *E.g., id.* at 4 (simply stating that if “a treaty stipulation be a part of the supreme law of the land, it is not only the right, but it is the duty of Congress to provide for its enforcement

Extradition legislation is one example. Although extradition provisions in treaties were taken early on to be self-executing,¹⁶¹ in 1848, Congress passed a statute that authorized the fulfillment of extradition treaty obligations by the judicial and executive branches.¹⁶² The *Congressional Globe* reveals no discussion of the constitutional basis of this statute although, interestingly, one of the Act's provisions was that it "shall continue in force during the existence of any treaty of extradition with any foreign government and no longer."¹⁶³ An opinion by the U.S. Attorney General in 1853 on the related issue of deserting seamen, however, emphasized that the extradition power "is not founded upon express provisions of the Constitution," but is instead "derived from the treaty-making power," giving rise to treaty provisions "to carry which into effect is the object of the appropriate acts of Congress."¹⁶⁴ He did not specify the power by which Congress derived the authority to carry into

and for the enjoyment of it by those who are entitled thereto"). A committee of the American Bar Association suggested in 1892 that principles of enumerated powers and federalism would make any treaty that provided for such criminal jurisdiction "null and void," and that the proposed legislation was similarly constitutionally problematic. 15 ANNUAL REPORT OF THE AMERICAN BAR ASSOCIATION 395, 419 (1892). *But see* JOHN MARBRY MATHEWS, THE CONDUCT OF AMERICAN FOREIGN RELATIONS 188 n.3 (1922) (noting that this report was never adopted by the ABA and that at least one committee member later changed his mind). Responding to this report, President Taft devoted considerable attention in one of his books to explaining why the scope of the treaty power reached the protection of aliens despite principles of federalism. WILLIAM HOWARD TAFT, THE UNITED STATES AND PEACE 40-80 (1914). He further explained that the Necessary and Proper Clause authorized Congress to pass legislation making offenses against aliens protected by treaties into federal crimes. *Id.* at 80-81. "It needs no straining of logic, but only the use of the reasoning pursued by the Supreme Court in hundreds of similar cases [sic], to deduce the power of Congress under that [Necessary and Proper] clause to enact legislation to carry out and execute such an agreement by the United States to protect aliens from lawless violence." *Id.* For additional discussion, see Brief for Amici Curiae Professors of International Law and Legal History in Support of Respondent, *Bond v. United States*, 134 S. Ct. 2077 (2014) (No. 12-158), 2013 WL 4507956, at *12-14.

161. *See supra* note 97.

162. An Act for Giving Effect to Certain Treaty Stipulations Between This and Foreign Governments, for the Apprehension and Delivering Up of Certain Offenders, ch. 167, 9 Stat. 302 (1848) (amended at 62 Stat. 824) (codified as amended at 18 U.S.C. § 3181 (2012)). This legislation followed a decision by one court that an extradition treaty with France was non-self-executing. *See* SAMUEL THAYER SPEAR, THE LAW OF EXTRADITION 59-61 (3d ed. 1879).

163. 9 Stat. at 303; *see also* 18 U.S.C. § 3181 (2012) (codifying the current version of this provision).

164. Caleb Cushing, *Surrender of Deserting Seamen* (October 14, 1853), in 6 OP. A.G. 148, 155 (1853-54). The statute at issue in this case was an 1829 statute providing for the enforcement of treaty stipulations regarding the restoration of deserting seamen. *Id.* at 148.

effect extradition treaties, but given his conclusion that the extradition power derives only from the treaty power, it is hard to think of a source other than the Necessary and Proper Clause. Samuel Thayer Spear's 1879 treatise on extradition made the connection more explicitly, asserting that Congress's "power to pass such a law" rested on Congress's power under the Necessary and Proper Clause to implement treaties.¹⁶⁵ Additionally, as noted earlier, *Neely v. Henkel* considered congressional legislation authorizing extradition and upheld it in that instance solely on the basis of Congress's treaty-implementing power.¹⁶⁶

Several other types of legislation in the nineteenth century were likely based on Congress's treaty-implementing power. Examples include legislation relating to consular courts abroad¹⁶⁷ and legislation addressing claims settlement.¹⁶⁸ These instances do not reveal clear congressional intent to exercise the treaty-implementing power, but they do provide further support for its existence in practice.

165. SPEAR, *supra* note 162, at 7-8; *see also id.* at 37 (making a similar point).

166. 180 U.S. 109, 116, 121 (1901).

167. Congress's treaty-implementing power offered a justification for legislation regulating extraterritorial conduct, as Congress's ordinary powers were not understood to reach extraterritorially, although I have not come across express discussion of the Necessary and Proper Clause in the debates. *Compare* 15 CONG. REC. 1646 (1884) (statement of Sen. Jones of Florida) (arguing that even though the treaty-making power reaches consular courts, Congress has no constitutional basis for passing implementing legislation, but referring only to the "seventeen distinct grants of authority in the enumerated powers" and making no references to the eighteenth Necessary and Proper Clause), *with id.* at 1647 (statement of Sen. Garland) ("[W]hen the [consular] treaty is made Congress can pass a law to enforce it. That is all there is of it. It is a clear case. It is within the jurisdiction of Congress under the treaty-making power."). *See also In re Ross*, 140 U.S. 453, 463-64 (1891). This legislation failed to provide the protections of the Bill of Rights to U.S. civilians tried in consular courts, *see generally id.*, but the Supreme Court has since made clear that some Bill of Rights protections reach extraterritorially. *Reid v. Covert*, 354 U.S. 1, 5-6, 15-18 (1956) (plurality opinion).

168. *See* 2 BUTLER, *supra* note 78, at 286-313. For other possible examples, *see* SAMUEL BENJAMIN CRANDALL, TREATIES: THEIR MAKING AND ENFORCEMENT 239-40 (2d ed. 1916) (describing various types of implementing legislation, though without discussing whether other constitutional bases existed for this legislation); QUINCY WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS 185-86 (1922) (listing examples of legislation aimed at imposing criminal penalties for treaty obligations, as well as discussing legislation aimed at treaty obligations related to extradition and to the return of deserting seamen).

C. Treatises by the Time of Missouri v. Holland

The early twentieth century saw a boom in scholarly interest in the treaty power. Between the Supreme Court decisions of *Neely v. Henkel* in 1901 and *Missouri v. Holland* in 1920, several significant treatises took up constitutional questions relating to the treaty power, including Congress's treaty-implementing power. These treatises took sharply different views on many issues, ranging from Charles Henry Butler's understanding of a strong treaty power to Henry St. George Tucker's insistence on a weak one. But as far as I can tell, all authors to consider the issue agreed that the Necessary and Proper Clause gave Congress the power to implement treaties.

Butler wrote his two-volume treatise, *The Treaty-Making Power of the United States*, in the time between serving as a legal expert on a bilateral commission in 1898 and becoming the Supreme Court Reporter in 1902.¹⁶⁹ He deemed himself descended from a supporter of the treaty power,¹⁷⁰ and while his treatise considered evidence from the Founding Era, historical practice, and scholarly treatises on all sides of the constitutional issues, he generally came down in favor of a strong treaty power. He considered the treaty power to "extend[] to every subject which can be the basis of negotiation and contract between any of the sovereign powers of the world" and to preempt state law "even if such provisions relate to matters wholly within State jurisdiction."¹⁷¹ Butler further considered that the Necessary and Proper Clause gave rise to a treaty-implementing power for Congress, both on the basis of its text and in light of historical practice like the extradition legislation.¹⁷²

Tucker's *Limitations of the Treaty-Making Power Under the Constitution of the United States* was written largely in response to Butler's treatise. The son of John Randolph Tucker, he shared his

169. 1 BUTLER, *supra* note 78, at i.

170. Butler dedicated his treatise to his grandfather, who "[o]n more than one occasion, while he was Attorney General [of the United States in the 1830s] sustained The Treaty-Making Power of the United States before the Supreme Court." *Id.* at front matter.

171. *Id.* at 5-6.

172. *See id.*; 2 BUTLER, *supra* note 78, at 139-44, 315 & n.5, 316-24. Butler also cited evidence from the drafting history in support of this reading, *id.* at 140, but this evidence is the same point made by Professor Henkin that Professor Rosenkranz has shown not to be applicable. *See supra* note 31.

father's narrow view of the treaty power, partly motivated by fear that a broad treaty power could be used to force racial integration upon segregationist states.¹⁷³ Tucker believed that the treaty power had limited scope, arguing, for example, that treaties could not preempt state laws made under the police powers of the states.¹⁷⁴ Yet Tucker expressed no doubt that the Necessary and Proper Clause gave Congress the power to implement treaties. In his *Bond* concurrence, Justice Scalia cited Tucker as supporting his position,¹⁷⁵ but Tucker did not advocate his reading of the Necessary and Proper Clause. To the contrary, Tucker followed his father in understanding the Necessary and Proper Clause to confer upon Congress a treaty-implementing power:

[Under the Necessary and Proper Clause,] Congress may also pass all laws necessary and proper for carrying into effect "all other powers vested by this Constitution in the government of the United States, or in any department of officer thereof." The treaty power is one of those vested in the government of the United States, so that Congress has power to legislate on the subject of treaties—to carry into effect the provisions that may require legislation.¹⁷⁶

173. *E.g.*, HENRY ST. GEORGE TUCKER, LIMITATIONS ON THE TREATY-MAKING POWER UNDER THE CONSTITUTION OF THE UNITED STATES 391 (1915) [hereinafter TUCKER, LIMITATIONS]; see also Henry St. George Tucker, *The Treaty-Making Power Under the Constitution of the United States*, 199 N. AM. REV. 560, 563 (1914) (expressing dismay at the prospect that, under a broad conception of the treaty power, "the negro from Hayti or the Congo may under a treaty be free to enter the schools of Texas and ride in any coach on a railroad that may suit his tastes, notwithstanding the laws of Texas to the contrary"). Tucker's narrow-mindedness extended to other areas of constitutional law. *E.g.*, HENRY ST. GEORGE TUCKER, WOMAN'S SUFFRAGE BY CONSTITUTIONAL AMENDMENT 1-2 (1916) (arguing that "the attempt to bring about the right of suffrage for women by an amendment to the Constitution of the United States is opposed to the genius of the [Constitution] itself, and subversive" of federalism principles).

174. TUCKER, LIMITATIONS, *supra* note 173, at 320.

175. 134 S. Ct. at 2102 (Scalia, J., concurring in the judgment). Justice Scalia also cites favorably to Westel Willoughby's constitutional law treatise, *id.* at 2101, but Willoughby also believed that Congress possessed the treaty-implementing power. 1 WESTEL WOODBURY WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES 506-07 (1st ed. 1910) ("[W]here, for its enforcement, a treaty requires ancillary legislation, Congress would seem to have the constitutional power to enact the needed laws, even though they may relate to matters not within the general sphere of its legislative authority.").

176. TUCKER, LIMITATIONS, *supra* note 173, at 130.

Like his father, he further read the Necessary and Proper Clause as implying that certain types of treaties must be understood as non-self-executing.¹⁷⁷ To be sure, Tucker resisted the idea that treaties could enable Congress to pass laws that Congress could not otherwise pass¹⁷⁸—but this was because of Tucker's narrow view of the scope of the Treaty Clause, not because he thought the Necessary and Proper Clause did not authorize treaty implementation. Indeed, he acknowledged that if the Treaty Clause had a broader scope than he accepted, then the "additional concession" that Congress could pass legislation otherwise beyond its powers to implement treaties "might well be admitted."¹⁷⁹

That two authors as divergent as Butler and Tucker both accepted that the Necessary and Proper Clause authorizes Congress to pass legislation implementing treaties signals just how uncontroversial that issue was at the time of *Missouri v. Holland*. They were far from alone. Among other authors during this time to recognize that the Necessary and Proper Clause empowers Congress to pass legislation implementing treaties were Samuel Crandall, Edward Corwin, President William Taft, and Senator (and later Justice) George Sutherland.¹⁸⁰ Unlike the scope of the Treaty Clause or the

177. *Id.* at 17, 353 (arguing that the Necessary and Proper Clause supported the conclusion that treaties on subjects within Congress's domain require congressional implementation).

178. *Id.* at 129. This is the passage quoted by Justice Scalia in his concurrence in *Bond*, but a full reading of Tucker makes clear that his objection to such legislation rested in his narrow view of the scope of the treaty power itself rather than in doubts about Congress's treaty-implementing power. *See id.* at 129-33. Justice Scalia's description of Tucker as "famous," *Bond*, 134 S. Ct. at 2102, is similarly questionable.

179. TUCKER, LIMITATIONS, *supra* note 173, at 132.

180. EDWARD S. CORWIN, NATIONAL SUPREMACY: TREATY POWER VS. STATE POWER 291-94 (1913) ("It is further evident that when a treaty has been once entered into upon [a subject outside Congress's powers], Congress may pass all laws necessary and proper for the carrying of such treaties into effect, although independently of the treaty Congress would have no power in the premises at all."); CRANDALL, *supra* note 168, at 241 (citing *Neely v. Henkel* for the proposition that "Congress has 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'"); GEORGE SUTHERLAND, CONSTITUTIONAL POWER AND WORLD AFFAIRS 153-55 (1919) ("The necessity of supplementary action to carry into operation treaty provisions which are not made self-executing, has the effect of authorizing Congress to legislate upon many matters which would be beyond its power in the absence of a treaty. In such case the authority is not derived from, nor is it limited by, the enumerated subjects of legislation; but it arises from that clause of the Constitution, which empowers Congress 'to make all laws which shall be necessary and proper.'"); TAFT, *supra* note 160, at 80-81 (reading the Necessary and Proper Clause to

extent to which non-self-execution was constitutionally mandated, Congress's treaty-implementing power was generally undisputed.

III. IMPLICATIONS

This backdrop to *Missouri v. Holland* helps explain why Congress's treaty-implementing power received so little attention in the case. Unlike the scope of the treaty power, Congress's treaty-implementing power was uncontroversial. It had a straightforward textual basis in the Necessary and Proper Clause combined with the Treaty Clause, as these clauses were read by virtually all who considered the issue. It had the sanction of historical practice in the political branches and the approval of leading commentators on the treaty power.

Indeed, Congress's treaty-implementing power was such an uncontroversial issue that the parties in *Missouri v. Holland* briefed it only lightly. As the brief for Mr. Holland explained:

[T]here can scarcely be a serious contention that Congress may not enact legislation to put into effect the provisions of any treaty which the President, with the advice and consent of the Senate, may lawfully negotiate, regardless of whether the subject matter is one within or without the general legislative powers of Congress. If therefore, the bill in this case can be maintained, it must be because the President, in negotiating this treaty, has dealt with a subject which is beyond the treaty-making power of the United States.¹⁸¹

The accuracy of this remark is supported by the brief of Missouri, which focused on challenging the scope of the treaty power and did

authorize legislation aimed at enforcing treaty stipulations); Chandler P. Anderson, *The Extent and Limitations of the Treaty-Making Power Under the Constitution*, 1 AM. J. INT'L L. 636, 662 (1907) (citing the Necessary and Proper Clause as the basis of congressional power where "the treaties under consideration deal with matters beyond the ordinary jurisdiction of Congress, and ... such a treaty is not self-executing"); see also WILLOUGHBY, *supra* note 175, at 506-07.

181. See Brief for Appellee at 13, *Missouri v. Holland*, 252 U.S. 416 (1920) (No. 609); see also *id.* at 10 (citing the Necessary and Proper Clause and observing that "there is here a power expressly given to Congress to make all laws which shall be necessary and proper for carrying into execution any treaty lawfully made by the President and ratified [sic] by the Senate").

not offer any clear separate challenge to Congress's treaty-implementing power.¹⁸² Given these facts, it is unsurprising that Justice Holmes devoted only a sentence to upholding Congress's treaty-implementing power, observing briskly that "there can be no dispute about the validity of [a statute implementing a valid treaty] as a necessary and proper means to execute the powers of the Government."¹⁸³

Had there been serious dispute over Congress's treaty-implementing power, this Article has shown that Justice Holmes could have drawn on a wealth of past practice supporting the conclusion that the Necessary and Proper Clause authorizes Congress to implement valid treaties, whether or not the implementing legislation would otherwise lie within Congress's power to pass. "[T]he way the framework has consistently operated fairly establishes that it has operated according to its true nature,"¹⁸⁴ and here historical practice had consistently interpreted the text of the Constitution as supporting Congress's treaty-implementing power. It was an "exposition of the Constitution, deliberately established by legislative acts"¹⁸⁵ such as the trademark legislation of 1881.

By the time of *Missouri v. Holland*, Congress's treaty-implementing power also furthered the interests of efficiency, reliance, and predictability that can arise from historical practice. As non-self-execution became accepted as a facet of some treaties, both through the practice of the political branches and through the Supreme Court precedent of *Foster v. Neilson*, the political branches could choose this option and use congressional legislation to implement treaty stipulations. With Congress's treaty-implementing power

182. *E.g., id.* at 33 (arguing that a treaty "cannot validate [an] Act of Congress when its effect is not only to accomplish that which under the Constitution Congress has no power to do, but also to do that which is forbidden to the entire Federal Government in all or any of its departments under the terms of the Constitution"). The amicus brief of Kansas did offer a separate argument about Congress's power to implement treaties, but this argument did not discuss, let alone engage with, the Necessary and Proper Clause and instead rested mostly on its concerns about the scope of the treaty power. See Brief of Richard J. Hopkins, Attorney General, and Samuel W. Moore, Amici Curiae and in Behalf of the State of Kansas at 29-37, *Missouri*, 252 U.S. 416 (No. 609).

183. *Missouri*, 252 U.S. at 432.

184. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring).

185. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401 (1819) (adding that this "ought not to be lightly disregarded").

available, they did not need to try alternative approaches, such as writing express criminal penalties into the text of a treaty.¹⁸⁶ As discussed above, members of the political branches who were more wary of treaties had indeed encouraged the developing role of Congress in treaty implementation. They viewed this role as providing further safeguards for limiting the use of the treaty power.

The support that historical practice offers to Congress's treaty-implementing power today is at least as strong—and almost certainly even stronger—than it was in the early twentieth century. For since that time, the constitutional acceptance of Congress's treaty-implementing power has not only had the sanction of the practice of the political branches, but also the clear approval of the Supreme Court in *Neely v. Henkel* and *Missouri v. Holland*. Accordingly, the President and the Senate have made treaties under the background presumption that Congress has the power to implement treaties, including those whose text employs language likely to be interpreted as non-self-executing and those for which the Senate includes other indicia of non-self-execution in its advice and consent process. Congress similarly has been authorized to pass legislation implementing treaties without needing to determine whether any enumerated power other than its treaty-implementing power justifies this legislation.

There are interesting parallels here to our overall understanding of the reach of the Necessary and Proper Clause. This understanding was established as a matter of judicial precedent in *McCullough v. Maryland*, which in turn recognized the importance of prior legislative acts as historical practice relevant to the constitutional question.¹⁸⁷ In *McCullough*, Chief Justice Marshall warned the “baneful influence” of a “narrow construction” of this clause and the word “necessary” within it.¹⁸⁸ Instead, he emphasized that “[t]his

186. Some have questioned whether treaties can directly include criminal penalties. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111 cmt. i (1987) (stating that “it has been assumed” that penal provisions in a treaty require implementing legislation). This issue has never clearly been resolved, as treaties generally rely on executory language regarding criminal penalties and leave it to Congress to pass implementing legislation. Both the Migratory Bird Treaty and the Chemical Weapons Convention employ this approach. See *supra* notes 18 and 44 and accompanying text.

187. 17 U.S. at 401.

188. *Id.* at 417.

provision is made in a Constitution intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs.”¹⁸⁹ It therefore should be interpreted to “allow to the national legislature that discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people.”¹⁹⁰

Whether Chief Justice Marshall correctly interpreted the Necessary and Proper Clause as an originalist matter, his opinion constitutes constitutional law that has stood the test of time in the past and should do so in the future. As John Manning has written:

[W]hen authors purport to recover lost understandings, a modern interpreter must consider the implications of the fact that these understandings were putatively lost.... Madison famously wrote, and the founders apparently widely believed, that the Constitution would come out unfinished and that its meaning would become settled only through the passage of time and the accretion of practical constructions by the branches charged with implementing it.... After almost two centuries, the burden of persuasion on those who would displace *McCulloch* strikes me as quite high.¹⁹¹

These words seem to me to apply equally to the task of challenging Congress's treaty-implementing power. Professor Rosenkranz and Justice Scalia are in effect claiming to recover a long-lost reading of the Necessary and Proper Clause—indeed, not even a lost meaning, but rather a meaning that was never used by anyone in the first place. The bar is a high one, and they have failed to meet it.

Although there is a place for changing constitutional interpretations over time, it is hard to think of any sufficiently compelling justifications for removing from the federal government a power that not only has a strong textual basis, but that also has been firmly entrenched without obvious opposition in the constitutional practices of the political branches since at least the nineteenth

189. *Id.* at 415 (emphasis omitted).

190. *Id.* at 421.

191. John F. Manning, *The Necessary and Proper Clause and Its Legal Antecedents*, 92 B.U. L. REV. 1349, 1353 (2012).

century, and squarely encompassed into Supreme Court precedent since the early twentieth century. The revived interest in federalism principles that the Supreme Court has shown since the Rehnquist Court certainly seems far from sufficient. Federalism was far more important to our constitutional framework in the nineteenth and early twentieth centuries, and yet Congress's treaty-implementing power was readily accepted during this period. It is hard to see why Congress's treaty-implementing power should be questioned today, other than consideration on the margin as to what specific legislation is actually "necessary and proper" to the execution, enforcement, and implementation of particular treaties.¹⁹²

CONCLUSION

A note from Justice Brandeis to Justice Holmes is pasted to the back of a copy of *Missouri v. Holland*. "Yes. It's fine," the note reads. "May it not be well to suggest that a treaty *plus* an Act of Congress may perhaps do what a treaty alone could not? It might allay fears."¹⁹³

This suggestion speaks to a theme described throughout this Article—the perception that having the President, the Senate, and Congress *all* involved in treaty matters offers more safeguards than relying solely on the President and the Senate. It is a theme that, with a few exceptions, has not been cemented into constitutional doctrine, and Justice Holmes did not incorporate it into his final opinion. But it is a theme that has proved powerful in practice, resulting in the increased involvement of Congress in treaty

192. Legislation like the 1881 trademark act and the Migratory Bird Treaty Act suggest that the Necessary and Proper Clause allows Congress to legislate beyond what is strictly necessary to implement treaty obligations, in keeping with the broad approach to the Necessary and Proper Clause taken by Chief Justice Marshall in *McCullough*. What is less clear is precisely how far this reach extends. For an argument for a comparatively strict approach to "necessary and proper" in the treaty-implementing process, see Virginia H. Johnson, Note, *Application of the Rational Basis Test to Treaty-Implementing Legislation: The Need for a More Stringent Standard of Review*, 23 *CARDOZO L. REV.* 347 (2001). As another possible example, Carlos Vazquez suggests that Congress's treaty-implementing power should not reach treaty provisions that are purely "aspirational." Vazquez, *supra* note 58, at 964-65. Although he does not explicitly link this argument to the question of what is "necessary and proper," I think this would be a reasonable framing for his argument.

193. 4 *LETTERS OF LOUIS D. BRANDEIS* 454 (Melvin I. Urofsky & David W. Levy eds., 1975).

implementation and the growing practice in the courts of interpreting treaties to be non-self-executing.

There are plenty of difficult questions about the treaty power, including its precise scope, the location and import of the boundary between self-executing and non-self-executing treaties, and the extent to which the United States can enter into international agreements other than Senate-approved treaties. But despite the views of Justices Scalia and Thomas, the question of whether the Necessary and Proper Clause confers a treaty-implementing power upon Congress is an easy one, even when Congress has no other basis for the legislation in question. From early in our Constitutional history, members of the political branches have interpreted the text of the Constitution to provide this power; the Supreme Court has done the same in multiple cases; and this interpretation is consistent with other developments in constitutional law in relation to the treaty power. The meaning of the Necessary and Proper Clause in relation to the treaty power has “be[en] liquidated and ascertained by a series of particular discussions and adjudications,”¹⁹⁴ and the consensus is clear and well-grounded.

194. THE FEDERALIST NO. 37, at 229-30 (James Madison) (Clinton Rossiter ed., 1961).