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## Putting *Missouri v. Holland* on the Map

Edward T. Swaine\*

### I. INTRODUCTION

While I can think of no fitter setting for a symposium on this important topic, it must be admitted that geographically speaking, *Missouri v. Holland* disappoints. One thrills to the prospect of a divisive dispute between the State of Missouri and a province of the Netherlands – perhaps a sub-national compact on flood control gone sour? It quickly becomes apparent, though, that “Holland” is merely a lower-level federal official. And Missouri’s particulars play a limited role in the case, as suggested by the fact that Kansas came to its side in the Supreme Court proceedings.<sup>1</sup> Those who are not students of American history,<sup>2</sup> or at least sports fans,<sup>3</sup> may not appreciate the rarity and generosity of Kansas’ gesture.

Yet Missourians were, of course, front and center in the case. Ray Holland, the federal game warden, roamed Missouri and several neighboring states in pursuit of lawbreakers. Frank McAllister, Missouri’s Attorney General, was an inveterate duck hunter and committed opponent of the reenacted federal ban on spring shooting who appears to have been on bad terms with Holland. Holland, hearing rumors that McAllister was encouraging others to break the law, apprehended the Attorney General and four friends while they were hunting near Nevada, Missouri; McAllister, found with a bag of seventy-six ducks, reportedly compounded his problems by giving a false name. He was prosecuted and fined, and in retaliation sought to enjoin the federal law on constitutional grounds. The proceedings ultimately generated *Missouri v. Holland* and victory for Holland – probably a particularly bitter pill for McAllister to swallow, given that he himself had argued the case on behalf of Missouri.<sup>4</sup>

More broadly, Missouri and its citizens were fixed and leading opponents to the Migratory Bird Treaty and its implementing legislation. In part

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\* Associate Professor of Law, The George Washington University Law School.

1. See Brief of Richard J. Hopkins, Attorney General, and Samuel W. Moore, Amici Curiae, and in Behalf of the State of Kansas, *Missouri v. Holland*, 252 U.S. 416 (1920) (No. 609) [hereinafter Kansas Brief].

2. See JEREMY NEELY, *THE BORDER BETWEEN THEM: VIOLENCE AND RECONCILIATION ON THE KANSAS-MISSOURI LINE* (2007) (analyzing forces dividing and reuniting border counties following open warfare relating to slavery).

3. Austin Murphy, *They Got Game*, *SPORTS ILLUSTRATED*, Nov. 26, 2007, at 44 (describing bitter Kansas-Missouri sports rivalry).

4. This account is drawn from KURKPATRICK DORSEY, *THE DAWN OF CONSERVATION DIPLOMACY: U.S.-CANADIAN WILDLIFE PROTECTION TREATIES IN THE PROGRESSIVE ERA* 233-34 (1998).

this was due to the migratory patterns of ducks, which skipped the Midwest when traveling south in the fall; this meant that federal limits on spring shooting would deprive Missourians of what they considered their fair share of ducks (or, perhaps more accurately, impair the ability of Missourian duck clubs to afford members like McAllister exclusive access to the ponds and small lakes that were most attractive during the spring).<sup>5</sup> Opposition to federal intervention was driven by Missouri's Senator James A. Reed, who maintained his own feud with the leading conservationist advocate, William Hornaday.<sup>6</sup> Reed singled out Hornaday as the man to blame for the entire initiative, and either "insane" or a "common slanderer and a common scoundrel."<sup>7</sup> Not to be outdone, when treaty ratification seemed assured Hornaday crowed, "Praise God, from whom all blessings flow; and now the spring-shooters of Missouri can go to hell!"<sup>8</sup>

It's hard to say where Missouri's spring shooters eventually wound up, but it was ingenious for Hornaday to speculate – however baselessly – about *their* migratory pattern. Keeping things figurative, we might try to understand *Missouri v. Holland*'s migration as well – focusing on just one aspect of the decision, its suggestion that congressional power may be enhanced by a treaty. I want to first put Justice Holmes' opinion on the map by identifying the claims he was making and the claims that might have been made on the facts of the case.<sup>9</sup> That exercise, I think, best informs attempts to reckon where *Missouri v. Holland* came from, and where it went afterwards. Doing so, I conclude, also undermines contemporary criticisms and defenses of the Court's decision.

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5. *Id.* at 199-200.

6. Hornaday, a native Indianan, was not only interested in birds: his tireless efforts at conservation included a stint as president of the American Bison Society and work to save the Alaska fur seal. His real talent may have been controversy. During a prior tenure as director of the New York Zoological Park, Hornaday famously exhibited Ota Benga, a pygmy from the Congo, in the monkey house, and considered the display and strong protests against it the zoo's "most amusing passage." Mitch Keller, *The Scandal at the Zoo*, N.Y. TIMES, Aug. 6, 2006, § 14, at 1.

7. 51 CONG. REC. 8447 (1914).

8. DORSEY, *supra* note 4, at 213.

9. See Mark W. Janis, *Missouri v. Holland: Birds, Wars, and Rights*, in INTERNATIONAL LAW STORIES 207 (John E. Noyes, Laura A. Dickinson & Mark W. Janis eds., 2007); Charles A. Lofgren, *Missouri v. Holland in Historical Perspective*, 1975 SUP. CT. REV. 77, 95-101.

## II. *MISSOURI V. HOLLAND* IN CONTEXT

Given the symposium's focus, I will provide only what background is necessary to understand the relevant parts of *Missouri v. Holland*.<sup>10</sup> The basics are easily stated. After nearly ten years of attempts, Congress adopted legislation – the Migratory Bird Act of 1913, also known as the Weeks-McLean Act – that extended federal protection to migratory birds and attempted to regulate their hunting. The law responded to broad-based concern that unconstrained shooting risked species extinction (the passenger pigeon being fresh in mind) and, consequently, the loss of millions of dollars in crops to the insects otherwise consumed by insectivorous birds. State regulation existed but was considered unequal to the task.<sup>11</sup>

Even advocates of the legislation, however, were uncertain about its constitutionality, and the Department of Agriculture tried to avoid enforcement for provoking an adverse result.<sup>12</sup> Eventually, their concerns were confirmed when two federal courts – one pitching in from Kansas – demurred.<sup>13</sup> After considerable intrigue and some misadventure,<sup>14</sup> the United States and Great Britain (on behalf of Canada) negotiated a treaty.<sup>15</sup> On that premise, Congress enacted the Migratory Bird Treaty Act of 1918, which was signed by President Wilson,<sup>16</sup> and the Secretary of Agriculture promulgated regulations.<sup>17</sup> Enforcement and a challenge eventually followed, and the case rose to the Supreme Court and Justice Holmes.

A recent article by Professor Rosenkranz notes that *Missouri v. Holland* involved the holy trinity of issues raised by the treaty power: first, whether (notwithstanding the Supremacy Clause) a treaty may be non-self-executing, in the sense that Congress must pass implementing legislation to give it domestic effect; second, whether a treaty might address subjects beyond reach of Congress' enumerated powers; and third, whether a treaty that was non-self-executing, and reached beyond enumerated authority, could enable

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10. 252 U.S. 416 (1920).

11. Lofgren, *supra* note 9, at 78.

12. *Id.* at 78-80.

13. *United States v. McCullagh*, 221 F. 288 (D. Kan. 1915); *United States v. Shauver*, 214 F. 154 (E.D. Ark. 1914).

14. Incensed by a long silence from the Canadian side, Hornaday stormed the British Embassy to demand progress, thereby exposing that an embassy clerk had inadvertently plunged the treaty into limbo by misfiling the paperwork. DORSEY, *supra* note 4, at 206-08.

15. Convention Between the United States and Great Britain for the Protection of Migratory Birds, U.S.-Gr. Brit., Aug. 16, 1916, 39 Stat. 1702.

16. Ch. 128, 40 Stat. 755 (1918).

17. Report of the Solicitor (Oct. 3, 1919), in ANNUAL REPORTS OF THE DEPARTMENT OF AGRICULTURE FOR THE YEAR ENDED JUNE 30, 1919, at 469, 490-91 (1920).

Congress to pass such implementing legislation.<sup>18</sup> Justice Holmes concentrated on the second question, and said little about the first or third. With respect to non-self-execution, his recitation of the facts simply stated that the treaty parties agreed they “would take or propose to their lawmaking bodies the necessary measures for carrying the treaty out”<sup>19</sup> – and otherwise assumed that the legislation performed a relevant function. *Foster v. Neilson* had previously resolved that some treaties required legislative execution before the courts could apply them,<sup>20</sup> and everyone in *Missouri v. Holland* simply assumed that the Migratory Bird Treaty was one of those treaties.<sup>21</sup>

With respect to the issue of congressional implementation, which is our focus here, Justice Holmes stated simply that “[i]f the treaty is valid there can be no dispute about the validity of the statute under Article 1, Section 8, as a necessary and proper means to execute the powers of the Government.”<sup>22</sup> As a predictive matter, he was quite wrong; there could be, and has been, dispute about the validity of such a statute. It seems disingenuous, in fact, for him to have suggested otherwise: Given that the “different way” in which he thought limits to the treaty power should be ascertained seemed to pose few if any obstacles to treaty-making,<sup>23</sup> the corresponding unshackling of Congress’ implementation power – and its controversial consequences for any notion of a limited national government – must have been apparent to Holmes.

That said, Holmes may well have regarded the implementation issue as a settled one. The Court had earlier endorsed a broad view of Congress’ power to implement treaties,<sup>24</sup> albeit without putting much meat on the bones,<sup>25</sup> and

18. Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867, 1876-77 (2005).

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

20. 27 U.S. (2 Pet.) 253, 314 (1829); see Rosenkranz, *supra* note 18, at 1876-77. That said, the Court had done a pretty rapid volte-face on non-self-execution, see *United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833), and could have done some clarifying.

21. See *infra* text accompanying notes 78-82.

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

23. *Id.* at 433.

24. See, e.g., *Keller v. United States*, 213 U.S. 138, 147 (1909); *Neely v. Henkel*, 180 U.S. 109, 121 (1901); *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 619 (1842). As Justice Story reasoned in *Prigg*:

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

*Id.* at 619.

it was hardly an uncommon position among commentators.<sup>26</sup> The briefing in *Missouri v. Holland* did little to disabuse him of this idea. Missouri did not deny that, assuming *arguendo* a treaty could validly go beyond enumerated powers, Congress' legislative powers were increased apace;<sup>27</sup> this left unchallenged the district court's view that those legislative powers were simply "an incident of the legitimate treaty making power."<sup>28</sup> For its part, the brief for the United States duly invoked the Necessary and Proper Clause,<sup>29</sup> and added:

Since . . . the power to make treaties is conferred upon the President and the Senate, there is here a power *expressly* given to the Congress to make all laws which shall be necessary and proper for carrying into execution any treaty lawfully made by the President and ratified by the Senate. Such a treaty becomes a part of the supreme law of the land, and, being so, Congress has the power to enact legislation necessary to carry into effect its provisions.<sup>30</sup>

Justice Holmes' opinion seemed to adopt the U.S. submission – for example, in alluding to the supremacy of the treaties over state law, seemingly irrespective of whether they were self-executing or not.<sup>31</sup> The result, in any

25. Cf. Rosenkranz, *supra* note 18, at 1880 n.61 (decrying those opinions as "dicta with the same conspicuous absence of reasoning" as found in *Missouri v. Holland*).

26. See, e.g., 1 CHARLES HENRY BUTLER, THE TREATY-MAKING POWER OF THE UNITED STATES § 3, at 5-6 (1902) ("[T]he power to legislate in regard to all matters affected by treaty stipulations and relations[hips] is co-extensive with the treaty-making power, and . . . acts of Congress enforcing such stipulations which, in the absence of treaty stipulations, would be unconstitutional as infringing upon the powers reserved to the States, are constitutional, and can be enforced, even though they may conflict with State laws or provisions of State constitutions.").

27. Kansas, its erstwhile ally, did a little more. Its bottom line was that treaties could not "add[] to and broaden[] the legislative powers of Congress," Kansas Brief, *supra* note 1, at 30, but the reason was that "[e]very treaty must find its warrant within the scope of the enumerated powers." *Id.* at 32. As to whether the Migratory Bird Treaty might achieve something beyond Congress's power, Kansas reasoned that this posed a substantial anomaly – because Congress could only enforce, and not repeal or modify, such a treaty, *id.* at 32-33 – that was dissolved if it was admitted that treaties were limited by enumerated powers and coterminous with the legislative powers. *Id.* at 36-37.

28. *United States v. Samples*, 258 F. 479, 482 (W.D. Mo. 1919).

29. U.S. CONST. art. I, § 8, cl. 18.

30. Brief for Appellee at 10, *Missouri v. Holland*, 252 U.S. 416 (1920) (No. 609).

31. *Holland*, 252 U.S. at 432 ("The language of the Constitution as to the supremacy of treaties being general, the question before us is narrowed to an inquiry into the ground upon which the present supposed exception is placed."); *id.* at 434 ("As most of the laws of the United States are carried out within the States and as many of them deal with matters which in the silence of such laws the State might regulate,

event, was that while the Court examined whether treaties could go beyond Congress' enumerated powers, it said little about why legislative authority should continue apace.

### III. *HOLLAND* AND TREATY IMPLEMENTATION

Unsurprisingly, the resuscitation of federalism in the Rehnquist Court prompted reconsideration of *Missouri v. Holland*, including as to its domestic implications for congressional authority.<sup>32</sup> As just noted, the Court's opinion did relatively little to justify its holding on that score; though many responses to its critics might be imagined (and many have already been articulated), I would like to compensate for Justice Holmes' reticence by teasing more out of the decision's original context – its place on our constitutional map, as it were.

#### A. *Minding the Gap*

Professor Rosenkranz's recent takedown of what is regarded as *Holland*'s holding – that the Necessary and Proper Clause affords the national government the authority to implement any treaty within its power (which is to say, virtually any treaty) – relies on evidence that the Court might well have considered, rather than any more contemporary concerns. His principle objection is textual. The Necessary and Proper Clause provides that:

The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.<sup>33</sup>

Examining this and related provisions closely, Professor Rosenkranz's argument is elegant. First, the treaty power is not a "foregoing Power[]" (because it is located in Article II, rather than preceding the Necessary and Proper Clause), but rather an "other Power[]" vested by the Constitution in the Government of the United States, or in any Department or Officer thereof."

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such general grounds are not enough to support Missouri's claim. Valid treaties of course 'are as binding within the territorial limits of the States as they are elsewhere throughout the dominion of the United States.' No doubt the great body of private relations usually fall within the control of the State, but a treaty may override its power." (citation omitted) (quoting *Baldwin v. Franks*, 120 U.S. 678, 683 (1887))).

32. Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 COLUM. L. REV. 403, 415-23 (2003) (noting contemporary bases for reviving challenges to *Missouri v. Holland*); *id.* at 415 ("[H]istory suggests that it may be vulnerable whenever it proves relevant.").

33. U.S. CONST. art. I, § 8.

Second, interpolating the treaty power from Article II results in a congressional power “[t]o make all Laws which shall be necessary and proper for carrying into Execution . . . [the President’s] Power, by and with the Advice and Consent of the Senate, to make Treaties.”<sup>34</sup> The key lies in the third move. Trying to determine what it means to be a law “for carrying into Execution . . . [the] Power . . . to make Treaties,” Rosenkranz distinguishes sharply between the “Power . . . to make Treaties’ in the first place,” such as the power to provide appropriations for treaty negotiations (or “any other laws necessary and proper to ensure the wise use of the power to enter treaties”),<sup>35</sup> and the “power to implement non-self-executing treaties already made.”<sup>36</sup> In his view, “[t]he ‘Power . . . to Make Treaties’ is exhausted once a treaty is ratified; implementation is something else altogether.”<sup>37</sup>

The argument for this theory – which I will call the “restrictive understanding” of the Necessary and Proper Clause<sup>38</sup> – is obviously more comprehensive than this, and it has many virtues.<sup>39</sup> Some of its challenges, though, bear mention. Most basically, it is unlikely that the Necessary and Proper Clause was drafted with the rigor this analysis assumes – in which its language applies consistently and with equal versatility to all the powers it implicates, with the drafters contemplating its every application.<sup>40</sup> One might sympathize, certainly, with the Framer who thought Congress had achieved “the power to make laws for carrying into execution ‘the treaty power,’” despite Professor Rosenkranz’s insistence that this was “emphatically not” the case.<sup>41</sup> The whole enterprise seems to have been debated in vastly simpler

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34. Rosenkranz, *supra* note 18, at 1882 (alterations in original) (emphasis added) (quoting U.S. CONST. art. I, § 8 & art. II, § 2, cl. 2).

35. *Id.* at 1882-84 (alteration in original).

36. *Id.* at 1884.

37. *Id.*

38. It might also be called the “preliminary” reading of the Clause, given its position that only congressional assistance prior to treaty-making might be licensed, but that might be misconstrued as suggesting that the theory was half-baked.

39. One is the coup of explaining how a generation of scholars had come to misunderstand the drafting history of the Clause. Rosenkranz, *supra* note 18, at 1887-92.

40. Some claim the opposite is more likely. See, e.g., Mark Graber, *Unnecessary and Unintelligible*, in CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES 43, 45 (William N. Eskridge, Jr. & Sanford Levinson eds., 1998) (“If any provision in the Constitution merits the appellation ‘stupid,’ the Necessary and Proper Clause seems the best candidate for this honor.”); JOSEPH M. LYNCH, *NEGOTIATING THE CONSTITUTION: THE EARLIEST DEBATES OVER ORIGINAL INTENT* 4 (1999) (“All the evidence points to the conclusion that in composing the Necessary and Proper Clause, the Committee of Detail drafted a compromise, a masterpiece of enigmatic formulation . . .”).

41. Rosenkranz, *supra* note 18, at 1882. But see *id.* (“By echoing the word ‘Power,’ the Treaty Clause leaves no doubt: the treaty power is an ‘other Power[]’ referred to in the [relevant part] of the Necessary and Proper Clause.”).



terms. Skeptics worried about whether Congress could be trusted with the degree of discretion the Clause entailed. The prevailing sentiment, though, was that there was little alternative, given that such authority would inevitably be implied<sup>42</sup> and the difficulty of establishing and maintaining a more justiciable standard.<sup>43</sup> No one seemed to believe that the courts would have a Rosenkranzian razor to make light work of the question.

To the extent they contemplated the matter, the Framers might have envisioned the Necessary and Proper Clause and the treaty power as more congruent in character – sharing the objective of concluding treaties *and* giving

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42. See, e.g., THE FEDERALIST NO. 33, at 202 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“[I]t may be affirmed with perfect confidence that the constitutional operation of the intended government would be precisely the same if these clauses were entirely obliterated as if they were repeated in every article. They are only declaratory of a truth which would have resulted by necessary and unavoidable implication from the very act of constituting a federal government and vesting it with certain specified powers.”); THE FEDERALIST NO. 44, at 285 (James Madison) (Clinton Rossiter ed., 1961) (“Had the Constitution been silent on this head, there can be no doubt that all the particular powers requisite as means of executing the general powers would have resulted to the government by unavoidable implication.”). As noted below, however, there is cause to discount these views.

43. Some, like Madison, cited the judiciary as among the first lines of defense. THE FEDERALIST NO. 44, at 286 (James Madison) (Clinton Rossiter ed., 1961) (“In the first instance, the success of the usurpation will depend on the executive and judiciary departments, which are to expound and give effect to the legislative acts; and in the last resort a remedy must be obtained from the people, who can, by the election of more faithful representatives, annul the acts of the usurpers.”). Others suggested that the primary bulwark would be the legislature. See THE FEDERALIST NO. 33, at 203 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (arguing that the legislature would be unlikely to abuse its Necessary and Proper Clause authority, and that if it did, the “national government, like every other, must judge, in the first instance, of the proper exercise of its powers, and its constituents in the last”); 1 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA app. at 288 (1803) (arguing that a modest construction of the Clause was “calculated to operate as a powerful and immediate check upon the proceedings of the federal legislature, itself,” and if applied “we should probably cease to hear any questions respecting the constitutionality of the acts of the federal government,” but that “this interpretation of the clause is indispensably necessary to support that principle of the constitution, which regards the judicial exposition of that instrument, as the bulwark provided against undue extension of the legislative power”). In practice, it quickly became the legislature. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 420 (1819) (“[T]he sound construction of the constitution must 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. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”).

them domestic legal effect. Professor Rosenkranz suggests that imputing such a broad object to the term “make Treaties” depends on the unreasonable implication of treaty-implementing authority for the *President* – since it is he, with the advice and consent of the Senate, who possesses the underlying “Power . . . to make Treaties.”<sup>44</sup> Assuming the argument holds to this point,<sup>45</sup> what the Necessary and Proper Clause would then communicate about the Treaty Clause is scarcely fatal. The President *does*, in point of fact, have the power to give treaties domestic legal effect, simply by virtue of his “Power . . . to make Treaties”; that is the whole notion of a self-executing treaty.<sup>46</sup> It is hardly peculiar to think that the Necessary and Proper Clause gives Congress the authority to ensure likewise the domestic legal effect of any other treaties. Perhaps this requires Congress to understand which treaty provisions require its assistance, but this kind of discrimination is inherent in the concept of necessary and proper powers, and the failure to address this specifically is inevitable in establishing Congress’ broad-ranging authority to address “all powers” vested anywhere in the national government.<sup>47</sup>

Professor Rosenkranz also dismisses too readily the possibility that implementing a treaty is “necessary and proper” because that “make[s] it easier for the President ‘to make’ the next treaty, by showing prospective treaty partners that the United States has power to perform its obligations under such treaties.”<sup>48</sup> The claim is somewhat speculative, as he notes, but no more

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44. Rosenkranz, *supra* note 18, at 1884.

45. One need not arrive there: perhaps what converts the power “to make” treaties into the power to imbue them with domestic effect is instead something within the Necessary and Proper Clause, such as Congress’ power of “carrying into Execution” the treaty power. That is, before concluding that identifying a Necessary and Proper power depends upon implying a cognate power held by the President (and Senate) alone, we would need to definitively exclude the possibility that the surrounding terms in the Necessary and Proper Clause might justify some variation. Even if the Clause’s terms add little to the powers that Congress would otherwise have, *but see infra* note 54, there is good reason to assume that they do *some* work: That Congress is enabling powers vested elsewhere in the government – as the Necessary and Proper Clause specifically entitles it to do – strongly suggests that its authority may be different in kind from that established by the powers in their own right. Thus, even if “mak[ing] Treaties” could not itself incorporate the power of establishing domestic legal effect, that would not deny such authority to Congress.

46. He may also have that authority for certain non-self-executing treaties. *See* Edward T. Swaine, *Taking Care of Treaties*, 108 COLUM. L. REV. 331, 353-59 (2008). *But cf.* *Medellín v. Texas*, 128 S. Ct. 1346 (2008).

47. Professor Rosenkranz also denies the possibility of any such term of art by pointing to British practice, for which Blackstone described the king’s prerogative of making treaties – in circumstances where doing so could not have entailed their execution into domestic law. Rosenkranz, *supra* note 18, at 1884. As he is aware, this implicates broader debates about whether British practice was actually so straightforward or well understood at the Founding, not to mention the degree to which the Framers sought to establish a new legal approach.

48. *Id.* at 1889. This is not the only such possibility. *See infra* Part III.B.

than his suggestion that this reasoning would license congressional kowtowing to a prospective treaty partner (for example, capitulating to France's demand that the United States establish gun-free school zones as a condition precedent to any treaty negotiations with the United States).<sup>49</sup> These were indeed the kinds of concern that made some wary about any Necessary and Proper powers, but others put their trust in Congress, and it was ultimately accepted as the price of the Clause.<sup>50</sup> In any case, the argument underplays evidence that the Framers were wholly convinced of the need to systematically develop a compliance capacity precisely in order to sustain the U.S. treaty power.<sup>51</sup> Their principal answer, again, was to make treaties self-executing, but it is plausible that the same logic was understood to support a broad view of the Necessary and Proper Clause.

At bottom, Professor Rosenkranz suggests a fundamental tension between the view of Hamilton, Madison, and (perhaps) Marshall "that the Necessary and Proper Clause increases the power of Congress not at all" and the need to depend on that provision to legislate pursuant to treaty; "[i]f they were right, then *Missouri v. Holland* is wrong."<sup>52</sup> But this dilemma is a false one. Even assuming that the Clause could be read as near surplusage<sup>53</sup> – and that Hamilton and Madison, at least, weren't merely campaigning<sup>53</sup> – the

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49. *Id.* at 1890.

50. What's more, the same kind of extreme case afflicts the restrictive understanding as well. If France were of a mind to reduce U.S. gun violence near schools, and reluctant to come to the table unless that were addressed, Congress could not (under Rosenkranz's theory) entice it by legislatively fixing the problem, before or after the treaty. But Congress might exploit its power to fund U.S. negotiations (the leading example, on the restrictive understanding, of a necessary and proper action supporting treaty-making) for the interchangeable end of bringing French negotiators to the table – upping the ante by paying France until it was willing to overlook its concerns about U.S. domestic policies. That is, Congress could simply pay taxes for its lack of regulatory authority, a prospect that – although formally different than allowing it to actually assume such authority – seems no less untoward.

51. See, e.g., Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 DUKE L.J. 1127 (2000).

52. Rosenkranz, *supra* note 18, at 1891-92.

53. It is notable, for example, that while Hamilton was addressing the Necessary and Proper Clause's lack of consequence, he was simultaneously saying much the same thing about the Supremacy Clause. THE FEDERALIST NO. 33, at 202 (Alexander Hamilton) (Clinton Rossiter ed., 1961). This kind of advocacy is one basis for questioning reliance on the Federalist Papers in establishing constitutional meaning. See Gregory E. Maggs, *A Concise Guide to the Federalist Papers as a Source of the Original Meaning of the United States Constitution*, 87 B.U. L. REV. 801, 825-40 (2007); Seth Barrett Tillman, *The Federalist Papers as Reliable Historical Source Material for Constitutional Interpretation*, 105 W. VA. L. REV. 601, 603-17 (2003) (noting fundamental mistakes made by the Papers' authors). The persuasive value of Hamilton's and Madison's views may be particularly suspect when it comes to their analysis of the Necessary and Proper Clause. See *supra* note 42 (noting enigmatic quality of text); LYNCH, *supra* note 40, at 23 (suggesting that politicians of all affiliations

baseline to which they were comparing the Necessary and Proper Clause was uncertain. Sometimes the Clause's supporters suggested that it did not add to the preexisting enumerated powers of Congress (or, at least, add another power of similar stature),<sup>54</sup> but sometimes they seem to have meant that the Clause added nothing to the powers that *would otherwise have been implied in its absence*.<sup>55</sup> Consequently, it is hard to comprehend what it meant to deny that any power was conveyed by the Clause.

In any case, the Framers' assumption that the Necessary and Proper Clause had modest implications for congressional power was unsettled less by inferring treaty-implementing authority than by a sea-change in the occasions for its use. Noting how the modern view would have the Clause give Congress a conspicuous additional power, because Congress does not itself make treaties, Professor Rosenkranz points out that the enforcement of treaties "is (generally) automatic under the Supremacy Clause."<sup>56</sup> But it is

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disregarded what the Federalist Papers had to say about the Clause). As to the substance, moreover, contemporaries observing the second bank controversy might have been surprised to see either Hamilton or Chief Justice Marshall held up as genuine supporters of a de minimis approach to the Necessary and Proper Clause. See Alexander Hamilton, *Final Version of an Opinion on the Constitutionality of an Act to Establish a Bank* (1791), reprinted in 8 THE PAPERS OF ALEXANDER HAMILTON 97 (Harold C. Syrett ed., 1965); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819); *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 396 (1805).

54. See, e.g., 1 TUCKER, *supra* note 43, app. at 287 ("It neither enlarges any power specifically granted, nor is it a grant of any new power to congress . . ."). Accord 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1238 (1833) (same). The delicacy of this depiction is illustrated by what Story said in response to the argument that the Clause was confined only to those measures that were "absolutely and indispensably necessary," *id.* § 1239:

The character of the clause equally forbids any presumption of an intention to use the restrictive interpretation. In the first place, the clause is placed among the powers of congress, and not among the limitations on those powers. In the next place, its terms purport to enlarge, and not to diminish, the powers vested in the government. It purports, on its face, to be an additional power, not a restriction on those already granted. If it does not, in fact, (as seems the true construction,) give any new powers, it affirms the right to use all necessary and proper means to carry into execution the other powers; and thus makes an *express* power, what would otherwise be merely an *implied* power. In either aspect, it is impossible to construe it to be a restriction.

*Id.* § 1249.

55. See Rosenkranz, *supra* note 18, at 1891.

56. *Id.* at 1891 & n.107 ("What seems clear, from the language of the Constitution and of John Marshall, is that in the United States the strong presumption should be that a treaty or a treaty provision is self-executing, and that a non-self-executing promise is highly exceptional. A tendency in the Executive branch and in the courts to interpret treaties and treaty provisions as non-self-executing runs counter to the language, and spirit, and history of Article VI of the Constitution.") (quoting LOUIS

precisely that assumption – that treaties were to be self-executing in the ordinary course, which was held even more widely at the time of the Framing<sup>57</sup> – that might have given everyone (mistaken) confidence that adding congressional implementing authority would in practice add little to the treaty power.<sup>58</sup> Had the Founding Generation really anticipated non-self-executing treaties, they might have conceded the Clause's considerable impact, rather than eschewing the view ultimately expressed in *Missouri v. Holland*.

### B. Bridging the Gap

This recurrent issue of non-self-execution brings us back to the underlying question of whether the relevant sentence in Justice Holmes' opinion – that “[i]f the treaty is valid there can be no dispute about the validity of the statute under Article 1, Section 8, as a necessary and proper means to execute the powers of the Government”<sup>59</sup> – is “flatly wrong,”<sup>60</sup> per Profess Rosenkranz, such that the case should be overruled.<sup>61</sup> This is strong medicine, and requires appreciating what the case stood for. Why, exactly, did the Migratory Bird Treaty require domestic implementation? Exploring that question informs our sense as to whether the statute was valid, even under the restrictive understanding of the Necessary and Proper Clause, and sheds light on the integrity of that understanding itself.

The most obvious answer is that the treaty itself called for legislative implementation. Article VIII provided that “[t]he High Contracting Powers agree themselves to take, or propose to their respective appropriate law-making bodies, the necessary measures for insuring the execution of the present Convention.”<sup>62</sup> This is almost certainly what Justice Holmes had in mind when he remarked that the treaty “agreed that the two powers would take or propose to their lawmaking bodies the necessary measures for carrying the treaty out.”<sup>63</sup> Applying the *Foster v. Neilson* test, the treaty seems *not*

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HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 201 (2d ed. 1996))).

57. See, e.g., JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 67-70 (2d ed. 2003); Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as “Supreme Law of the Land,”* 99 COLUM. L. REV. 2095 (1999). Quite recently, the *Medellin v. Texas*, 128 S. Ct. 1346 (2008), decision created what arguably amounts to a presumption *against* self-execution.

58. Assuming, that is, that they thought about the treaty power at all in this regard.

59. *Missouri v. Holland*, 252 U.S. 416, 432 (1920).

60. Rosenkranz, *supra* note 18, at 1875.

61. *Id.* at 1868.

62. Convention Between the United States and Great Britain for the Protection of Migratory Birds, *supra* note 15, 39 Stat. at 1704.

63. *Holland*, 252 U.S. at 431.

to be of the kind “operat[ing] of itself without the aid of any legislative provision,” such as would benefit from the Supremacy Clause.<sup>64</sup>

Sadly, this is not as evident as it should be, and the contrast to *Foster* is instructive. The English text of the treaty in *Foster*, when construed (mistakenly) as non-self-executing,<sup>65</sup> was understood to contemplate future ratification by virtue of its commitment that the grants in question “shall be ratified and confirmed.”<sup>66</sup> This language put off, as a matter of treaty operation, any legal effect until implementation; it only “pledge[d] the faith of the United States to pass acts which shall ratify and confirm [the grants].”<sup>67</sup> This made sense – assuming one accepted the inroads against the Supremacy Clause – because the treaty’s operative clause, directed solely to the United States, made the perfection of the title to land claimed by the private plaintiffs in *Foster* contingent on an intervening act by U.S. authorities.

The Migratory Bird Treaty is not precisely comparable. First, unlike the treaty provision at issue in *Foster*, the treaty spoke to the obligations of two parties, not just one. What is more, the other party – Great Britain – depended on Canada for implementation of treaty commitments undertaken on Canada’s behalf,<sup>68</sup> and Canada in turn depended on its provinces for approval before the treaty could become effective as domestic law.<sup>69</sup> So Article VIII, which adverted to “tak[ing] or propos[ing] to their lawmaking bodies” the necessary measures for implementing the treaty, was sufficiently motivated by the need to take into account a U.S. *partner’s* system. The argument that the treaty itself *required* separate implementation by the United States, notwithstanding its Supremacy Clause, suffered accordingly: The language could be explained by the need to take into account only the other party’s circumstances.<sup>70</sup> If the non-self-execution inquiry is simply whether a treaty requires U.S. implementing legislation, or manifests an intent not to become

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64. 27 U.S. (2 Pet.) 253, 254 (1829).

65. See *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 88-89 (1833) (reversing *Foster* on the basis of an equally authoritative Spanish text, which provided that “the grants shall remain ratified and confirmed”).

66. *Foster*, 27 U.S. (2 Pet.) at 314.

67. *Id.*

68. Cf. Constitution Act, 1867, 30 & 31 Vict. Ch. 3 (U.K.), as reprinted in R.S.C., No. 5, § 132 (Appendix II 1985) (“The Parliament and Government of Canada shall have all Powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries.”).

69. This remained the case even after Canada achieved independence in managing its foreign relations. *Attorney-General for Canada v. Attorney-General for Ontario*, [1937] A.C. 326, 351-52 (P.C.) (appeal taken from Labour Conventions). See *id.* at 352 (stating that “the Dominion cannot merely by making promises to foreign countries clothe itself with legislative authority inconsistent with the constitution which gave it birth”).

70. This problem is also noted in Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT’L L. 695, 709-10 (1995).

effective unless and until each party legislates,<sup>71</sup> it is plausible that – notwithstanding Article VIII – the Migratory Bird Treaty was not non-self-executing at all.<sup>72</sup>

Second, the Migratory Bird Treaty actually had *other* provisions that unambiguously required action by either party before they might become effective. But unlike Article VIII, these were not mechanisms for effectuating treaty obligations so much as means for varying from its strictures – for example, permitting each party to allow additional hunting, for defined purposes, according to regulations that it might issue.<sup>73</sup> The result was that the treaty might be fully effectuated through ratification if a party did *not* choose to avail itself of those options. The possibility that a state might elect to pursue one or more options, however, would have fully warranted the reference to implementation in Article VIII, even if one were to overlook the need to accommodate Canada's particular circumstances.

In some regards, all this vindicates Professor Rosenkranz's concerns. If a non-self-executing treaty does not require separate domestic implementation, but instead simply affords the national government the *opportunity* to legislate, necessary and proper authority seems less, well, necessary – and less proper, given the potential for abuse.<sup>74</sup> At the same time, they illustrate the complex distinction between self-executing and non-self-executing treaties, which is decisive of a treaty's potential domestic effect under the restrictive understanding.<sup>75</sup> For example, if the option-driven reading of the

71. See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 (1987).

72. As made evident below, this is an argument from first principles, not an account of how the Convention was understood at the time of its making. Members of Congress debating the wisdom of U.S. implementing legislation were aware of the Canadian scheme – some were a little jealous of it – but did not seem to believe that the burden of implementation rested on Canada alone. See, e.g., 56 CONG. REC. 7372, 7373 (1918) (Rep. Graham).

73. Article II permitted hunting during close seasons “for scientific or propagating purposes under permits issued by proper authorities” and allowed each party to restrict the hunting season for a period not more than three and a half months as they “may severally deem appropriate and define by law or regulation”; Article IV allowed the setting of terms for duck season “by such other regulations as may be deemed appropriate”; Article V prescribed that the taking of certain nests or eggs was prohibited save on conditions like those for hunting Article II; Article VII allowed permits to be issued under extraordinary conditions for the killing of protected birds under regulations that “may be issued by the proper authorities of the High Contracting Powers under suitable regulations prescribed therefor by them respectively.” Convention Between the United States and Great Britain for the Protection of Migratory Birds, *supra* note 15.

74. Cf. Rosenkranz, *supra* note 18, at 1930 n.285 (remarking on possibility that in view of Article VIII, *Missouri v. Holland* stands for the proposition that a mere obligation to propose legislation could establish constitutional authority to enact it).

75. See *id.* at 1919.

Migratory Bird Treaty were correct, the true issue in *Missouri v. Holland* should have been whether the rules provided in the Migratory Bird Act of 1918 and its implementing regulations – if not sustainable under the Commerce Clause or some other enumerated authority – were independently warranted by self-executing provisions of the treaty itself.<sup>76</sup> If and to the extent the legislative provisions were redundant, or sustainable as an interpretive guide to the treaty, Justice Holmes may have been right in dismissing the challenge.

Did the relevant actors – the Senate and the President in making the treaty, or Congress in implementing it<sup>77</sup> – actually think about the treaty and the statute in one of these ways? It is unlikely, but hard to dismiss entirely. Most thought legislation was necessary to carry out the treaty,<sup>78</sup> but the reasons seemed to vary. Some appeared to think that implementing legislation was appropriate regardless of the treaty's nature – perhaps because they thought little of treaties' supremacy,<sup>79</sup> or because constitutional niceties took a back seat to the interests of the states, hunters, or conservation.<sup>80</sup> Others, certainly, thought it was because of Article VIII of the treaty.<sup>81</sup> Yet others seemed to think it was incumbent upon Congress to instruct the Secretary of Agriculture, though it is unclear whether they thought that was necessary because of domestic delegation principles, Article VIII, or the treaty's options for regulatory derogation.<sup>82</sup>

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76. Some provisions of a treaty may be self-executing while others are not – and that it may be more precise to address whether a particular provision so qualifies. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. h (1987).

77. *Cf. id.* § 111(4)(b) (providing for non-self-execution “if the Senate in giving consent to a treaty, or Congress by resolution, requires implementing legislation”).

78. *See, e.g.*, 55 CONG. REC. 4400 (1917) (reprinting State Department letter). Sometimes it was suggested that the converse would suffice – that is, if the treaty reflected the terms of the 1913 act. *See, e.g.*, 51 CONG. REC. 8452, 8453 (1914) (Sen. McLean).

79. Senator Reed, for example, took the view that the treaty would invariably depend upon implementing legislation – seemingly, no matter what form the treaty took. 51 CONG. REC. 8453 (1914) (Sen. Reed). Representative Stedman, on the other hand, invoked Supreme Court precedent to the effect that treaties were automatically enforceable in federal court – but still thought the treaty required implementing legislation. 56 CONG. REC. 7362 (1918) (Rep. Stedman).

80. *See, e.g.*, 56 CONG. REC. 7370 (1918) (Rep. Raker) (citing environmental imperative).

81. *See, e.g.*, 56 CONG. REC. 7360-61 (1918) (Rep. Stedman).

82. *See, e.g.*, 56 CONG. REC. 7365 (1918) (Rep. Walsh) (emphasizing that “[t]he law will be the regulation promulgated by the Department of Agriculture[;] [i]t will not be this act necessarily”). 56 CONG. REC. 7364 (1918) (Rep. Huddleston describing need for regulations or legislation to establish, variously, either the open or closed seasons, meaning that “[t]he treaty is ineffective without legislation to back it up”).



Some of the explanations are hard to square with any theory of the treaty power,<sup>83</sup> while others pose a particular challenge to the restrictive understanding.<sup>84</sup> Perhaps the most intriguing were superficially pedestrian: the emphases on needing legislation either to ensure funding<sup>85</sup> or to provide for criminal penalties.<sup>86</sup> Congressional debates recalled the doctrine according to which treaty provisions that would require appropriations or criminalize conduct (among other things) are deemed non-self-executing – not because the treaty-makers would have it so, but because they call for action that only Congress may take.<sup>87</sup> Representative Temple, for example, explained that treaties imposing some ends (such as appropriations) called for legislation as a matter of constitutional law, so that while “[t]he treaty has gone into effect and is a part of the supreme law of the land . . . there is as yet no penalty for violation of this law and Congress has not as yet empowered the proper authorities to issue the regulations provided for by Article VII of the treaty.”<sup>88</sup> Much of the remaining debate within Congress focused, then, on the need for funding and the authority to be delegated to the Secretary of Agriculture to regulate criminal enforcement. Later, when *Missouri v. Holland* finally reached the

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83. For example, those perceiving domestic implementation as inevitable, regardless of what the treaty said, would presumably be dismissed as having too narrow an understanding of the Supremacy Clause or the potential for self-executing treaties.

84. Representative Miller, for example, articulated a view very much like that taken by Justice Holmes. See 56 CONG. REC. 7371 (1918).

85. See, e.g., 54 CONG. REC. 970 (1917) (Rep. Raker).

86. See, e.g., 51 CONG. REC. 8450 (1914) (Sen. Reed). Much later, Representative Robbins argued strenuously against referring to the provisions of the treaty in the implementing act; when pressed as to why, he explained that the penal nature of the provisions made it imperative to provide notice by statute of any legal requirements. With that seemingly in mind, he added: “This act is passed to carry into effect this treaty in the United States. That is what we are legislating about. It is not self-acting. We are passing this act to do that.” 56 CONG. REC. 7455 (1918) (Rep. Robbins).

87. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. i & n.6 (1987); CONGRESSIONAL RESEARCH SERV., LIBRARY OF CONGRESS, TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE, S. REP. NO. 106-71, at 73 (2001); Vázquez, *supra* note 70, at 718. E.g., *The Over the Top*, *Schroeder v. Bissell*, 5 F.2d 838, 845 (D. Conn. 1925) (“It is not the function of treaties to enact the fiscal or criminal law of a nation. For this purpose no treaty is self-executing. Congress may be under a duty to enact that which has been agreed upon by treaty, but duty and its performance are two separate and distinct things. Nor is there any doubt that the treaty making power has its limitations. What these are has never been defined, perhaps never need be defined. Certain it is that no part of the criminal law of this country has ever been enacted by treaty.”).

88. 56 CONG. REC. 7368 (1918) (Rep. Temple). *Accord id.* at 7367-68 (explaining that, because the ratifications had been exchanged, the treaty was binding under the Supremacy Clause – but the question was “how much legislation is necessary in order that the provisions of the treaty may be actually enforced,” and adverting to principle according to which “if any treaty requires the appropriation of money, the act appropriating money must pass both Houses”).

Supreme Court, the structure of the United States' argument echoed Representative Temple: first, the national government generally has the power to make treaties, the effect of which is prescribed by the Supremacy Clause; second, "[w]hat we are dealing with now, however, is an act of Congress creating criminal offenses"; third, Congress has Necessary and Proper authority, and thus the power to carry out treaties already made.<sup>89</sup>

Neither the Justice Department nor Congress fully articulated their views as to why, or to what extent, the treaty was non-self-executing: The former did not need to, given its view that the Necessary and Proper Clause sufficed no matter what, and the latter's views were too varied and unfocused. Nor would this necessarily have been of interest to Justice Holmes, who understood (correctly) that Missouri was instead objecting to Congress' power, however derived, to interfere with state sovereignty. It is unsurprising, therefore, that these issues find no expression in the apparent holding of *Missouri v. Holland*, under which legislative power may be found to carry out any treaty obligation not infringing some distinct constitutional barrier.

Would the reason for non-self-execution have mattered on the restrictive view of the Necessary and Proper Clause? Potentially, at least for some forms of "constitutional" non-self-execution. Treaty provisions deemed non-self-executing because they require the appropriation of money to effect payment under the agreement or attempt themselves to raise revenue<sup>90</sup> – the more plausible candidates for constitutional non-self-execution, because they involve something clearly exclusive to Congress<sup>91</sup> – are by the same token unproblematic candidates for legislative authority. Any such legislation would appear to exercise an enumerated power or, at most, one of Congress' "foregoing Powers" under the Necessary and Proper Clause;<sup>92</sup> indeed, there is no basis for limiting such expenditures to those preliminary to treaty-making, even under the restrictive understanding, since Congress' enumerated power is not so limited. Difficult issues might be posed if the appropriations legislation included substantive direction relating to expenditures.<sup>93</sup> But if the

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89. Brief for Appellee, *supra* note 30, at 9-10.

90. Treaties had been thought to require legislation if they required the appropriation of money to effect payment under the agreement, or raised revenue by imposing a new tax or tariff; the mere fact that money was required to finance enforcement of the statute should not have been considered enough. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. i (1987).

91. U.S. CONST. art. I, § 9, cl. 7 ("No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . ."). *But see* PAUST, *supra* note 57, at 77-78.

92. Professor Rosenkranz seems to concede that the Necessary and Proper Clause is essentially an irrelevancy under similar circumstances. Rosenkranz, *supra* note 18, at 1883 n.72.

93. To my understanding, these would be subject to a point-of-order objection, made available by and waivable under House and Senate rules, that the appropriation legislation improperly "legislates." But so-called unauthorized appropriations do persist. *Cf.* CONGRESSIONAL RESEARCH SERV., EARMARKS AND LIMITATIONS IN

Migratory Treaty Act of 1918 had consisted solely of appropriations terms (and perhaps provisions identical with self-executing treaty terms), it would bridge no gap between enumerated authority and the treaty power.

The criminalization subcategory is less clear. The tradition that treaties establishing criminal offenses or penalties are non-self-executing seems to be premised on the notion that Congress' "define and punish" authority is somehow exclusive (though the constitutional text does not say so).<sup>94</sup> Even if that enumerated authority were exclusive, it is truncated, seemingly establishing only a capacity relative to "Offences against the Law of Nations" – which is commonly understood to connote customary international law rather than treaties.<sup>95</sup> Assuming, in any event, that these obstacles were overcome, the decisive argument from the vantage of the restrictive understanding is the same one made against the broader understanding of *Missouri v. Holland*: giving Congress a power to punish offenses arising under particular treaties would run afoul of the admonition against letting Necessary and Proper authority depend upon the "fruits" of the treaty power rather than the power to make treaties in the abstract.<sup>96</sup>

Perhaps the most essential point, however, is this: To my knowledge, no one, even prior to *Missouri v. Holland*, seems to have thought of constitutional non-self-execution in such a painstaking fashion, and doing so – as would seem to be warranted by the restrictive understanding – is of limited utility. Longstanding practice established not only that treaty provisions of these varied types were non-self-executing, but also that Congress could remedy that deficiency; many, indeed, spoke of a duty to do so.<sup>97</sup> St. George Tucker,<sup>98</sup> for example, sought to illustrate the point that the Necessary and Proper

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APPROPRIATIONS BILLS at CRS-2 (No. 98-518) (2004). As a matter of practice, treaties have been considered sufficient to provide the necessary authorization – which, if the same view was held in 1918, would have mooted the appropriations justification for the Act. See HENKIN, *supra* note 56, at 480 n.109.

94. U.S. CONST. art. I, § 8, cl. 10; see RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 n.6 ("Criminal law to implement the foreign relations of the United States is wholly statutory.").

95. Jeremy Waldron, *Foreign Law and the Modern Ius Gentium*, 119 HARV. L. REV. 129, 132-35 (2005). See generally J. Andrew Kent, *Congress's Under-Appreciated Power to Define and Punish Offenses Against the Law of Nations*, 85 TEX. L. REV. 843 (2007); Beth Stephens, *Federalism and Foreign Affairs: Congress's Power to "Define and Punish . . . Offenses Against the Law of Nations,"* 42 WM. & MARY L. REV. 447 (2000).

96. Rosenkranz, *supra* note 18, at 1885-86 (arguing that Congress has the power to execute the power to make treaties, but not the "fruits" of that power – the treaties themselves – any more than Congress has Necessary and Proper "power to make laws necessary and proper for carrying into execution the fruits of the exercise of such powers, which is to say, other statutes").

97. See, e.g., HENKIN, *supra* note 56, at 203.

98. Speaking, occasionally, of geography, it's noteworthy that while St. George Tucker was from near what is now St. George, his family name appears to have

Clause was unthreatening by offering a “single example [to] illustrate this matter”:

The executive has power to make treaties, and by the treaty with Algiers, a certain tribute is to be paid annually to that regency. But the executive have no power to levy a tax for the payment of this tribute; congress, therefore, are authorised by this clause, to pass a law for that purpose: without which the treaty, although it be a supreme law of the land, in it's nature, and therefore binding upon congress, could not be executed with good faith. For the constitution expressly prohibits drawing any money from the treasury but in consequence of appropriations made by law.<sup>99</sup>

It is challenging to reconcile this account with the formalisms of the restrictive understanding. That approach should resist interpreting Tucker's argument as concerning execution of the treaty power only – because, by hypothesis, Congress would not really be executing an “other Power[] vested by th[e] Constitution” in the treaty-makers if they lacked that authority in the first place, and in any event the execution would be of a treaty already made.<sup>100</sup> It might more readily accept Tucker's scenario as relating to circumstances in which Congress is executing one of its “foregoing Powers” – the power to appropriate – but on that view, it would be unnecessary even to conceive of this as entailing the Necessary and Proper Clause, as he clearly did.<sup>101</sup>

Tucker instead seemed to think that the appropriations would be made in service of the treaty, and that this was necessary in order to execute the treaty in good faith. This probably suggests a more expansive understanding of what it means to facilitate the power to “make” treaties, one that includes those already perfected on the international plane. Tucker may also have been expressing faith that Congress was carrying into execution a power vested by the Constitution “in the Government of the United States.” It was this line of thinking, in any event, that was picked up over a hundred years later by Justice Holmes's terse declaration that “there can be no dispute about

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preceded the place. He was also the second at the College of William and Mary to occupy the chair in law, but first in Williamsburg to occupy his own bathroom. History will judge the greater accomplishment. See Colonial Williamsburg, St. George Tucker, <http://www.history.org/Almanack/people/bios/biotuck.cfm> (last visited Oct. 2, 2008).

99. TUCKER, *supra* note 43, at 287-88.

100. Rosenkranz, *supra* note 18, at 1881.

101. See, e.g., *Turner v. Am. Baptist Missionary Union*, 24 F. Cas. 344 (C.C.D. Mich. 1852) (explaining that, when a treaty called for the appropriation of money, members of Congress “act upon their own responsibility, and not upon the responsibility of the treaty-making power”).

the validity of the statute under Article 1, Section 8, as a necessary and proper means to execute *the powers of the Government*.<sup>102</sup>

#### IV. WHERE *MISSOURI V. HOLLAND* WAS

Understanding *Missouri v. Holland* in its context – geographic and otherwise – informs our appreciation for what it decided and the assumptions on which it rested. For reasons previously expressed, the decision might be reconceived as one founded on treaty that is partly self-executing and partly (constitutionally) non-self-executing. Whether doing so would clear analytic space, or set up a future decision that distinguished and marginalized *Holland*, is a question that cowardice compels me to avoid.

The clearer payoff, rather, is in helping to defuse more recent critiques. For example, Professor Rosenkranz observes that *Missouri v. Holland* seems to create the anomaly that an implementing statute might be constitutional when enacted, but lose that constitutionality in the event a treaty ceased, without anyone having behaved unconstitutionally.<sup>103</sup> The significance of that anomaly would have likely been lost on Justice Holmes. He and the rest of the Court assumed *arguendo* that the statute alone would have been unconstitutional, but that question admitted of no easy answer; not only had there been a roiling debate in Congress and in the lower courts,<sup>104</sup> but a challenge to the 1913 Act had been dropped from the Court's docket because the justices were evenly split on its constitutionality.<sup>105</sup> Looking forward, it was equally hard to suppose the Court's view of the Commerce Clause and state

102. *Missouri v. Holland*, 252 U.S. 416, 432 (emphasis added).

103. Rosenkranz, *supra* note 18, at 1907-12. This was the result anticipated by Professor Henkin. See HENKIN, *supra* note 56, at 480 n.108. Professor Rosenkranz also notes the rival reading by which statutes might be deemed to survive the loss of their enabling treaty, which he considers more “textually and doctrinally plausible,” but with “bizarre ramifications” – including that “the United States Code might be filled with undead statutes that are the supreme law of the land today but that Congress could not reenact or even amend tomorrow.” This leads him to surmise that Justice Holmes would have favored the other answer. *Id.* at 1908.

104. He noted that two decisions had held the earlier act unconstitutional, *Holland*, 252 U.S. at 432, but the division of opinion seems to have been broader and more evenly balanced than that suggests. 56 CONG. REC. 7361 (1918) (Rep. Stedman) (reporting that the 1913 act had been declared unconstitutional by three federal and two state decisions, but sustained in fifteen).

105. The case, *United States v. Shauver*, was at first delayed by the government due to doubts about its likelihood of prevailing, but after argument the Court apparently divided three to three, with the remaining three justices not participating. Chief Justice White apparently held the case for a full bench but in the meantime undertook an effort on the law's behalf that strained propriety. ALEXANDER BICKEL & BENNO C. SCHMIDT, JR., *THE JUDICIARY AND RESPONSIBLE GOVERNMENT, 1910-1921*, at 477-78 (1984). The case was dismissed on the petition of the Solicitor General after adoption of the 1918 Act. *United States v. Shauver*, 248 U.S. 594 (1919) (dismissing writ).

sovereignty (including their property interest in migratory birds) would last for the ages. Against this background, Holmes' anxiety about contingent constitutionality was likely to have been tempered. If anything, his approach to the Tenth Amendment – in which he depicted the issue as being “what this country has become,” not whatever the Framers or their successors might have supposed<sup>106</sup> – suggests an appreciation for the inevitable contingency of constitutional doctrine.

To be sure, *Missouri v. Holland*'s context also qualifies efforts at redeeming it. Given the preceding collapse of the Inland Fisheries Treaty, the congressional debate over the 1913 Act and the lack of executive branch enthusiasm for its enforcement, and the reasonable grounds for doubt as to whether the 1918 Act would be passed and later upheld, the Court could not have been sanguine that the United States would always fulfill its treaty commitments. Even if the Court were otherwise inclined to recover the more implementation-friendly expectations of the Framers, the advent of non-self-executing treaties meant that original expectations as to whether potential treaty partners could bank on U.S. commitments would almost certainly have been disappointed. The facts underlying *Missouri v. Holland* would have made that abundantly clear – such that construing the Necessary and Proper Clause to ensure U.S. compliance looks like shutting the barn door after the horse (or duck) was gone. If nothing else, contemplating Canada's role as the other treaty party would have undermined substantially any argument that U.S. treaty-makers required national constitutional capacity in order to keep abreast.

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Subsequent to this symposium, the Supreme Court held in *Medellin v. Texas*<sup>107</sup> that a potentially substantial number of U.S. treaties might be deemed non-self-executing – that, in the absence of mandatory language, they might be understood as political commitments that bound the United States on the international plane without constituting binding law enforceable in our courts.<sup>108</sup> The solution, the Court stressed, was for Congress to adopt implementing legislation.<sup>109</sup> In the absence of such legislation, the Court found it unnecessary to cite *Missouri v. Holland*, but just as surely signaled its continued relevance and possible contestation. If future cases assume a more stringent test for identifying self-executing treaties, premised in part on the backstop of congressional implementation, the likelihood increases that Congress will take measures on the fringes of its Necessary and Proper authority – on a

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106. *Holland*, 252 U.S. at 434.

107. 128 S. Ct. 1346 (2008); see *id.* at 1380-82 (Breyer, J., dissenting) (describing difficulty of finding self-execution under the majority approach).

108. *Id.* at 1361, 1367 (majority opinion).

109. *Id.* at 1368-71.

matter not squarely licensed by the enumerated powers in Article I, in an instance where non-self-execution is premised purely on the treaty's international meaning (as in *Medellin*, seemingly) and not in part on constitutional limits to the treaty power (as in *Missouri v. Holland*, arguably). The odds that Missourians (or ducks) will be directly involved in that future controversy are long, but the context they afford for understanding *Missouri v. Holland*'s foundations may prove relevant all the same.