

November 2011

## Which Treaties Reign Supreme? The Dormant Supremacy Clause Effect of Implemented Non-Self-Executing Treaties

Leonie W. Huang

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

---

### Recommended Citation

Leonie W. Huang, *Which Treaties Reign Supreme? The Dormant Supremacy Clause Effect of Implemented Non-Self-Executing Treaties*, 79 Fordham L. Rev. 2211 (2011).

Available at: <https://ir.lawnet.fordham.edu/flr/vol79/iss5/12>

This Note is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

**WHICH TREATIES REIGN SUPREME? THE  
DORMANT SUPREMACY CLAUSE EFFECT OF  
IMPLEMENTED NON-SELF-EXECUTING  
TREATIES**

*Leonie W. Huang\**

*The Supremacy Clause includes treaties in the list of supreme laws which state judges are bound to uphold against conflicting state laws. However, as the U.S. Supreme Court most recently affirmed in *Medellin v. Texas*, not all Article II treaties receive this Supremacy Clause effect immediately upon ratification. Some treaties, known as non-self-executing treaties, are domestically unenforceable by United States courts until passage of federal legislation implementing the treaty. Based on this distinction between non-self-executing and self-executing treaties, courts have disagreed as to whether an implemented non-self-executing treaty can preempt state law or whether only the implementing legislation can have such Supremacy Clause effect.*

*This Note argues that the inclusion of the words “all Treaties” in the language of the Supremacy Clause is grounded in the decision that the federal government would dominate national foreign relations and in the necessity of reigning in conflicting state actions in that area. Due to this constitutional framework, once a non-self-executing treaty has been properly implemented, in some cases it can and should preempt state law. In short, implemented non-self-executing treaties should have Supremacy Clause effect where it is necessary to uphold United States foreign policy decisions and to stop states from placing the United States in breach of international obligations that have already been domestically executed.*

TABLE OF CONTENTS

|                                      |      |
|--------------------------------------|------|
| INTRODUCTION.....                    | 2213 |
| I. KEEPING FAITH WITH TREATIES ..... | 2216 |

---

\* J.D. Candidate, 2012, Fordham University School of Law; M.P.A., 2004, American University; B.S.F.S., 2002, Georgetown University. I am grateful to Professor Thomas H. Lee for his insight, guidance, and advice; to Professor Carlos Manuel Vázquez for his enthusiasm and patience in teaching international law which helped inspire this Note; and to my friends and family, most especially my parents Alice and David Huang, for their ever present love and support.

|     |  |      |
|-----|--|------|
| A.  | <i>The Supremacy Clause of the United States Constitution: Securing Federal Preemption and Foreign Relations Dominance</i> .....             | 2217 |
| 1.  | The Legacy of the Articles of Confederation.....   | 2217 |
| 2.  | Foreign Relations Enforcement Failure: The Case of the 1783 Treaty of Peace.....   | 2218 |
| 3.  | The Supremacy Clause and Federal Control of Foreign Relations Policy .....   | 2219 |
| B.  | <i>The Treaty Power and Its Limits: Separation of Powers, Federalism, and Powers Reserved to the States</i> .....                            | 2223 |
| 1.  | Article II Treaties and Other International Agreements ..  | 2223 |
| 2.  | <i>Missouri v. Holland</i> and Lawmaking Through Treaties ..   | 2225 |
| C.  | <i>The Supreme Court's Treaty Jurisprudence: Development and Application of the Self-Executing and Non-Self-Executing Distinction</i> .....  | 2226 |
| 1.  | Self-Executing and Non-Self-Executing Treaties: The Legacy of <i>Foster v. Neilson</i> and <i>United States v. Percheman</i> .....           | 2226 |
| a.  | <i>Origins of the Self-Executing versus Non-Self-Executing Treaty Distinction</i> .....  | 2226 |
| b.  | <i>Foster v. Neilson</i> and <i>United States v. Percheman</i> ....  | 2227 |
| c.  | <i>Non-Self-Executing Treaty Categories</i> .....  | 2228 |
| 2.  | <i>Medellin v. Texas</i> .....   | 2231 |
| II. | CAN AN IMPLEMENTED NON-SELF-EXECUTING TREATY PREEMPT CONFLICTING LAW ALL BY ITSELF? .....  | 2233 |
| A.  | <i>Requirements of the New York Convention, the Federal Arbitration Act, and the McCarran-Ferguson Act</i> .....                             | 2234 |
| 1.  | The New York Convention.....   | 2234 |
| a.  | <i>Ratification Following Passage of Chapter Two of the Federal Arbitration Act</i> .....  | 2234 |
| b.  | <i>Statutory Requirements for Enforcement of Mandatory Arbitration Under the Federal Arbitration Act</i> .....                               | 2235 |
| c.  | <i>Arbitration Agreements Under the New York Convention</i> .....  | 2236 |
| 2.  | The McCarran-Ferguson Act .....  | 2239 |
| a.  | <i>Passage and Rationale of the McCarran-Ferguson Act</i> .....  | 2239 |
| b.  | <i>Statutory Requirements for Reverse Preemption Under the McCarran-Ferguson Act</i> .....   | 2239 |
| c.  | <i>State Laws Enacted for the Purpose of Regulating the Business of Insurance</i> .....  | 2240 |
| B.  | <i>The Fifth Circuit Distinguishes Implemented Treaties: Safety National Casualty Corp. v. Certain Underwriters at Lloyd's, London</i> ..... | 2242 |

|            |   |      |
|------------|---|------|
| 2011]      | <i>WHICH TREATIES REIGN SUPREME?</i>  | 2213 |
|            | 1. The Majority Opinion .....   | 2242 |
|            | <i>a. The New York Convention as the Source of Law</i> .....  | 2244 |
|            | <i>b. Treaties Are Not Acts of Congress</i> .....   | 2247 |
|            | 2. The Dissent .....  | 2248 |
|            | C. <i>The Second Circuit Finds Non-Self-Executing Treaties</i><br><i>Inapplicable: Stephens v. American International</i><br><i>Insurance Co.</i> ..... | 2249 |
| III.       | TREATIES, WHETHER SELF-EXECUTING OR NOT, CAN HAVE<br>INDEPENDENT SUPREMACY CLAUSE EFFECT.....   | 2251 |
|            | A. <i>The Case of the New York Convention</i> .....   | 2251 |
|            | 1. State Anti-Arbitration Insurance Provisions Arguably<br>Fulfill the McCarran-Ferguson Act Requirements.....  | 2252 |
|            | 2. The New York Convention Exception for Special<br>National Interests .....  | 2253 |
|            | 3. The New York Convention as the Embodiment of a<br>Foreign Policy Decision Left Unaltered by Its<br>Implementing Legislation .....                    | 2253 |
|            | B. <i>The Second Circuit Decision and Fifth Circuit Dissent</i><br><i>Incorrectly Analyze Foster Self-Execution Doctrine</i> .....                      | 2255 |
|            | C. <i>Focusing on National Foreign Policy in Determining When</i><br><i>Treaties Have Supremacy Clause Effect</i> .....                                 | 2256 |
| CONCLUSION | .....   | 2257 |

#### INTRODUCTION

Two international wrongs may not make a domestically enforceable right,<sup>1</sup> but an implemented non-self-executing treaty may. The Supremacy Clause of the United States Constitution states:

This Constitution, and the Laws of the United States . . . and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.<sup>2</sup>

A plain reading of the first part of the Supremacy Clause implies that “Treaties” are, by themselves, the “supreme Law of the Land” in the same way as the “Constitution” and statutory “Laws of the United States.”<sup>3</sup> The clause does not say that a treaty needs a “Law[] of the United States” to be

---

1. In *Medellin v. Texas*, 552 U.S. 491 (2008), violations of a United States treaty obligation by the State of Texas resulted in an International Court of Justice judgment. *Id.* at 497–98; see also *infra* Part I.C.2. Texas’s refusal to comply with the judgment caused a violation of another international obligation. *Cf. Medellin*, 552 U.S. at 504. The U.S. Supreme Court held that although the treaties at issue in *Medellin* represented international obligations, the International Court of Justice judgment was not domestically enforceable. *See id.* at 522–23.

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

3. *Id.*

the “supreme Law,” but rather implies equality between “Treaties” and “Laws of the United States” as far as supremacy is concerned.<sup>4</sup> However, for a very long time, courts and commentators have focused on a distinction between two different types of treaties: non-self-executing treaties—which require implementation by a “Law[] of the United States” to have Supremacy Clause effect—and self-executing treaties—which do not.<sup>5</sup>

The importance of the non-self-executing/self-executing treaty distinction to potential litigants is great. Assuming the treaty provides a private right of action, the possibility of judicial enforcement of that right in the absence of an implementing statute turns on the non-self-executing/self-executing distinction.<sup>6</sup> Another corollary of the distinction is that non-self-executing treaties do not automatically bind state judges to override state laws contrary to the treaty.<sup>7</sup> In contrast, self-executing treaties do bind state judges (and *a fortiori* federal judges who decide state law issues) to disregard contrary state laws as soon as the treaty enters into force.<sup>8</sup>

One example of this corollary in action is the U.S. Supreme Court’s decision in *Medellin v. Texas*.<sup>9</sup> In *Medellin*, the Court held that certain treaties, purporting to make binding an International Court of Justice (ICJ) judgment (which strongly suggested that U.S. courts override state procedural bars to consider the merits of claims by Mexican nationals under the Vienna Convention on Consular Relations<sup>10</sup>), were non-self-executing.<sup>11</sup> This holding necessarily meant that the treaties at issue were not entitled to Supremacy Clause effect, and state procedural bars were not overridden.<sup>12</sup>

Consider for a moment, however, a scenario with two facts different from *Medellin*. First, assume the treaty sources do make ICJ judgments binding. Second, assume the treaty sources had all been implemented by legislation. In this scenario, the ICJ judgment logically would have been binding, even if there were no legislation enacting the judgment itself.<sup>13</sup> Thus Texas state procedural bars would have to yield to the judgment and consider the claim.<sup>14</sup> But what if another federal law (an anti-Supremacy Clause statute predating the treaties and implementing legislation) provided that no act of Congress will be construed to override state criminal procedural bars? Does the result change in this case, and if so why?

---

4. *See id.*

5. *See infra* Part I.C.

6. *See infra* Part I.C.

7. *See infra* Part I.C.

8. *See* U.S. CONST. art. VI, cl. 2. (“[T]he Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”); *infra* Part I.C.

9. 552 U.S. 491 (2008).

10. *Opened for signature* Apr. 24, 1963, 21 U.S.T. 77 [hereinafter VCCR] (entered into force with respect to the United States of America December 24, 1969).

11. *See infra* Part I.C.2.

12. *See infra* note 146.

13. *See infra* notes 146–57 and accompanying text.

14. *See infra* notes 141–46 and accompanying text.

While the above scenario is hypothetical, a similar conflict has recently arisen in the federal Courts of Appeals.<sup>15</sup> The conflict involves a treaty that, like those in the *Medellin* hypothetical, received Supremacy Clause effect by the enactment of an implementing statute.<sup>16</sup> The real-life conflict also involves an anti-Supremacy Clause statute that disables the Supremacy Clause's command of obedience to state judges. In this case, the anti-Supremacy Clause statute permits state judges to apply state laws passed for the purpose of regulating the business of insurance, even if those laws are "Contrary" to "an Act of Congress."<sup>17</sup> The anti-Supremacy Clause statute plainly cancels out the Supremacy Clause effect of the implementing legislation, which is, after all, an act of Congress. The question is, does it also disable the treaty's domestic effect as law?

The federal Courts of Appeals have been confused about how to address this issue<sup>18</sup> and this Note seeks to clear up some confusion and provide an answer to the question of whether an implemented non-self-executing treaty can have independent Supremacy Clause effect. One answer might be that only implementing legislation is given Supremacy Clause effect.<sup>19</sup> Under that approach, the anti-Supremacy Clause statute effectively disables any domestic effect of the implemented non-self-executing treaty.<sup>20</sup> Another answer—and, as this Note argues, the correct answer—is that it is possible for an implemented non-self-executing treaty to have independent Supremacy Clause effect.<sup>21</sup>

The true importance of the non-self-executing/self-executing treaty distinction is tied to the constitutional issue of separation of powers.<sup>22</sup> The distinction turns on whether a treaty without implementing legislation can provide a rule of decision for the court or whether some political decision yet exists that would be inappropriate for judicial determination.<sup>23</sup> Therefore, when analyzing whether an implemented non-self-executing treaty may have independent Supremacy Clause effect, the focus should not be on whether an implemented treaty was self-executing or not, but on why it had that status. In other words, the focus should return to the more basic inquiry of why a court would not be able to use the treaty as a rule of decision, if no implementing legislation had been passed, and whether those concerns are germane in light of implementation.

In sum, the answer is that even under *Medellin*, a treaty that was implemented by statute may be afforded Supremacy Clause effect apart from its implementing legislation and bind state and federal judges, "any Thing in the Constitution or Laws of any State to the Contrary

---

15. See *infra* Part II.B–C.

16. See *infra* Part II.A.1.

17. See *infra* Part II.A.2.

18. See, e.g., *infra* Part II.B–C.

19. See *infra* Part II.B.2–C.

20. See *infra* Part II.B.2–C.

21. See *infra* Part III.C.

22. See *infra* Parts I.C, III.C.

23. See *infra* Parts I.C, III.C.

notwithstanding.”<sup>24</sup> Whether a particular non-self-executing treaty has continuing force of law— independent of its implementing legislation— depends to a large extent on three factors: the reason the treaty was non-self-executing, the intentions of the treaty makers, and the intentions of the implementing legislation.<sup>25</sup> Together these factors define the scope of the treaty’s Supremacy Clause effect by indicating the foreign policy decision the treaty represents and whether that decision was meant to—and should—stand in the face of a conflicting domestic policy decision.<sup>26</sup>

Part I of this Note provides background information, including the historical record with respect to the special status of treaties; an explanation of the presumption of national governmental dominance in foreign affairs; and an overview of United States treaty law, including a survey of the Supreme Court’s major treaty execution jurisprudence. Part II presents two conflicting views on the Supremacy Clause effect of implemented non-self-executing Treaties in cases involving an implemented treaty known as the New York Convention and an anti-Supremacy Clause statute known as the McCarran-Ferguson Act. Part II first explains the requirements of the New York Convention and the McCarran-Ferguson Act, then describes the conflicting views of the U.S. Courts of Appeals for the Fifth and Second Circuits, as presented in the Fifth Circuit’s majority and dissenting opinions in *Safety National Casualty Corp. v. Certain Underwriters at Lloyd’s, London*,<sup>27</sup> and the Second Circuit’s decision in *Stephens v. American International Insurance Co.*<sup>28</sup> Part III argues that “all Treaties,” whether self-executing or not, are imbued with the potential for Supremacy Clause effect and, to the extent that an implemented non-self-executing treaty independently represents a foreign policy decision, the treaty itself can and ought to independently have preemptive force as a “supreme Law of the Land.”

### I. KEEPING FAITH WITH TREATIES

The debate about treaty supremacy begins with Article VI, Clause 2 of the United States Constitution. The plain text of this clause communicates that all treaties are the “supreme Law of the Land;”<sup>29</sup> nonetheless, the proper place for treaties in our federal system has been contested since the founding.<sup>30</sup> This part provides relevant background information on United States treaty law, beginning with Part I.A, which explains the early American concern with fulfilling United States treaty obligations and the

---

24. U.S. CONST. art. VI, cl. 2; *see infra* Part III.

25. *See infra* Part III.C.

26. *See infra* Part III.C.

27. 587 F.3d 714 (5th Cir. 2009) (en banc).

28. 66 F.3d 41 (2d Cir. 1995).

29. *Id.*

30. *See infra* note 44 and accompanying text; *see also* John T. Parry, *Congress, the Supremacy Clause, and the Implementation of Treaties*, 32 FORDHAM INT’L L.J. 1209, 1214, 1328–29, 1332–35 (2009) (arguing that *Medellin*, rather than creating a conclusion for or against a self-executing treaty presumption, is instead the “latest doctrinal contribution” to an ongoing conversation about constitutional law and politics in treaty implementation).

existing presumption of federal government dominance in foreign relations power. Next, Part I.B discusses the various roles of the three branches of the federal government in foreign policy decision making through treaties, and constitutional limitations on treaty power. Finally, Part I.C surveys the major cases in the Supreme Court's treaty execution jurisprudence.

A. *The Supremacy Clause of the United States Constitution: Securing Federal Preemption and Foreign Relations Dominance*

1. The Legacy of the Articles of Confederation

The American Revolution officially ended with the signing of the 1783 Treaty of Peace with Great Britain.<sup>31</sup> The United States had been operating under the Articles of Confederation since their ratification in 1781.<sup>32</sup> It soon became clear, however, that there were serious problems with the governmental structure under the Articles of Confederation.<sup>33</sup> The effort to address these faults resulted in the drafting of the United States Constitution in 1787 followed by its ratification in 1789.<sup>34</sup>

The major failing of the Articles of Confederation was the inability of the national government to enforce foreign policy, including compliance with the 1783 Treaty of Peace.<sup>35</sup> As stated by Alexander Hamilton in *The Federalist* No. 22,

A circumstance which crowns the defects of the Confederation remains yet to be mentioned—the want of a judiciary power. Laws are a dead letter without courts to expound and define their true meaning and operation. The treaties of the United States, to have any force at all, must be considered as part of the law of the land. Their true import, as far as respects individuals, must, like all other laws, be ascertained by judicial

---

31. Definitive Treaty of Peace, U.S.-Gr. Brit., Sept. 3, 1783, 8 Stat. 80 [hereinafter Treaty of Peace].

32. See GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 8 (6th ed. 2009).

33. See Thomas H. Lee, *The Supreme Court of the United States as Quasi-International Tribunal: Reclaiming the Court's Original and Exclusive Jurisdiction Over Treaty-Based Suits by Foreign States Against States*, 104 COLUM. L. REV. 1765, 1829–30 (2004) (discussing early American concerns regarding state refusal to honor United States international obligations); Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 616–19 (2008); John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 2013–14 (1999).

34. See STONE, *supra* note 32, at 12.

35. See, e.g., Michael P. Van Alstine, *Federal Common Law in an Age of Treaties*, 89 CORNELL L. REV. 892, 901 (2004) (“Indeed, the express reference to treaties in the Supremacy Clause was an immediate result of the international embarrassment arising from the states’ failure to adhere to national treaty obligations—particularly those under the 1783 Treaty of Paris with Great Britain—under the Articles of Confederation.”); Vázquez, *supra* note 33, at 617 (“The Supremacy Clause was the Founders’ solution to one of the principal ‘vices’ or ‘evils’ of the Articles of Confederation. The Articles gave Congress the power to conclude treaties, but they did not establish a mechanism for their enforcement.”); Yoo, *supra* note 33, at 2013 (“Foreign policy failures were central to the primary defect in the Articles [of Confederation’s] treaty making structure . . . . Inability to command compliance with its foreign policy virtually ensured Congress’[s] failure . . . .”).



determinations. To produce uniformity in these determinations, they ought to be submitted, in the last resort, to one SUPREME TRIBUNAL.<sup>36</sup>

## 2. Foreign Relations Enforcement Failure: The Case of the 1783 Treaty of Peace

In return for recognition of the United States' independence and territorial boundaries, the 1783 Treaty of Peace provided that "creditors on either side, shall meet with no lawful impediment to the recovery of the full value . . . of all bona fide debts heretofore contracted."<sup>37</sup> However, most states did not honor this obligation, and instead passed laws to confiscate or make uncollectable debt held by British creditors.<sup>38</sup> Not only did the British retaliate for violations of the treaty by refusing to leave militarily and commercially strategic forts they occupied in the northern frontier,<sup>39</sup> but American failure to enforce the treaty caused problems with other nations.<sup>40</sup> Concluding treaties with other countries became difficult,<sup>41</sup> and

36. THE FEDERALIST NO. 22, at 150 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

37. See Treaty of Peace, *supra* note 31, at art. IV. In addition to the debt provision, the United States also agreed that Congress would recommend to the states that British loyalists receive compensation for property confiscated during the war and that no other actions would be taken against individuals due to the war. *Id.* at art. V–VI.

38. See *JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd.*, 536 U.S. 88, 94 (2002) ("Both during and after the Revolution, state courts were notoriously frosty to British creditors trying to collect debts from American citizens, and state legislatures went so far as to hobble British debt collection by statute, despite the specific provision of the 1783 Treaty of Paris . . ."); see also FREDERICK W. MARKS III, INDEPENDENCE ON TRIAL: FOREIGN AFFAIRS AND THE MAKING OF THE CONSTITUTION 11 (1973) ("Massachusetts, New York, Pennsylvania, and all states to the south were preventing British merchants from collecting prewar debts which had been guaranteed under Article IV [of the Treaty of Peace]"); Lee, *supra* note 33, at 1829–30, 1860–61 (discussing problems with state compliance with the 1783 Treaty of Peace and measures, including judicial enforcement, developed to resolve state non-compliance with treaty obligations); Yoo, *supra* note 33, at 2015 (noting states that had "either passed laws that confiscated debts owed to British citizens, or prevented the collection of such debts after Congress's ratification of the treaty").

39. See SAMUEL FLAGG BEMIS, JAY'S TREATY: A STUDY IN COMMERCE AND DIPLOMACY 4–5 (1923) ("[T]hat the United States was not loyally fulfilling its obligations under the treaty is the first expression of recrimination . . . which American representatives encountered during the next ten years whenever the delivery of the posts was demanded."); MARKS, *supra* note 38, at 11 (noting British responses to questions regarding the "frontier posts" "was invariably the same: the United States had violated the treaty first, and as soon as the offending states fulfilled their treaty responsibilities the frontier posts would be vacated"); Yoo, *supra* note 33, at 2015. The British used state breaches of the Treaty of Peace as a justification for the British failure to turn over economically valuable forts as agreed by the Treaty of Peace. See Letter from John Adams to John Jay (May 25, 1786), in 8 THE WORKS OF JOHN ADAMS 394 (Charles Francis Adams ed., 1853) ("By the answer of Lord Carmarthen to the memorial of the 30th of November, congress will see that the detention of the posts is attempted to be justified by the laws of certain States impeding the course of law for the recovery of old debts. . ."); MARKS, *supra* note 38, at 9–10 (discussing the economic benefits that were dependent on British withdrawal from the posts).

40. See Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1276–77 (2008) (discussing problems caused by being an "unreliable treaty partner"); Vázquez, *supra* note 33, at 617 ("Congress had concluded a number of treaties . . . but the states violated them, causing significant problems for the fledgling nation. . . . The Founders were anxious to avoid treaty violations because such violations threatened to provoke wars and otherwise

the failure of some states to comply with treaties in force meant that no states could get the benefits of those treaties.<sup>42</sup>

### 3. The Supremacy Clause and Federal Control of Foreign Relations Policy

As part of the remedy for problems experienced under the Articles of Confederation, the Supremacy Clause of the Constitution specifically binds judges to uphold “Treaties” as the “supreme Law of the Land.”<sup>43</sup> Commentators disagree about the original intent of the Founders to establish an assumption that all treaties would automatically receive Supremacy Clause effect.<sup>44</sup> However, there is consensus that, when Supremacy Clause effect is present it functions to make treaties supreme over state laws,<sup>45</sup> and that the Supremacy Clause sought to remedy the problem of enforcing national foreign policy.<sup>46</sup> In addition, Article III of the Constitution extended judicial power to reach cases arising under Treaties.<sup>47</sup> It has been recognized that a key role envisioned for the federal

complicate relations with more powerful nations.”); *cf.* Lee, *supra* note 33, at 1829 (“The documentary record is replete with affirmations of Madison’s and Marshall’s acute concern that a State’s particular difficulties in adhering to U.S. treaty obligations with a foreign state would drag the entire United States into war . . . .”); *id.* at 1850–51 (discussing potential consequences of treaty violations at the time of the framing of the Constitution).

41. See Hathaway, *supra* note 40, at 1277.

42. The breach by a state justified other nations’ breach of treaty agreements. See Hathaway, *supra* note 40, at 1277 (“[B]ecause the country was unable to live up to many of the agreements it had managed to negotiate, its treaty partners felt justified in doing the same.”); Lee, *supra* note 33, at 1850 (“As a matter of international law . . . it was immaterial whether the national government or a State occasioned breach of a ratified treaty of the United States. The treaty had been breached, and the offended sovereign treaty partner had legal rights of redress.”); *supra* note 39.

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

44. Compare Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as “Supreme Law of the Land”*, 99 COLUM. L. REV. 2095 (1999) (arguing that the prevailing view that the Founders intended treaties to be self-executing is supported by history, in particular the text of the Supremacy Clause; the votes and debates at the Constitutional Convention; and ratification evidence), with Yoo, *supra* note 33 (arguing for a presumption of non-self-execution on the grounds that neither the Supremacy Clause nor its history indicate that the status of a treaty as the supreme law of the land was to be achieved through direct judicial enforcement, and that non-self-execution allows the political branches necessary discretion to conduct foreign policy). For Supreme Court decisions on self-execution doctrine, see *infra* Part I.C.

45. See *Hopkirk v. Bell*, 7 U.S. (3 Cranch) 454, 456–57 (1806) (“[T]he treaty says that the creditor shall meet with no legal impediment; and the constitution of the United States declares the treaty to be the *supreme* law of the land[.] The [Virginia] act of limitations, therefore, must yield to the treaty. In the case of *Ware v. Hylton*, this court, upon very solemn argument, decided, that the treaty not only repealed all the state laws which operated as impediments, but nullified all acts done, and all rights acquired, under such laws, which tended to obstruct the creditor’s right of recovery.” (citing *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796))); Yoo, *supra* note 33, at 2074 (“[T]he Supremacy Clause declared the superiority of treaties to state law . . .”).

46. See *supra* note 35 and accompanying text.

47. U.S. CONST. art. III, § 2, cl. 1 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . .”); see also 2 DEBATES OF THE STATE CONVENTIONS, ON THE FEDERAL CONSTITUTION 454–55 (Jonathan Elliot ed., 1836) (statement of James Wilson at the Pennsylvania Ratifying Convention) (“The judicial power

judiciary, and a driving force in its creation, was the alternative forum federal courts could provide, thereby providing relief from state practices disruptive of national foreign relations and commercial activities.<sup>48</sup> In short, states could not opt out of treaties, and because the courts were bound to uphold a treaty just as any other federal law, enforcement could and did occur.<sup>49</sup>

In addition to the enforcement power provided by the Supremacy Clause, the Constitution, in Article I, section 10, explicitly limits state power to engage in foreign relations.<sup>50</sup> This section provides that “[n]o State shall enter into any Treaty, Alliance, or Confederation,”<sup>51</sup> and “[n]o State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State, or with a foreign Power.”<sup>52</sup> In contrast, the Constitution explicitly grants full power over many areas of foreign relations to the federal branches of government.<sup>53</sup>

Other limits to state power in foreign relations are not explicitly stated but are instead implied by the structure of the Constitution and the federal

extends to all cases arising under treaties made, or which shall be made by the United States. . . . This clause, sir, will [show] the world that we make the faith of treaties a constitutional part of the character of the United States; that we secure its performance no longer nominally, for the judges of the United States will be enabled to carry into effect, let the legislatures of the different states do what they may.”)

48. *See, e.g.*, *JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd.*, 536 U.S. 88, 94–95 (2002) (“This penchant of the state courts to disrupt international relations and discourage foreign investment led directly to the alienage jurisdiction provided by Article III of the Constitution. . . . ‘[T]he proponents of the Constitution . . . made it quite clear that the elimination or amelioration of difficulties with credit was the principal reason for having the alienage and diversity jurisdictions, and that it was one of the most important reasons for a federal judiciary.’” (alteration in original) (citation omitted) (quoting Wythe Holt, “*To Establish Justice*”: *Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1473)); *see also* U.S. CONST. art. III, § 2, cl. 1. (“The judicial Power shall extend . . . to Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.”).

49. Treaties were often enforced against state laws to protect the national interest by enforcing obligations already incurred and thereby securing the benefits of the treaty as well as cooperation with other countries in securing future treaties. *See, e.g.*, *Hauenstein v. Lynham*, 100 U.S. 483, 487–89 (1879) (preempting state law to provide a treaty based right and holding that a liberal interpretation to secure rights granted by a treaty is preferred to a restrictive interpretation); *see also* *Geofroy v. Riggs*, 133 U.S. 258, 271 (1890) (“It is a general principle of construction with respect to treaties that they shall be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them.”); Hathaway, *supra* note 40, at 1285 (“Between 1791 and 1835, more than twenty percent of the cases heard by the Supreme Court involved foreign or international law. A full thirty of these early cases involved the Treaties of Peace with Great Britain.”).

50. *See* U.S. CONST. art. I, § 10.

51. *Id.* at cl. 1.

52. *Id.* at cl. 3.

53. The Constitution grants Congress the following foreign relations powers in Article I, Section 8: regulation of foreign commerce; regulation of naturalization and immigration; criminalization and punishment of piracy and other felonies on the high seas and offenses against international law; the power to declare war; the power to authorize private citizens to retaliate against citizens or ships of foreign nations; and the power to raise, regulate, and maintain an army and navy. U.S. CONST. art. I, § 8, cl. 3–4, 10–14. In addition, Article II grants the President power to make treaties with the advice and consent of two-thirds of the Senate, and to appoint ambassadors. *Id.* at art. II, § 2, cl. 2.

system created under the Constitution.<sup>54</sup> For example, although not specifically mentioned in the Constitution, areas clearly related to and necessary for regulating foreign relations are thought to implicitly belong to the federal government.<sup>55</sup> This leads to two possible limits on state power in the area of foreign relations. First, because it is implied that the federal government has complete power over foreign relations, if a state law conflicts with federal law, the latter prevails.<sup>56</sup> Second, federal power over foreign relations may be considered exclusive.<sup>57</sup> For example, in what is known as field preemption<sup>58</sup> or dormant foreign affairs preemption,<sup>59</sup> if the

---

54. The United States federal system separates powers between those expressly granted to the federal government (the enumerated powers) and those reserved to the states or the people. *Compare id.* at art. I, § 8, and art. II, § 2, with *id.* at amend. X. For example, in 1819, Chief Justice John Marshall wrote, “This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it . . . is now universally admitted.” *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819). Those powers granted to the federal government by the Constitution are called express or enumerated powers. BLACK’S LAW DICTIONARY 1288 (9th ed. 2009). In addition, the Necessary and Proper Clause grants implied power for Congress to “make all Laws which shall be necessary and proper for carrying into Execution” its enumerated powers. U.S. CONST. art. I, § 8, cl. 18; see also *McCulloch*, 17 U.S. at 411–12 (defining the scope of “necessary and proper”).

55. See *Perez v. Brownell*, 356 U.S. 44, 57 (1958) (“Although there is in the Constitution no specific grant to Congress of power to enact legislation for the effective regulation of foreign affairs, there can be no doubt of the existence of this power in the law-making organ of the Nation.”); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 318 (1936) (“The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality.”); *id.* at 319 (“The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations . . . .” (quoting S. COMM. ON FOREIGN RELATIONS, 14TH CONG., 1ST SESS., REP. OF FEB. 15, 1816, reprinted in S. DOC. NO. 56-231, pt. 6, at 21 (1901))); *Burnet v. Brooks*, 288 U.S. 378, 396 (1933) (“As a nation with all the attributes of sovereignty, the United States is vested with all the powers of government necessary to maintain an effective control of international relations.”). See generally George Sutherland, *The Internal and External Powers of the National Government*, 191 N. AM. REV. 373 (1910) (explaining the source of non-enumerated federal foreign relations power).

56. See U.S. CONST. art. VI, cl. 2; *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 108 (1992) (“[U]nder the Supremacy Clause, from which our pre-emption doctrine is derived, ‘any state law, however clearly within a State’s acknowledged power, which interferes with or is contrary to federal law, must yield.’” (quoting *Felder v. Casey*, 487 U.S. 131, 138 (1988))).

57. See, e.g., *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (“[T]he Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.”). *But see* G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1, 21–26 (1999) (comparing the view that the Constitution seemed to make the treaty power exclusive to the federal government with an orthodox “reserved-powers-centered” view of federalism that would allow states to operate in the field of foreign relations where the federal government had not acted).

58. Field preemption occurs when there is extensive federal regulation such that the “field excludes state and local actions.” ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 406 (3d ed. 2006). Criteria for this can include the requirement that the field is unique to the federal government’s role, that Congress’s intent is to eliminate dual federal and state regulation, or that there is a potential risk of state law impeding the

state law is essentially a foreign affairs regulation, the state law is preempted.<sup>60</sup> This is so even if the state law is not in conflict with the federal law regulating the area<sup>61</sup> and even in the absence of a federal law directly regulating the area.<sup>62</sup> Likewise, dormant foreign commerce clause power<sup>63</sup> prevents states from overly burdening foreign commerce<sup>64</sup> or

---

federal regulatory scheme. *Id.* at 401–02, 408–09. However, field preemption may be avoided if there is an important traditional state interest in the regulation. *Id.* at 409.

59. See Carlos Manuel Vázquez, *W(h)ither Zschernig?*, 46 VILL. L. REV. 1259, 1262–64 (2001) (discussing the Supreme Court’s use of dormant foreign affairs preemption). An argument has also been made that the federal treaty power has preemptive effect such that state laws that would interfere with the ability of the national government to negotiate treaties are invalid even in the absence of a treaty. See generally Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 DUKE L.J. 1127, 1138 (2000) (arguing that there is 1dormant treaty power that preempts states from engaging in activities that would burden the federal government’s ability to negotiate with other nations regarding areas of national concern).

60. See, e.g., *Zschernig v. Miller*, 389 U.S. 429, 432 (1968) (“[W]e conclude that the history and operation of this Oregon statute make clear that [it] is an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress”).

61. See, e.g., *Hines v. Davidowitz*, 312 U.S. 52, 62–63 (1941) (“When the national government by treaty or statute has established rules and regulations touching the rights, privileges, obligations or burdens of aliens as such, the treaty or statute is the supreme law of the land. No state can add to or take from the force and effect of such treaty or statute . . . . The Federal Government, representing as it does the collective interests of the forty-eight states, is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties.”); see also CHEMERINSKY, *supra* note 58, at 403 (describing the preemption in *Hines* as noteworthy because the state law “complemented the federal law”).

62. See *Zschernig*, 389 U.S. at 440–41 (“The several States, of course, have traditionally regulated the descent and distribution of estates. But those regulations must give way if they impair the effective exercise of the Nation’s foreign policy. . . . Certainly a State could not deny admission to a traveler from East Germany nor bar its citizens from going there. If there are to be such restraints, they must be provided by the Federal Government. The direct Oregon law is not as gross an intrusion in the federal domain . . . [but] it has a direct impact upon foreign relations and may well adversely affect the power of the central government to deal with those problems.” (citations omitted)).

63. Dormant commerce clause power is a related concept, and is defined as “[t]he constitutional principle that the Commerce Clause prevents state regulation of interstate commercial activity even when Congress has not acted under its Commerce Clause power to regulate that activity.” BLACK’S LAW DICTIONARY, *supra* note 54, at 305. With foreign commerce, however, “because matters of concern to the entire Nation are implicated,” the constitutional limits on state power may be broader than with interstate commerce. *Kraft Gen. Foods, Inc. v. Iowa Dep’t of Revenue & Fin.*, 505 U.S. 71, 79 (1992); *accord Japan Line, Ltd. v. Cnty. of L.A.*, 441 U.S. 434, 446 (1979) (“When construing Congress’[s] power to ‘regulate Commerce with foreign Nations,’ a more extensive constitutional inquiry is required.” (quoting U.S. CONST. art. I, § 8, cl. 3)).

64. See, e.g., *Kraft Gen. Foods*, 505 U.S. at 79, 81 (“[T]he Foreign Commerce Clause recognizes that discriminatory treatment of foreign commerce may create problems, such as the potential for international retaliation, that concern the Nation as a whole. . . . Absent a compelling justification . . . a State may not advance its legitimate goals by means that facially discriminate against foreign commerce.”); *cf.* *S. Pac. Co. v. Arizona*, 325 U.S. 761, 769 (1945) (“For a hundred years it has been accepted constitutional doctrine that the commerce clause, without the aid of Congressional legislation, thus affords some protection from state legislation inimical to the national commerce . . .”).

preventing the federal government from speaking in one voice about foreign commerce.<sup>65</sup>

*B. The Treaty Power and Its Limits: Separation of Powers, Federalism, and Powers Reserved to the States*

While the federal system set up by the Constitution provides supremacy to federal law in the area of enumerated powers, the Constitution provides safeguards against dominance by one branch by balancing the roles of various branches as well as safeguards to state power by reserving unenumerated powers to the states.<sup>66</sup> This section first explains the types of treaties available under United States law and the roles of the executive and legislative branches in treaty law making.

1. Article II Treaties and Other International Agreements

The Constitution gives the President, with the advice and consent of two-thirds of the Senate, the power to ratify treaties.<sup>67</sup> In the United States, these treaties are referred to as Article II treaties.<sup>68</sup> It is generally these treaties that have Supremacy Clause force, with the qualification, of course, that an Article II treaty deemed non-self-executing would first require the consent of two-thirds of the Senate<sup>69</sup> and a second round of consent by a majority of the Senate as well as the House of Representatives to be given Supremacy Clause effect by U.S. courts.<sup>70</sup> However, under international

---

65. See *Japan Line, Ltd.*, 441 U.S. at 448, 451 (“[A] state tax on the instrumentalities of foreign commerce may impair federal uniformity in an area where federal uniformity is essential. Foreign commerce is preeminently a matter of national concern. . . . [A] court must . . . inquire . . . whether the tax prevents the Federal Government from ‘speaking with one voice when regulating commercial relations with foreign governments.’ If a state tax contravenes . . . [this] precept[], it is unconstitutional under the Commerce Clause.” (quoting *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976))). *But see* *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 324–27 (1994) (finding no preemption when there had been numerous congressional studies and bills introduced that would have prohibited the type of state tax in question, but Congress did not pass legislation); *id.* at 330–31 (“The Constitution does ‘not make the judiciary the overseer of our government.’ . . . [W]e leave it to Congress—whose voice, in this area, is the Nation’s—to evaluate whether the national interest is best served by tax uniformity, or state autonomy.” (quoting *Dames & Moore v. Regan*, 453 U.S. 654, 660 (1981))).

66. See U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”). Compare U.S. CONST. art. I (legislative powers), with art. II (executive powers), and art. III (judicial powers).

67. *Id.* at art. II, § 2, cl. 2.

68. See *id.* Strictly speaking, the term “treaty,” under U.S. constitutional law, refers only to Article II treaties and not to other agreements. See *Weinberger v. Rossi*, 456 U.S. 25, 29–30 (1982).

69. See U.S. CONST. art. II, § 2, cl. 2; White, *supra* note 57, at 9–21 (discussing the Article II “treaty-centered” approach of treaty jurisprudence at the end of the nineteenth century and the development of executive agreements); *infra* Part I.C.

70. See U.S. CONST. art. I, § 7, cl. 2–3 (prescribing how a bill can become law); *cf.* LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 204–05 (1996) (discussing Congress’s ability and obligation to implement treaties by enacting legislation).

law, any agreement properly entered into by a nation is considered a treaty, in the sense that it creates international obligations.<sup>71</sup>

In addition to Article II treaties, internationally binding agreements include congressional-executive agreements and sole executive agreements.<sup>72</sup> A congressional-executive agreement is a treaty (in the sense that it creates international obligations) that the President negotiates, and which Congress implements domestically by enacting legislation to enforce the treaty.<sup>73</sup> These agreements do not require the consent of two-thirds of the Senate, but instead require a simple majority of both the House of Representatives and the Senate in order to pass the law that will enforce the treaty.<sup>74</sup> A sole executive agreement is also a treaty in the international sense that it creates binding obligations on the United States, but with a sole executive agreement, Congress does not enact legislation.<sup>75</sup> Instead, the agreement is made by the President and is upheld by the courts against conflicting state action when the sole executive agreement is found to be within the President's power.<sup>76</sup>

---

*See generally* Missouri v. Holland, 252 U.S. 416 (1920) (providing an example of one such Article II treaty and upholding both the treaty and its implementing legislation).

71. *See generally* Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT] (representing, for the most part, the customary international law that governs enforcement of treaty obligations). The binding nature of treaties does not depend on the Supremacy Clause, but rather on customary international law. *See infra* note 109. The inability of the United States to comply with its binding obligations was in fact one reason for the adoption of the Supremacy Clause. *See supra* Part I.A.1–2; *supra* notes 43–49 and accompanying text.

72. *See* HENKIN, *supra* note 70, at 215–30.

73. *See id.* at 215–16; *see also* Weinberger, 456 U.S. at 30–31 (recognizing that Congress has used the term treaty in statutes to refer to congressional-executive agreements as well as Article II treaties). *See generally* Hathaway, *supra* note 40, at 1289–1301 (discussing the history and development of congressional-executive agreements).

74. *See* Hathaway, *supra* note 40, at 1239.

75. *See* HENKIN, *supra* note 70, at 222 (“One is compelled to conclude that there are agreements which the President can make on his sole authority . . .”); *see also* United States v. Pink, 315 U.S. 203, 223, 233–34 (1942) (holding that under the terms of a sole executive agreement, New York was preempted from seizing the assets of a state branch of a nationalized Russian insurance company); Hathaway, *supra* note 40, at 1239. *Compare* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303(4) (1986) (“The President, on his own authority, may make an international agreement dealing with any matter that falls within his independent powers under the Constitution.”), *with id.* § 303(4) cmt. a (noting that agreements in subsection 4 are referred to as sole executive agreements). For a discussion on the constitutionality of sole executive agreements, *see* White, *supra* note 57, at 9, 15–21, 77–120.

76. *See, e.g.,* Am. Ins. Ass’n v. Garamendi, 539 U.S. 396, 416–17, 421, 427 (2003) (finding state law preempted by foreign relations policy contained in sole executive agreements); Dames & Moore v. Regan, 453 U.S. 654, 660, 682–83, 686–88 (1981) (upholding a claims settlement agreement with Iran made solely by the President); Pink, 315 U.S. at 229 (“The powers of the President in the conduct of foreign relations included the power, without consent of the Senate, to determine the public policy of the United States . . .”); United States v. Belmont, 301 U.S. 324, 330 (1937) (upholding an international compact “within the competence of the President” as valid without consent of the Senate).

## 2. *Missouri v. Holland* and Lawmaking Through Treaties

The extent of the federal government's power to make binding law through treaties was contested in the 1920 case of *Missouri v. Holland*.<sup>77</sup> In *Holland*, the Supreme Court held that a traditional state area of regulation<sup>78</sup> could be preempted by federal law grounded in a treaty.<sup>79</sup> This conflict between a traditional state power and federal foreign relations power arose after 1916, when the President concluded an Article II treaty with Great Britain.<sup>80</sup> The treaty provided that both countries would propose legislation protecting migratory birds, as necessary, to execute the treaty.<sup>81</sup> Congress then enacted the Migratory Bird Treaty Act,<sup>82</sup> which made it "unlawful to hunt, take, capture, kill, [or] . . . sell . . . any migratory bird" except as allowed by federal regulation.<sup>83</sup> The State of Missouri brought a constitutional challenge to the Act.<sup>84</sup> At that time, regulation of birds was not considered part of Congress's enumerated powers, and Missouri argued that this power was reserved to the states under the Tenth Amendment.<sup>85</sup> Additionally, Missouri argued that lawmaking through treaties should not go beyond enumerated lawmaking powers.<sup>86</sup>

The Supreme Court held that in this situation, Congress could pass legislation that would normally be outside of its enumerated powers.<sup>87</sup> The Court reasoned that it was "a necessary and proper means to execute the powers of the Government," as allowed by Article I, section 8 of the U.S. Constitution.<sup>88</sup> The Court concluded that because the treaty power was a delegated power and treaties made under the authority of the United States are the supreme law of the land, there could be no dispute about the validity of the statute if the treaty were valid.<sup>89</sup>

In examining the validity of the treaty and the limits of lawmaking through treaties, the Court noted that while "[a]cts of Congress are the supreme law of the land only when made in pursuance of the

77. 252 U.S. 416 (1920).

78. *See id.* at 432; White, *supra* note 57, at 64–65, 65 n.227.

79. *See Holland*, 252 U.S. at 432–33.

80. *See* Convention Between the United States and Great Britain for the Protection of Migratory Birds, U.S.-Gr. Brit., Aug. 16, 1916, 39 Stat 1702; *see also Holland*, 252 U.S. at 431.

81. *See* Convention Between the United States and Great Britain for the Protection of Migratory Birds, *supra* note 80, at art. VIII; *see also Holland*, 252 U.S. at 431; White, *supra* note 57, at 62–67 (providing background of the treaty and dispute in *Holland*).

82. 65 Pub. L. No. 186, 40 Stat. 755 (1918).

83. *Id.* § 2; *see also Holland*, 252 U.S. at 431.

84. *Holland*, 252 U.S. at 430–31.

85. *See id.* at 431 ("The ground of the bill is that the statute is an unconstitutional interference with the rights reserved to the States by the Tenth Amendment, and that the acts of the defendant done and threatened under that authority invade the sovereign right of the State and contravene its will manifested in statutes."); *cf. id.* at 432 ("An earlier act of Congress that attempted by itself and not in pursuance of a treaty to regulate the killing of migratory birds within the States had been held bad in the District Court.").

86. *See id.* at 431–32.

87. *Id.*

88. *Id.*; *see* U.S. CONST. art. I, § 8, cl. 18.

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



Constitution . . . treaties are declared to be so when made under the authority of the United States.”<sup>90</sup> The Court found this to indicate that the limitations on the treaty power “must be ascertained in a different way.”<sup>91</sup> The Court concluded that the treaty was valid because the interest at stake was “a national interest of very nearly the first magnitude” that could “be protected only by national action in concert with that of another power.”<sup>92</sup>

Following *Holland*, some lawmakers grew concerned that American liberties could be abrogated through the Article II treaty process or sole executive agreements.<sup>93</sup> Today it is well settled that all treaties are subject to the Constitution.<sup>94</sup> However, concerns related to federalism and separation of powers continue to provide reasons for limiting automatic enforcement of treaties or curtailing the effect of international treaties and agreements that implicate areas of traditional state concern.<sup>95</sup>

*C. The Supreme Court’s Treaty Jurisprudence: Development and Application of the Self-Executing and Non-Self-Executing Distinction*

1. Self-Executing and Non-Self-Executing Treaties: The Legacy of *Foster v. Neilson* and *United States v. Percheman*

*a. Origins of the Self-Executing versus Non-Self-Executing Treaty Distinction*

While there is some disagreement over whether it was originally intended that all treaties be presumed to have Supremacy Clause effect automatically,<sup>96</sup> Chief Justice John Marshall, writing for the Supreme Court in *Foster v. Neilson*,<sup>97</sup> foreclosed the idea that all treaties are always automatically enforceable in domestic courts.<sup>98</sup> *Foster* has been used to ensconce two treaty possibilities: (1) those that operate directly on their object “without the aid of any legislative provision,” and (2) those that are like contracts for performance by the legislature and require Congress to “execute” the treaty by passing implementing legislation “before it can

90. *Id.* at 433.

91. *Id.*

92. *Id.* at 435.

93. See generally *The Bricker Amendment: A Cure Worse than the Disease?*, TIME, July 13, 1953, at 20. To address these fears, a series of amendments known as the Bricker Amendments were proposed but never ratified. See Hathaway, *supra* note 40, at 1302; Louis Henkin, Comment, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT’L L. 341, 348–49 (1995).

94. See, e.g., *Reid v. Covert*, 354 U.S. 1, 16–18 (1957).

95. See, e.g., Henkin, *supra* note 93, at 345 (discussing the motivations and use of non-self-executing and federalism reservations and declarations).

96. See *supra* notes 30, 44 and accompanying text.

97. 27 U.S. (2 Pet.) 253 (1829).

98. See *id.* at 314–15; see also *Medellin v. Texas*, 552 U.S. 491, 504–05 (2008) (“This Court has long recognized the distinction between treaties that automatically have effect as domestic law, and those that . . . do not . . . . The distinction was well explained by Chief Justice Marshall’s opinion in *Foster v. Neilson* . . . .” (citing *Foster*, 27 U.S. at 315)).

become a rule for the Court.”<sup>99</sup> Today, the first category of treaties is referred to as self-executing treaties, while the second category is referred to as non-self-executing treaties.<sup>100</sup>

*b. Foster v. Neilson and United States v. Percheman*

*Foster* is interesting because it dealt with an 1819 Treaty of Amity<sup>101</sup> between the United States and Spain that was found to be non-self-executing.<sup>102</sup> Four years later, Chief Justice Marshall returned to the same treaty in *United States v. Percheman*,<sup>103</sup> but in this case found the treaty to be self-executing.<sup>104</sup> Despite this about-face, *Percheman* reiterated the treaty execution language and textual analysis of *Foster*, thereby inculcating or illuminating, depending on your perspective, the two forms of treaty execution and the proper mode of judicial interpretation.<sup>105</sup>

*Foster* started with the proposition that “[a] treaty is in its nature a contract between two nations, not a legislative act.”<sup>106</sup> Analogizing a treaty to a contract fits well with the current conception of international treaty law, which recognizes that treaties are ultimately agreements between nations that gain force of law through the formal expressed intention of nations to be bound by a treaty.<sup>107</sup> Similar to the way in which individual parties can contract around common law rules that would otherwise govern their relationship, countries can establish rules to change,<sup>108</sup> supplement, or ensure the application of customary international law.<sup>109</sup> However, *Foster* used the comparison in a different sense.

99. *Foster*, 27 U.S. at 314.

100. The Supreme Court first used the term “self-executing” in *Bartram v. Robertson*, 122 U.S. 116, 120 (1887). Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT’L L. 760, 766 (1988). The Court used the term in explaining that “stipulations [of a treaty with Denmark], even if conceded to be self-executing” did not cover the dispute before the Court. *Bartram*, 122 U.S. at 120. A year later, the Court again used the term, stating, “[b]y the Constitution a treaty is placed on the same footing . . . with an act of legislation. . . . [I]f the two are inconsistent, the one last in date will control the other, provided always the stipulation of the treaty on the subject is self-executing.” *Whitney v. Robertson*, 124 U.S. 190, 194 (1888).

101. Treaty of Amity, Settlement and Limits, U.S.-Spain, Feb. 22, 1819, 8 Stat. 252.

102. *Foster*, 27 U.S. at 314.

103. 32 U.S. (7 Pet.) 51 (1833).

104. *Id.* at 89. The difference in the outcomes hinged on the difference between the English version of the treaty and the Spanish version of the treaty. *See id.* at 88–89; *see also infra* notes 119–20 and accompanying text.

105. *See Percheman*, 32 U.S. at 88–89.

106. *Foster*, 27 U.S. at 313.

107. *See generally* VCLT, *supra* note 71. Treaty law is similar to contract law in terms of formation, interpretation, performance, breach, and defenses for breach. *See id.* at arts. 26, 31–32, 60–62.

108. Just as with contract law, there are some things countries cannot contract around through a treaty. *Id.* at art. 53. For example, treaties that violate preemptory norms (also known as *jus cogens*), such as any that contemplate universally unacceptable acts such as slavery or genocide, are invalid and unenforceable. *See id.* Similar to contracts, treaties can also be invalidated for error, fraud, corruption, or coercion. *See id.* at art. 48–52.

109. The Vienna Convention on the Law of Treaties (VCLT) is itself an example of a treaty that primarily encapsulates what was already established customary law. *See, e.g.,*

Chief Justice Marshall was coming from an understanding of treaties as they are under the British system or one like it when he wrote that “[a treaty] does not generally effect, of itself, the object to be accomplished; especially so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument.”<sup>110</sup> In the British system, all treaties require a parliamentary act to have any domestic force of law.<sup>111</sup> Chief Justice Marshall next acknowledged that “[i]n the United States a different principle is established. Our Constitution declares a treaty to be the law of the land.”<sup>112</sup> The conclusion Chief Justice Marshall articulated was that where treaties are not like contracts, in the sense of a contract to be performed, they are “to be regarded in Courts of justice as equivalent to an act of the legislature.”<sup>113</sup> If this is not the case, then the treaty is addressed “to the political . . . department” and requires their performance to satisfy the obligation it represents.<sup>114</sup> Thus, instead of moving from a system where all treaties presumptively require legislation to one where presumptively no treaties require legislation, *Foster* contemplates a system where either situation is possible depending on the text and context of the treaty itself.<sup>115</sup>

### c. Non-Self-Executing Treaty Categories

Under *Foster* and *Medellin*, a treaty is itself instructive of whether or not it is self-executing.<sup>116</sup> Under this view, courts have held treaties to be non-

---

De Los Santos Mora v. New York, 524 F.3d 183, 196 n.19 (2d Cir. 2008). The United States is not a party to the VCLT, but it recognizes the majority of its provisions as customary international law binding on the United States. *Id.*

110. *Foster*, 27 U.S. at 313–14.

111. *See* Ware v. Hylton 3 U.S. (3 Dall.) 199, 273–74 (1796) (discussing the difference in the British rule of treaty implementation which requires an act of Parliament to give effect to treaties made by the King).

112. *Foster*, 27 U.S. at 314.

113. *Id.*

114. *Id.*

115. *See id.*; *see also* *Medellin v. Texas*, 552 U.S. 491, 504–05 (2008) (“*Foster* . . . held that a treaty is ‘equivalent to an act of the legislature,’ and hence self-executing, when it ‘operates of itself without the aid of any legislative provision.’” (quoting *Foster*, 27 U.S. at 314)).

116. *But see* Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT’L. L. 695, 702 & n.36 (1995) (arguing that having no presumption either for or against self-execution practically acts as a presumption against self-execution); Vázquez, *supra* note 33, at 601–02 (arguing the Supremacy Clause is best read to create a presumption that treaties are self-executing in the “*Foster* sense”: unless the treaty itself indicates a need for legislative implementation, the treaty operates of itself). Some commentators make the argument that treaties are presumptively non-self-executing, whereas others argue that the Supremacy Clause establishes a presumption of self-execution. *Compare* Yoo, *supra* note 33, at 2074 (“[T]he Framers did not understand [the Supremacy Clause] to override the separation of powers principle that treaties that sought to have a domestic, legislative effect could not take effect without congressional implementation.”), *with* Paust, *supra* note 100, at 760 (“[T]he distinction found in certain cases between ‘self-executing’ and ‘non-self-executing’ treaties is a judicially invented notion that is patently inconsistent with express language in the Constitution affirming that ‘all Treaties . . . shall be the supreme Law of the Land.’” (alteration in original) (quoting U.S. CONST. art. VI, cl. 2)).

self-executing in what one commentator has distinguished as four separate categories.<sup>117</sup> First, a treaty may be held to be non-self-executing if a court finds that was the “intent” of the treaty makers as expressed in the treaty itself.<sup>118</sup> For example, the English translation of the treaty in *Foster* contained the phrase “shall be ratified and confirmed,” and the Court found this to indicate an intention for future action.<sup>119</sup> Likewise, the Spanish translation of the same treaty contained the phrase “shall remain ratified and confirmed,” and the Court, armed with this translation, found that it became clear that the treaty was self-executing.<sup>120</sup> Another example is a treaty that the United States ratifies with a specific declaration that the treaty is non-self-executing with the intent to preclude the treaty from providing a vehicle for private litigation.<sup>121</sup> For example, in ratifying the International Convention on the Elimination of all Forms of Racial Discrimination,<sup>122</sup> the United States included a declaration “that the provisions of the Convention are not self-executing.”<sup>123</sup> The United States further indicated that the intent was to preclude the creation of a private right of action in U.S. courts based on the treaty, in preference of relying on legal remedies already in place.<sup>124</sup>

Second, the treaty may contemplate an obligation that constitutionally requires legislation to take effect, for example if the treaty purports to criminalize behavior or provide appropriations.<sup>125</sup> These non-self-executing treaties do not raise the question of the meaning of the Supremacy Clause because they go beyond the constitutional power of a

---

117. See generally Vázquez, *supra* note 116.

118. *Id.* at 700–04 (finding *Foster* to fall within the intent-based category). But see White, *supra* note 57, at 26 n.75 (citing *Foster* as an example of a foreign relations case that presents a political question). An 1876 treaty with Hawaii discussed in *Whitney v. Robertson*, 124 U.S. 190 (1888), may also be considered an example of intent-based non-self-execution. *Id.* at 192–93. But see David Sloss, *Non-Self-Executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. DAVIS L. REV. 1, 31–35 (2002) (arguing that the best interpretation of the Court’s decision in *Whitney* is that the Hawaii treaty requires implementing legislation because it implicates Congress’s exclusive lawmaking power for raising revenue).

119. *Foster*, 27 U.S. at 313.

120. *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 89 (1833) (“Although the words ‘shall be ratified and confirmed,’ are properly the words of contract, stipulating for some future legislative act; they are not necessarily so. They may import that they ‘shall be ratified and confirmed’ by force of the instrument itself. When we observe that in the counterpart of the same treaty, executed at the same time by the same parties, they are used in this sense, we think the construction proper, if not unavoidable.”).

121. See, e.g., Henkin, *supra* note 93, at 346 (discussing the use of non-self-executing declarations in human rights treaties).

122. *Opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195 (entered into force Oct. 21, 1994).

123. Comm. on the Elimination of Racial Discrimination, Reports Submitted by States Parties Under Article 9 of the Convention, Third Periodic Reports of States Parties due in 1999, Addendum, United States of America, U.N. Doc. CERD/C/351/Add.1, ¶ 169 (Oct. 10, 2000), available at [www.state.gov/documents/organization/100306.pdf](http://www.state.gov/documents/organization/100306.pdf); see also *supra* notes 93–95 and accompanying text; *infra* note 175.

124. See Comm. on the Elimination of Racial Discrimination, *supra* note 123, at 43–44.

125. Vázquez, *supra* note 116, at 718–19.

treaty. That is, a treaty is not constitutional if it attempts to do what it cannot under the Constitution.<sup>126</sup>

Third, treaties may be incapable of or inappropriate for judicial action.<sup>127</sup> For example, if a treaty says only that the parties shall advance environmental stability, this alone is too vague to be justiciable because it does not explain what counts as stability or what advancing stability entails.<sup>128</sup> Similarly, if a treaty expresses a desire for action in a non-binding way through the use of terms like “use our best efforts” or “cooperate,” the treaty is too aspirational for judicial enforcement.<sup>129</sup> In both these cases the treaties present a political question of how best to fulfill the treaty.<sup>130</sup> In other words, they present issues that are appropriate for the political branches of government and not appropriate for the judicial branch.<sup>131</sup> Treaties held to be non-self-executing on this basis can be said to deal with the concern of separation of power: safeguarding against tyranny by balancing and keeping separate the powers delegated to the three branches of government.<sup>132</sup>

Similar to these situations is the case where treaties require “domestic procedures and institutions” that do not exist in order to fulfill the obligations.<sup>133</sup> Courts may also stretch the inquiry into what likely impact judicial enforcement would have.<sup>134</sup> Deciding self-execution on this basis, however, has been criticized for asking “courts to engage in an open-ended inquiry to determine on a case-by-case basis whether judicial enforcement of a particular treaty is a good idea.”<sup>135</sup>

126. *See id.*

127. *Id.* at 713–15.

128. *See id.*

129. *Id.* at 710–13; *see, e.g.,* *Medellin v. Texas*, 552 U.S. 491, 508 (2008); *see also* Vázquez, *supra* note 33, at 661 (“The *Medellin* opinion indicates that the Court concluded that ICJ judgments are not directly enforceable in the courts because Article 94, in effect, obligates the United States to do its best to comply with ICJ judgments.”). The U.N. Charter, one of the treaty sources for the International Court of Justice (ICJ) judgment that was at issue in *Medellin*, states, “Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.” U.N. Charter art. 94, para. 1. In *Medellin*, the Supreme Court found that the phrase “undertakes to comply,” unlike “shall” or “must” comply, indicates a non-self-executing nature. *Medellin*, 552 U.S. at 508.

130. Vázquez, *supra* note 116, at 714–15.

131. *See* CHEMERINSKY, *supra* note 58, at 129–30 (explaining the Political Question Doctrine as subject matter that the Court deems inappropriate for judicial review and that should be left to the politically accountable branches of government).

132. *See generally* THE FEDERALIST NO. 47 (James Madison).

133. *People of Saipan by Guerrero v. U.S. Dep’t of Interior*, 502 F.2d 90, 97 (9th Cir. 1974); Vázquez, *supra* note 116, at 715–18.

134. Professor Carlos Manuel Vázquez has characterized tests such as those contemplated by *People of Saipan*, 502 F.2d at 97 (listing contextual factors to be examined as “the purposes of the treaty and the objectives of its creators, the existence of domestic procedures and institutions appropriate for direct implementation, the availability and feasibility of alternative enforcement methods, and the immediate and long-range social consequences of self- or non-self-execution”), as a “free-wheeling inquiry into the treaty’s judicial enforceability.” Vázquez, *supra* note 116, at 715.

135. Vázquez, *supra* note 116, at 715–17.

Finally, treaties have been held to be non-self-executing because they fail to provide a right of private action.<sup>136</sup> This category, however, is not a correct basis for finding a treaty to be non-self-executing because treaties, like statutes—whether self-executing or not—may not confer a private right of action.<sup>137</sup> This view has been endorsed by the Supreme Court in *Medellin*, as the Court indicated in dicta that whether a treaty provides a private right of action is a separate inquiry from whether it is self-executing.<sup>138</sup> This is important because the private right of action could be provided by common law or another treaty or statute.<sup>139</sup> Additionally, a treaty could provide a defense rather than a positive right.<sup>140</sup>

## 2. *Medellin v. Texas*

The Supreme Court's most recent decision regarding the Supremacy Clause effect of a treaty came in the 2008 case of *Medellin*.<sup>141</sup> In this decision, the Court considered whether an International Court of Justice<sup>142</sup> judgment obligating the United States to review and reconsider<sup>143</sup> a particular case was binding in U.S. domestic courts.<sup>144</sup> The Court held that Texas state procedural rules<sup>145</sup> were not preempted by the ICJ judgment

---

136. *Id.* at 719 & n.114.

137. *See id.* at 719.

138. *See* *Medellin v. Texas*, 552 U.S. 491, 506 n.3 (2008).

139. *See, e.g.,* *Edye v. Robertson* (Head Money Cases), 112 U.S. 580, 598 (1884) (standing for the proposition that treaties concerned with the rights of property by descent or inheritance confer a private right of action and such treaty provisions stand on equal footing as laws of Congress); *Vázquez*, *supra* note 116, at 720–21.

140. *See Vázquez*, *supra* note 116, at 721.

141. *Medellin*, 552 U.S. at 491.

142. The International Court of Justice (ICJ) is the United Nations' "principal judicial organ." U.N. Charter art. 92.

143. In the *Case Concerning Avena and Other Mexican Nationals*, (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31), the ICJ found that the United States had violated the Vienna Convention on Consular Relations (VCCR), *supra* note 10, by failing to notify many of the Mexican nationals named in *Avena* of their right to communicate with their consulate. *Avena*, 2004 I.C.J. ¶ 128. The ICJ found that "appropriate reparation . . . consist[ed] . . . [of] the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration of the convictions and sentences" of 51 Mexican nationals, *id.* ¶ 153(9), "without regard to state procedural default rules," *Medellin*, 552 U.S. at 503.

144. José Ernesto Medellín had appealed his conviction for the rape and murder of two teenage girls on the basis of a VCCR violation by Texas state officials. *Medellin*, 552 U.S. at 498. Whenever a United States official, including local law enforcement, acts in his or her official capacity, this action is attributable to the United States as a matter of customary international law binding on the United States. *See, e.g., id.* at 536 (Stevens, J., concurring) ("[I]t was Texas that—by failing to provide consular notice in accordance with the Vienna Convention—ensnared the United States in the current controversy."); Application of Convention on Prevention and Punishment of Crime of Genocide (*Bosn. & Herz. v. Serb. & Montenegro*), 2007 I.C.J. 191, ¶ 385 (Feb. 26) ("[C]onduct of any State organ . . . gives rise to the responsibility of the State if it constitutes a breach of an international obligation of the State."); *see also* *The Paquete Habana*, 175 U.S. 677, 700 (1900) (holding that "[i]nternational law is part of our law").

145. State procedural rules automatically bar defendants from raising an issue on appeal if they failed to raise the issue in a timely fashion before the end of their trial. *See, e.g.,* *Wainwright v. Sykes*, 433 U.S. 72, 89–90 (1977) (upholding and discussing the benefits of the contemporaneous objection rule in maintaining the integrity of the United States

because the treaties that allegedly required the United States to be bound by the ICJ judgment were non-self-executing.<sup>146</sup>

The Court focused on the self-executing/non-self-executing treaty distinction<sup>147</sup> and indicated that the rationale underlying the importance of the treaty distinction is based in constitutional principles of separation of powers.<sup>148</sup> Specifically, “[t]he point of a non-self-executing treaty is that it ‘addresses itself to the political, *not* the judicial department.’”<sup>149</sup> As the Court explained, the Framers established checks and balances in the law making process.<sup>150</sup> Additionally, the Court made clear that the power to make law, both through statute and treaties, is vested in the political branches, not the judicial branch, and that power is further balanced by requiring separate executive and legislative action.<sup>151</sup> For this reason, when a treaty is not intended to be self-executing, the court cannot enforce it as law, because it is not yet actually law under proper constitutional procedures.<sup>152</sup> For courts to enforce non-implemented non-self-executing treaties would in effect be a form of judicial lawmaking, and this would be an unconstitutional violation of separation of powers.<sup>153</sup>

---

adversarial justice system); *Ex parte Medellín*, 280 S.W.3d 854, 855, 860 (Tex. Crim. App. 2008) (explaining the contemporaneous objection rule which “applies in every jurisdiction in America”). In addition, the Supreme Court has held that, like other federal claims, Article 36 VCCR claims are subject to procedural bars. *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 360 (2006); *accord Medellín*, 552 U.S. at 498–99; *Breard v. Greene*, 523 U.S. 371, 375–76 (1998) (citing *Wainwright*, 433 U.S. at 53).

146. *See Medellín*, 552 U.S. at 506 (“Because none of these . . . treaty sources [of the ICJ judgment] creates binding federal law in the absence of implementing legislation, and because it is uncontested that no such legislation exists, we conclude that the [ICJ] judgment is not automatically binding domestic law.”); *see also id.* at 522–23 (“In sum, . . . [the judgment] does not of its own force constitute binding federal law that pre-empts state restrictions on the filing of successive habeas petitions.”).

147. *See, e.g., id.* at 504–06. In determining whether a treaty was self-executing, the Court reaffirmed the inquiry presented in *Foster*. *Id.* at 504–05. The Court defined the term self-executing to mean a “treaty [that] has automatic domestic effect as federal law upon ratification.” *Id.* at 505 n.2. The Court defined the term non-self-execution as the converse, stating that it is a “treaty [that] does not by itself give rise to domestically enforceable federal law,” and “[w]hether such a treaty has domestic effect depends upon implementing legislation passed by Congress.” *Id.*

148. *See id.* at 515.

149. *Id.* at 516 (quoting *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829)).

150. *Id.* at 515 (citing U.S. CONST. art. I, § 7, art. II, § 2).

151. *Id.* The Court also noted that international obligations fall within the realm of the political branches. *See id.* at 520 (“Such judgments would still constitute international obligations, the proper subject of political and diplomatic negotiations.” (citing *Head Money Cases*, 112 U.S. 580, 598 (1884))).

152. *Id.* at 515 (“Our Framers established a careful set of procedures that must be followed before federal law can be created under the Constitution—vesting that decision in the political branches, subject to checks and balances.” (citing U.S. CONST. art. I, § 7)); *see also id.* at 519 (“[W]e have held treaties to be self-executing when the textual provisions indicate that the President and Senate intended for the agreement to have domestic effect.”).

153. *See id.* at 514–15 (“[I]t is not for the federal courts to impose [a remedy] on the States through lawmaking of their own.” (quoting *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 347 (2006))); *cf. id.* at 516 (“To read a treaty so that it sometimes has the effect of domestic law and sometimes does not is tantamount to vesting with the judiciary the power not only to interpret but also to create the law.”).

The Court also examined the process of implementing a non-self-executing treaty in determining whether President George W. Bush<sup>154</sup> could implement the United States' treaty-based obligation to comply with the ICJ's *Avena* judgment.<sup>155</sup> The Court again focused on "our constitutional system of checks and balances,"<sup>156</sup> explaining that in order for treaties to attain Supremacy Clause effect, joint action by both the Executive and Legislative branches was required, and in the case of a non-self-executing treaty, Congress must enact implementing legislation.<sup>157</sup>

## II. CAN AN IMPLEMENTED NON-SELF-EXECUTING TREATY PREEMPT CONFLICTING LAW ALL BY ITSELF?

Part II examines the major arguments for and against finding that the New York Convention, an implemented non-self-executing treaty, has Supremacy Clause effect although its implementing legislation does not. This part focuses primarily on the Fifth Circuit's *Safety National* opinion and the decision's accompanying dissent. In *Safety National*, the Fifth Circuit held that as an implemented treaty, the New York Convention preempts a conflicting Louisiana state law although its implementing legislation, the Federal Arbitration Act (FAA), could not due to reverse preemption requirements contained in another federal statute, known as the McCarran-Ferguson Act (MFA).<sup>158</sup> The Second Circuit took the opposite position in *Stephens*, holding that the Supremacy Clause did not cause the New York Convention to preempt a conflicting Kentucky state law because the New York Convention was non-self-executing.<sup>159</sup>

Part II.A provides background on the legal requirements of the FAA, the New York Convention, and the MFA, which aids an understanding of the conflicts involved in *Safety National* and *Stephens*. Part II.B explains the Fifth Circuit *Safety National* opinion, beginning with an explanation of the court's analysis of the MFA's application to the Louisiana statute. Next, the *Safety National* majority and dissenting opinions are presented. Part II.C explains the Second Circuit opinion in *Stephens*, likewise beginning with an explanation of the application of the MFA to the relevant state law, in this case a Kentucky statute, before moving to the main issue and conclusion.

---

154. President George W. Bush had written a memorandum stating "pursuant to [his] authority . . . as President[,] . . . the United States" would comply with *Avena* "by having State courts give effect to the decision." *Id.* at 503.

155. *See id.* at 523–28.

156. *Id.* at 528.

157. *See id.* at 527.

158. *Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, London*, 587 F.3d 714, 717–18, 731 (5th Cir. 2009) (en banc); *see infra* Part II.B.1.

159. *Stephens v. Am. Int'l Ins. Co.*, 66 F.3d 41, 45 (2d Cir. 1995); *see infra* Part II.C.



A. *Requirements of the New York Convention, the Federal Arbitration Act, and the McCarran-Ferguson Act*

1. The New York Convention

a. *Ratification Following Passage of Chapter Two of the Federal Arbitration Act*

The New York Convention<sup>160</sup> was adopted by the United Nations Conference on International Commercial Arbitration, held from May 20 to June 10, 1958 at the U.N. headquarters in New York.<sup>161</sup> Although the United States participated in the 1958 Convention, it was not a signatory<sup>162</sup> and did not ratify the treaty until Sept. 30, 1970, with entry into force on Dec. 29, 1970.<sup>163</sup>

Ratification took place after Congress enacted Chapter Two of the FAA on July 31, 1970.<sup>164</sup> It was thought at the time that without changes to United States law, carrying out the New York Convention would be an impossible task due to a number of legal and procedural difficulties.<sup>165</sup> The idea that changes to U.S. law were needed to put the treaty into effect applied to both enforcement of arbitral awards and arbitration

160. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter New York Convention].

161. See Gerald Aksen, *American Arbitration Accession Arrives in the Age of Aquarius: United States Implements United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 3 SW. U. L. REV. 1, 4 (1971).

162. *Id.* At the time of the 1958 Convention, widespread mistrust of arbitration and “Bricker Amendment fears” resulted in the United States delegation making a recommendation against signature. *Id.* The term “Bricker Amendment fears” refers to concerns about passing domestic laws through treaties. See *supra* notes 93–95 and accompanying text.

163. United Nations Commission on International Trade Law, *Status 1958—Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html) [hereinafter Convention Status] (last visited Mar. 23, 2011). While the treaty became effective in the United States on December 29, 1970, the United States later extended the treaty “to all the territories for the international relations of which the United States of America is responsible.” See Aksen, *supra* note 161, at 24–25. The signing of a treaty normally indicates a nation’s intention to become a party to the treaty, i.e., it indicates a nation’s consent to be bound by the treaty. See VCLT, *supra* note 71, at art 11. In the United States, ratification refers to the Article II treaty process, and is one way the United States may make or enter into treaties. See U.S. CONST. art. II, § 2, cl. 2; see also *supra* Part I.B.1. International obligations undertaken by treaty become effective for a sovereign nation on the date the treaty officially enters into force with respect to that nation, either as specified by the treaty or after the nation’s consent to be bound has been established. See VCLT, *supra* note 71, at arts 11–16, 24.

164. An Act To Implement the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Pub. L. No. 91-368, 84 Stat. 692 (1970) (codified at 9 U.S.C. §§ 201–208 (2006)).

165. Aksen, *supra* note 161, at 14–16. Concerns included that no provisions for jurisdiction, venue, amount in controversy requirements, or precedent for compelling arbitration outside of the United States existed. *Id.* at 15.

agreements.<sup>166</sup> For this reason, President Lyndon B. Johnson presented the New York Convention to the Senate for its advice and consent with the express understanding that the United States would not accede to the New York Convention until after the necessary legislative changes had been made.<sup>167</sup> President Johnson stated, “Changes in Title 9 (Arbitration) of the United States Code will be required before the United States becomes a party to the Convention. The United States instrument of accession to the Convention will be executed only after the necessary legislation is enacted.”<sup>168</sup> Chapter Two of the FAA was that legislation.<sup>169</sup>

The following sections, Parts II.A.1.b–c, provide an explanation of the statutory requirements of the FAA and what obligations the United States has under the New York Convention.

*b. Statutory Requirements for Enforcement of Mandatory Arbitration  
Under the Federal Arbitration Act*

Chapter Two of the FAA<sup>170</sup> provides that “[t]he Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter.”<sup>171</sup> In § 202, the FAA provides that “[a]n arbitration agreement . . . arising out of a legal relationship, whether contractual or not . . . falls under the Convention” unless the relationship has no connection with foreign citizens or states (e.g., the relationship is completely between United States citizens or involves no property outside the United States).<sup>172</sup> Finally, § 206 provides that “[a] court . . . may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States.”<sup>173</sup>

166. *See id.* *But see* Safety Nat’l Cas. Corp. v. Certain Underwriters at Lloyd’s, London, 587 F.3d 714, 732 (5th Cir. 2009) (en banc) (Clement, J., concurring) (“I would hold that the relevant treaty provision, Article II of the Convention, is self-executing.”).

167. Aksen, *supra* note 161, at 15. The treaty was presented on April 24, 1968 and the Senate gave advice and consent on October 4, 1968. *Id.* at 15–16; *see also* H.R. REP. NO. 91-1181, at 2–3 (1970), *reprinted in* 1970 U.S.C.C.A.N. 3601, 3601–02.

168. Aksen, *supra* note 161, at 15.

169. An Act To Implement the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ch. 2, 84 Stat at 692.

170. Chapter Two is titled the “Convention on the Recognition and Enforcement of Foreign Arbitral Awards.” 9 U.S.C. § 201 (2006). The provisions relevant to enforcement of arbitration agreements include § 202 and § 206. *Id.* §§ 202, 206.

171. *Id.* § 201. The effective date of the act was the date of “entry into force of the New York Convention with respect to the United States.” *See* An Act To Implement the Convention on the Recognition and Enforcement of Foreign Arbitral Awards § 208.

172. 9 U.S.C. § 202.

173. *Id.* § 206. The language directing that arbitration may be in or outside the United States is not explicitly required by the language or requirements of the New York Convention. *See infra* notes 178–83 and accompanying text. For an argument that going beyond the requirements of the New York Convention is an indication of a policy favoring international arbitration for international trade disputes, *see* Gerald Aksen, *The Application of the New York Convention by the United States Courts*, in IV YEARBOOK COMMERCIAL ARBITRATION 341, 348 (Pieter Sanders ed., 1979).

*c. Arbitration Agreements Under the New York Convention*

Article II of the New York Convention contains the treaty language related to enforcement of arbitration agreements. It provides that written arbitration agreements are to be recognized and enforced by nations who are parties to the Convention, subject to some conditions and exceptions.<sup>174</sup> In addition, the United States entered a “Reservation, Understanding, or Declaration”<sup>175</sup> that altered its treaty obligation, such that the United States is obligated to “apply the Convention only to differences arising out of legal relationships, whether contractual or not, that are considered commercial under the national law.”<sup>176</sup> The following paragraphs explain how courts comply with the treaty requirements related to enforcement of arbitration agreements and the conditions and limitations of their application.

In order to comply with Article II of the New York Convention, courts can “compel arbitration.”<sup>177</sup> This phrase does not appear in the New York Convention, but refers to the mandatory requirement that court proceedings brought in violation of an arbitration agreement be stayed<sup>178</sup> in order to allow arbitration to be determinative.<sup>179</sup> The New York Convention uses the word “shall,”<sup>180</sup> which establishes the mandatory nature of the provision.<sup>181</sup> Additionally, the phrase “refer the parties to arbitration”<sup>182</sup> is

174. New York Convention, *supra* note 160, at art. II(3).

175. A RUD is the term that describes the United States’ entry of a reservation, understanding, or declaration to a treaty, and is the acronym for those three devices. *See generally* HENKIN, *supra* note 70, at 180–84. Countries enter RUDs in order to change the treaty obligations they are entering into (a reservation), explain their understanding of the obligation they are entering into (an understanding), or make some other information known (a declaration). *See id.* at 180–84, 452–53 n.29; Rep. of the Int’l Law Comm’n to the Gen. Assembly, 50th Sess., April 20–June 12, July 27–Aug 14, 1998, U.N. Doc. A/53/10; GAOR, 53d Sess., Supp. No. 10 (1998) *reprinted in* [1998] II Y.B. Int’l L. Comm’n 90–108, U.N. Doc. A/CN.4/SER.A/1998/Add.1 (Part 2) (discussing the meaning and use of reservations under the VCLT and distinguishing declarations of understandings).

176. Convention Status, *supra* note 163. The United States also entered a RUD that it would only enforce awards under the Convention made in a member state’s territory. *Id.*

177. *See, e.g.,* Safety Nat’l Cas. Corp. v. Certain Underwriters at Lloyd’s, London, 587 F.3d 714, 719 (5th Cir. 2009) (en banc) (“The Convention contemplates enforcement . . . directing that courts ‘shall’ compel arbitration.” (quoting New York Convention, *supra* note 160, at art. II(3))); Sedco, Inc. v. Petroleos Mexicanos Mexican Nat’l Oil Co. (Pemex), 767 F.2d 1140, 1145 (5th Cir. 1985); Goshawk Dedicated Ltd. v. Portsmouth Settlement Co. I, Inc., 466 F. Supp. 2d 1293, 1304 (N.D. Ga. 2006). The phrase appears in the title of § 206 of the FAA. 9 U.S.C. § 206 (2006).

178. A stay is “[t]he postponement or halting of a proceeding, judgment, or the like.” BLACK’S LAW DICTIONARY, *supra* note 54, at 1548.

179. *See* ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION 128–31 (1981).

180. New York Convention, *supra* note 160, at art. II(3) (“The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.”).

181. *See Safety Nat’l*, 587 F.3d at 719; *Intergen N.V. v. Grina*, 344 F.3d 134, 141 (1st Cir. 2003) (“[E]nforcing arbitration clauses under the New York Convention is an obligation, not a matter committed to district court discretion.”); *McCreary Tire & Rubber Co. v. Ceat S.p.A.*, 501 F.2d 1032, 1037 (3d Cir. 1974) (“There is nothing discretionary about article

interpreted to mean a court order to stay the proceedings, or in American usage, an order to compel arbitration.<sup>183</sup>

The New York Convention provides a few exceptions to the requirement of enforcing an arbitration agreement.<sup>184</sup> The exceptions include agreements not within the meaning of Article II and agreements that are “null and void, inoperative or incapable of being performed.”<sup>185</sup> The Fifth Circuit noted that none of these exceptions were applicable in *Safety National*,<sup>186</sup> but because some of these exceptions could resolve the conflict between the Convention and state law, a brief explanation follows.

For the agreement to be within the meaning of Article II, it must meet three conditions of Article II(1)<sup>187</sup>: (1) the agreement must be in writing, (2) there must be a dispute to be decided that arose from a defined legal relationship, and (3) the subject matter of the agreement must be capable of settlement by arbitration.<sup>188</sup> This last requirement has been interpreted by the Second Circuit as a “certain *category* of claims [that] may be non-arbitrable because of the special national interest vested in their [judicial, rather than arbitral,] resolution.”<sup>189</sup> At least one commentator has made the argument that insurance is one such interest.<sup>190</sup> In the past, “[c]lassic examples of non-arbitrable subject matters” were considered to include

---

II(3) of the Convention. It states that district courts *shall* at the request of a party to an arbitration agreement refer the parties to arbitration.”); VAN DEN BERG, *supra* note 179, at 135 (“The mandatory character of the referral by a court to arbitration . . . is an internationally uniform rule.”).

182. New York Convention, *supra* note 160, at art. II(3).

183. See VAN DEN BERG, *supra* note 179, at 129–31. “Refer to arbitration” does not mean that a court order is required in order for arbitration to proceed. *Id.* at 129.

184. See *generally id.* at 144–61.

185. New York Convention, *supra* note 160, at art. II(3). For the full text of Article II(3), see *supra* note 180.

186. See *Safety Nat’l*, 587 F.3d at 719.

187. See VAN DEN BERG, *supra* note 179, at 144–45.

188. New York Convention, *supra* note 160, at art. II(1) (“Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.”); see also *id.* at art. II(2) (“The term ‘agreement in writing’ shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.”).

189. *Parsons & Whittemore Overseas Co. v. Societe Generale de L’Industrie du Papier (RAKTA)*, 508 F.2d 969, 975 (2d Cir. 1974); cf. Kathleen B. Carr, *The Enforceability of Arbitration Clauses in Marine Insurance Contracts: The Conflict Between the Arbitration Convention and the McCarran-Ferguson Act*, 18 TUL. MAR. L.J. 71, 86 (1993) (arguing that “[a] proper construction of the Arbitration Convention should render it inapplicable according to its own terms” where state laws prohibit arbitration agreements in marine insurance contracts).

190. See, e.g., Carr, *supra* note 189, at 86. But see Mariana Isabel Hernández-Gutiérrez, *The Remaining Hostility Towards Arbitration Shielded by the McCarran-Ferguson Act: How Far Should the Protection to Policyholders Go?*, 1 U.P.R. BUS. L.J. 35, 42–45, 61 (2010) (discussing limits of insurance-based arguments for anti-arbitration laws and arguing that a strong national policy in favor of arbitration makes precluding arbitration in insurance contracts an “extreme measure”).

“anti-trust, the validity of intellectual property rights . . . , family law[,] and the protection of certain weaker parties.”<sup>191</sup>

In the United States, because the application of the treaty applies only to disputes arising from a commercial relationship, categories falling outside a commercial relationship, like family law, pose no concern.<sup>192</sup> Additionally, the Supreme Court has upheld arbitration of anti-trust claims.<sup>193</sup> Finally, the Supreme Court has recognized a strong national policy in favor of enforcing arbitration for international commercial agreements that pre-dated United States ascension to the New York Convention, and this interest often wins out in the context of an international commercial contract.<sup>194</sup>

After the exception for agreements not within the meaning of Article II, the next category of exceptions is for agreements that are “null and void, inoperative or incapable of being performed.”<sup>195</sup> Null and void can be interpreted to refer to situations where the arbitral clause itself is invalid, for example if the agreement was subject to “misrepresentation, duress, fraud or undue influence.”<sup>196</sup> An arbitration agreement is inoperative when it ceases to have effect, for example if the parties have revoked the agreement or the same dispute has already been settled or decided in arbitration or in litigation.<sup>197</sup> Finally, an arbitration agreement may be incapable of being performed if an effective implementation of the agreement is not possible, for example if its language is too unclear.<sup>198</sup> Another example comes from *Corcoran v. Ardra Insurance Co.*<sup>199</sup> In *Corcoran*, the New York State Court of Appeals held that an arbitration agreement was incapable of being performed because New York law only empowered the Superintendent of Insurance to litigate, and not to arbitrate, on behalf of an insolvent insurance company.<sup>200</sup>

To summarize, Chapter Two of the FAA enforces the New York Convention requirements entered into by the United States, including mandatory enforcement of arbitration agreements for commercial relationships.<sup>201</sup> Thus, to the extent that a state law prohibits the enforcement of mandatory arbitration of commercial disputes arising out of a legally defined relationship, the state law conflicts with both the FAA and

---

191. See VAN DEN BERG, *supra* note 179, at 369; see also *Am. Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 826 (2d Cir. 1968) (recognizing “the conflict between federal statutory protection of a large segment of the public, frequently in an inferior bargaining position, and encouragement of arbitration as a ‘prompt, economical and adequate solution of controversies’” (quoting *Wilko v. Swan*, 346 U.S. 427, 438 (1953))).

192. See *supra* notes 175–76 and accompanying text.

193. See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 628–29 (1985).

194. See, e.g., *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 515–20 (1974).

195. New York Convention, *supra* note 160, at art. II(3). For the full text of Article II(3), see *supra* note 180.

196. VAN DEN BERG, *supra* note 179, at 156.

197. *Id.* at 158.

198. *Id.* at 159.

199. 567 N.E.2d 969 (N.Y. 1990).

200. *Id.* at 232, 234.

201. See *supra* Part II.A.1.

the New York Convention.<sup>202</sup> The next section deals with the requirements of the MFA.

## 2. The McCarran-Ferguson Act

### *a. Passage and Rationale of the McCarran-Ferguson Act*

In 1945, Congress passed the MFA in response to the Supreme Court's 1944 decision in *United States v. South-Eastern Underwriters Ass'n*.<sup>203</sup> In *South-Eastern Underwriters*, the Court overruled prior precedent dating from 1869<sup>204</sup> that had excluded insurance from interstate commerce.<sup>205</sup> In addition to holding that Congress's Commerce Clause powers extended to the business of insurance, the Court also found that the Sherman Act applied to the insurance industry.<sup>206</sup> This was considered an unanticipated and unintended consequence of the Sherman Act,<sup>207</sup> and there was concern that "other generally phrased congressional statutes might also apply to the issuance of insurance policies, thereby interfering with state regulation of insurance in similarly unanticipated ways."<sup>208</sup> To protect against this possibility, Congress enacted the MFA.<sup>209</sup>

### *b. Statutory Requirements for Reverse Preemption Under the McCarran-Ferguson Act*

The MFA allows state laws enacted "for the purpose of regulating the business of insurance" to reverse the preemption of congressional acts that do not specifically "relate[] to the business of insurance."<sup>210</sup> This reflects a policy decision that it is in the public interest for states to have a broad grant of authority over the business of insurance.<sup>211</sup> This was achieved in two ways.<sup>212</sup>

202. See *supra* Part II.A.1.

203. 322 U.S. 533 (1944), *superseded by statute*, McCarran-Ferguson Act, ch. 20, 59 Stat. 33 (1945), *as recognized in* *Barnett Bank, N.A. v. Nelson*, 517 U.S. 25, 40 (1996).

204. See *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 183 (1869) ("Issuing a policy of insurance is not a transaction of commerce."), *abrogated by South-Eastern Underwriters*, 322 U.S. 533. Congress may only pass laws that fall expressly within one of its powers enumerated in the United States Constitution, which includes regulating interstate commerce. U.S. CONST. art. I, § 8, cl. 3; see also *supra* note 54.

205. See *South-Eastern Underwriters*, 322 U.S. at 534, 543–44 & n.18, 553 (overruling, explaining, and providing cases that relied on *Paul*); see also *Humana Inc. v. Forsyth*, 525 U.S. 299, 306 (1999) (recognizing that *South-Eastern Underwriters* overruled *Paul*).

206. *South-Eastern Underwriters*, 322 U.S. at 553 ("A general application of the [Sherman] Act to all combinations of business and capital organized to suppress commercial competition is in harmony with the spirit and impulses of the times which gave it birth.").

207. See *Barnett Bank*, 517 U.S. at 40 (explaining that the application of antitrust regulation to the insurance industry was an unintended consequence).

208. *Id.*

209. *Id.* In particular, federal antitrust regulation was "widely perceived as a threat to state power to tax and regulate the insurance industry." *U.S. Dep't of Treasury v. Fabe*, 508 U.S. 491, 499–500 (1993).

210. 15 U.S.C. § 1012(b) (2006).

211. *Id.* § 1011; see also *Fabe*, 508 U.S. at 505 ("[The McCarran-Ferguson Act] was intended to further Congress'[s] primary objective of granting the States broad regulatory

First, Congress made clear that state law will govern the business of insurance.<sup>213</sup> Second, Congress removed any “obstructions” to state law enacted for the purpose of regulating the business of insurance “which might be thought to flow from [Congress’s] own power, whether dormant or exercised, except as otherwise expressly provided in the Act itself or in future legislation.”<sup>214</sup>

*c. State Laws Enacted for the Purpose of Regulating the Business of Insurance*

Given the purpose of the MFA, a primary inquiry in determining whether it applies to a state law is whether the law was enacted “for the purpose of regulating the business of insurance.”<sup>215</sup> Courts often examine whether the practice is part of the business of insurance,<sup>216</sup> using for example a three factor test recognized in *Union Labor Life Insurance Co. v. Pireno*.<sup>217</sup> This

authority over the business of insurance.”); *id.* at 500 (“Shortly after passage of the [McCarran-Ferguson] Act, the Court observed: ‘Obviously Congress’[s] purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance.’” (quoting *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 429 (1946))).

212. *Fabe*, 508 U.S. at 500.

213. 15 U.S.C. § 1012(a) (“The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.”).

214. *Fabe*, 508 U.S. at 500 (alteration in original) (quoting *Prudential Ins. Co.*, 328 U.S. at 429–30); *see also* 15 U.S.C. § 1012(b) (“No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance: *Provided*, That . . . the Sherman Act . . . shall be applicable to the business of insurance to the extent that such business is not regulated by State Law.”). The Supreme Court has explained that “the second clause [of § 1012(b)] exempts only ‘the business of insurance’ itself from the antitrust laws” whereas the first clause “is not so narrowly circumscribed.” *Fabe*, 508 U.S. at 504; *see also id.* at 504 n.6.

215. 15 U.S.C. § 1012(b). If the state law would conflict with the federal law and the federal law is determined not to “specifically relate to the business of insurance,” then the primary inquiry is whether the state “statute is a law enacted ‘for the purpose of regulating the business of insurance.’” *Fabe*, 508 U.S. at 501; *see also id.* at 504 (explaining that when determining if a law was “‘enacted . . . for the purpose of regulating the business of insurance’ . . . [w]e deal . . . with the *first* clause” of § 1012(b) (quoting 15 U.S.C. § 1012(b))).

216. *See Fabe*, 508 U.S. at 502–04; *Stephens v. Am. Int’l Ins. Co.*, 66 F.3d 41, 44 (2d Cir. 1995) (using the *Pireno* test in the context of the first clause of the MFA while recognizing the test originated within the context of the second clause); Susan Randall, *Mandatory Arbitration in Insurance Disputes: Inverse Preemption of the Federal Arbitration Act*, 11 CONN. INS. L.J. 253, 265–69 (2005).

217. *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982). The three factors include: “*first*, whether the practice has the effect of transferring or spreading a policyholder’s risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry.” *Pireno*, 458 U.S. at 129. For an example of the use of the *Pireno* test to establish the central inquiry of the relationship between the insurer and insured, *see Stephens*, 66 F.3d at 44–45 and *infra* notes 302–06 and accompanying text. The Supreme Court also established a two factor test—representing a “a clean break” from the McCarran-Ferguson factors—for determining the meaning of regulating insurance under the Employee Retirement Income Security Act of 1974 (ERISA), which does not preempt state laws

test was originally used to determine whether a practice is part of the business of insurance and thus exempt from antitrust regulation under the second clause of § 1012(b) of the MFA.<sup>218</sup> However, to determine whether state law may reverse preempt federal law, under the first clause of the MFA, the true inquiry hinges on the state enactment's purpose of regulating the business of insurance.<sup>219</sup>

Laws enacted for the purpose of regulating the business of insurance “possess the ‘end, intention, or aim’ of adjusting, managing, or controlling the business of insurance.”<sup>220</sup> To determine this, most courts, based on the Supreme Court's holding in *SEC v. National Securities, Inc.*,<sup>221</sup> focus on whether the statute is aimed at the relationship between the insurer and the insured.<sup>222</sup>

To summarize, the New York Convention and the FAA thus appear to conflict with the MFA. The former requires courts to enforce arbitration agreements in commercial contracts,<sup>223</sup> while the latter commands them to refuse to do so if compelled by state law.<sup>224</sup> When faced with this potential conflict, the courts first examine whether the laws are “capable of co-existence” before determining which law prevails.<sup>225</sup>

regulating insurance. *See* *Ky. Ass'n of Health Plans, Inc. v. Miller*, 538 U.S. 329, 333, 341–42 (2003).

218. *See Pireno*, 458 U.S. at 129.

219. *See Fabe*, 508 U.S. at 504 (“To equate laws ‘enacted . . . for the purpose of regulating the business of insurance’ with the ‘business of insurance’ itself . . . would be to read words out of the statute. This we refuse to do.”); *see also supra* note 215 and accompanying text.

220. *Fabe*, 508 U.S. at 505 (quoting BLACK'S LAW DICTIONARY 1236 (6th ed. 1990)).

221. 393 U.S. 453 (1969).

222. *Id.* at 460 (“[W]hatever the exact scope of the statutory term, it is clear where the focus was—it was on the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating this relationship, directly or indirectly, are laws regulating the ‘business of insurance.’”); *see, e.g.,* *Autry v. Nw. Premium Servs.*, 144 F.3d 1037, 1044 (7th Cir. 1998) (quoting *National Securities, Inc.*, at 460; *Fabe*, 508 U.S. at 505); *Munich Am. Reinsurance Co. v. Crawford*, 141 F.3d 585, 593–94 (5th Cir. 1998) (quoting *Nat'l Secs., Inc.*, 393 U.S. at 460); *Hudson v. Supreme Enters., Inc.*, No. 2:06-cv-795, 2007 U.S. Dist. LEXIS 58280, at \*12-14 (S.D. Ohio Aug. 9, 2007); *Nat'l Home Ins. Co. v. King*, 291 F. Supp. 2d 518, 529 (E.D. Ky. 2003) (“[T]he Kentucky legislature has enacted a statute that is directed specifically at the relationship between the insurer and insured with the aim of protecting policyholders from mandatory arbitration agreements reached in the context of an adhesion contract.”); *Kachanis v. United States*, 844 F. Supp. 877, 881–82 (D.R.I. 1994); *Ambrose v. Blue Cross & Blue Shield*, 891 F. Supp. 1153, 1162–63 (E.D. Va. 1995); *see also* *Randall*, *supra* note 216, at 265 n.49 (explaining the rationale of *Nat'l Homes Ins. Co.*); *id.* at 263 (“Insurance companies, as repeat players unencumbered by precedent or estoppel, may take varying positions on the same policy provision in successive arbitrations, or continue to advance an oft-rejected interpretation.”).

223. *See supra* Part II.A.1.

224. *See supra* Part II.A.2.

225. This is the general rule governing conflicts between any sources of law, for example between two statutes, a statute and a treaty, or a statute and customary international law. *See* *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 533 (1995) (“[W]hen two statutes are capable of co-existence . . . it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.” (first alteration in original) (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974))); *Pittsburgh & Lake Erie R.R. Co. v. Ry. Labor Execs' Assn.*, 491 U.S. 490, 510 (1989)); *Whitney v.*



The next two sections show courts performing precisely this form of analysis, but coming to opposite results, given the conflicting obligations of the New York Convention, the FAA, and the MFA. Part II.B addresses the Fifth Circuit's wrestling with this question in *Safety National*, while Part II.C describes the Second Circuit's position in *Stephens*. The discussion focuses on the courts' analysis of whether the New York Convention has Supremacy Clause effect, independent of its implementing legislation, but each part first addresses why the MFA is applicable in each case, thereby overturning the Supremacy Clause effect of the FAA. This leads to the main issue of whether an implemented non-self-executing treaty can independently preempt a state law.

*B. The Fifth Circuit Distinguishes Implemented Treaties: Safety National Casualty Corp. v. Certain Underwriters at Lloyd's, London*

1. The Majority Opinion

In 2009, sitting en banc,<sup>226</sup> the Fifth Circuit *Safety National* majority held that “implemented treaty provisions, self-executing or not, are not reverse-preempted by state law pursuant to the McCarran-Ferguson Act.”<sup>227</sup> *Safety National* involved a reinsurance dispute between the Louisiana Safety Association of Timbermen—Self Insurance Fund (LSAT),<sup>228</sup> underwriters at Lloyd's, London (the Underwriters), and Safety National Casualty

---

Robertson, 124 U.S. 190, 194 (1888) (“By the Constitution, a treaty is placed on the same footing, and made of like obligation, with an act of legislation. . . . When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either. . . .”); *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (establishing the Charming Betsy Rule that U.S. statutes are generally interpreted to be consistent with international law absent clear contrary congressional intent because “an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains”).

226. The case was heard by all seventeen then-active circuit judges and one judge with senior status. *See Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, London*, 587 F.3d 714, 716 (5th Cir. 2009) (en banc) (listing the judges). The majority consisted of fourteen judges, while one judge concurred in the opinion and three judges dissented. *See id.* at 717. The concurring judge argued that the text of Article II of the New York Convention indicated that it was self-executing and therefore preempts the Louisiana Insurance Code. *Id.* at 733–35 (Clement, J., concurring); *see also id.* at 736 (arguing that only some parts of the Convention were non-self-executing, such as enforcement of foreign arbitral decisions). However, this contradicts the understanding at the time of ratification that implementing legislation would be needed for enforcement of both arbitral agreements and decisions. *See supra* notes 165–68 and accompanying text.

227. *Safety Nat'l*, 587 F.3d at 731. One student commentator has argued that arbitration agreements in international reinsurance contracts should be enforced against conflicting state law, notwithstanding the MFA. *See generally* J. Logan Murphy, Note, *Law Triangle: Arbitrating International Reinsurance Disputes Under the New York Convention, the McCarran-Ferguson Act, and Antagonistic State Law*, 41 VAND. J. TRANSNAT'L L. 1535 (2008) (arguing that arbitration agreements should be enforced under traditional rules of international law and Supreme Court precedent favoring enforcement of international arbitration agreements).

228. Louisiana Safety Association of Timbermen—Self Insurers Fund (LSAT) operates in Louisiana and provides members with workers' compensation insurance. *Safety Nat'l*, 587 F.3d at 717.

Corporation (Safety National).<sup>229</sup> LSAT and the Underwriters entered reinsurance agreements that contained arbitration provisions.<sup>230</sup> The Underwriters sought to compel arbitration, and LSAT sought to quash arbitration by arguing that the Louisiana Insurance Code voided arbitration agreements.<sup>231</sup>

The Louisiana Insurance Code voids language in insurance contracts (subject to the State of Louisiana's laws) that would deprive Louisiana courts of jurisdiction over cases brought against insurers.<sup>232</sup> Louisiana courts have held that arbitration agreements in insurance contracts are voided and unenforceable under the Louisiana Insurance Code.<sup>233</sup> In support of this conclusion, the *Safety National* petitioners have argued that "[t]he Louisiana arbitration statute is designed to force insurers to handle claims of Louisiana residents in good faith by subjecting them to jury trials in local state courts if they refuse to pay covered claims."<sup>234</sup> The Fifth Circuit assumed without deciding that section 868 of the Louisiana Insurance Code regulates the business of insurance within the meaning of the MFA,<sup>235</sup> but noted three reasons for uncertainty prior to turning to whether the New York Convention was reverse preempted.<sup>236</sup> First, an argument could be made that "one of the criteria for determining whether a law regulates the business of insurance is whether it has the effect of spreading or transferring a policyholder's risk," and anti-arbitration provisions do not have this effect.<sup>237</sup> Second, an argument could be made that because arbitration is a question of forum selection and does not implicate the substantive rights of the parties, anti-arbitration provisions may not be considered to be enacted for the purpose of regulating the business of insurance, but rather "for the parochial purpose of regulating a foreign insurer's choice of forum."<sup>238</sup> Third, an argument could be made that prohibiting arbitration does not fulfill the necessary requirement of protecting policy holders.<sup>239</sup> After noting these uncertainties, the majority

---

229. *Id.*

230. *Id.* The dispute related in part to the validity of an assignment LSAT had made, transferring LSAT's rights under the reinsurance agreements with Certain Underwriters at Lloyd's, London to Safety National Casualty Corporation. *Id.*

231. *Id.* As explained previously, if a state law satisfies the MFA, then state law applies rather than a conflicting federal statute. *See supra* Part II.A.2.

232. LA. REV. STAT. ANN. § 22:868(C) (Supp. 2011).

233. *Safety Nat'l*, 587 F.3d at 719 n.11.

234. Reply Brief for Petitioner at 12, *La. Safety Ass'n of Timbermen—Self Insurers Fund v. Certain Underwriters at Lloyd's, London*, 130 S. Ct. 3311 (2010) (No. 09-945), 2010 WL 1602098 at \*12.

235. *Safety Nat'l*, 587 F.3d at 720–21.

236. *See id.* at 720–21 & n.21. For an argument that arbitration agreements do not regulate the business of insurance, see Hernández-Gutiérrez, *supra* note 190, at 42–45.

237. *See Safety Nat'l*, 587 F.3d at 720 n.21 (citing *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982)).

238. *Id.* (quoting *Int'l Ins. Co. v. Duryee*, 96 F.3d 837, 840 (6th Cir. 1996)); *Duryee*, 96 F.3d at 839 (noting that while preserving litigation may be a valid concern, choice of forum between courts is not).

239. *Safety Nat'l*, 587 F.3d at 721 n.21.

then turned to their argument that the MFA did not cause state law to reverse preempt the New York Convention.

To reach its conclusion, the majority essentially relied on the following line of reasoning.<sup>240</sup> First, it “construed” an implemented non-self-executing treaty as the source of federal law in conflict with state law.<sup>241</sup> Next, it held that a treaty, “self-executing or not,” is not an “Act of Congress” within the meaning of the McCarran-Ferguson Act.<sup>242</sup> Thus, the court concluded that “the McCarran-Ferguson Act’s provision that ‘no Act of Congress’ shall be construed to supersede state law regulating the business of insurance is inapplicable.”<sup>243</sup>

*a. The New York Convention as the Source of Law*

The court explained multiple times that it was construing the New York Convention, and not the FAA, to establish the parties’ rights and obligations.<sup>244</sup> LSAT had argued that an implemented non-self-executing treaty “has no effect independent of [the] legislation enabling it,” and therefore only the FAA was relevant.<sup>245</sup> The court rejected this argument for several reasons.

First, the court reasoned that a treaty was a distinct entity that remained in place as an “international agreement or contract negotiated by the Executive Branch and ratified by the Senate, not by Congress.”<sup>246</sup> The treaty did not cease to matter because Congress passed an act to implement it.<sup>247</sup> Therefore, “[i]mplementing legislation that does not conflict with or override a treaty does not replace or displace that treaty.”<sup>248</sup>

---

240. The opinion did not follow this order, and instead was primarily framed in terms of the meaning of “Act of Congress” and “Treaty.” *See, e.g., Safety Nat’l*, 587 F.3d at 731 (“Because we give the phrases ‘Act of Congress’ and ‘such Act’ their usual, commonly understood meaning, we conclude that implemented treaty provisions, self-executing or not, are not reverse-preempted by state law pursuant to the McCarran-Ferguson Act.” (quoting 15 U.S.C. § 1012(b) (2006))). However, because the heart of the analysis depends on the court finding that the treaty can serve as an independent source of law, the next section begins with this analysis before moving to the meaning of “Act of Congress.”

241. *Id.* at 718 (“[I]t is when we construe a treaty . . . to determine the parties’ respective rights and obligations, that the state law at issue is superseded.”); *id.* at 724 (“Equally important in the present case, it is a treaty (the Convention) . . . that we construe to supersede Louisiana law.”); *id.* at 725 (“[W]hen we ‘construe’ the Convention, we are faced with the possibility of ‘superseding’ the Louisiana law.”); *id.* (“[I]t is by reference to the Convention that . . . we ‘supersede’ Louisiana law . . .”).

242. *Id.* at 718 (“Congress did not intend to include a treaty within the scope of an ‘Act of Congress’ when it used those words in the McCarran-Ferguson Act . . . .”); *id.* at 723 (“The fact that a treaty is implemented by Congress does not mean that it ceases to be a treaty and becomes an ‘Act of Congress.’”).

243. *Id.* at 725.

244. *See supra* note 241.

245. *Safety Nat’l*, 587 F.3d at 721.

246. *Id.* at 723.

247. *See id.* In support of this reasoning, the court cited cases that stood for the proposition that treaties and statutes have equal stature under the Constitution, and if there is a conflict then the one last in time prevails. *See id.* at 722–23 n.32 (quoting *Egle v. Egle*, 715 F.2d 999, 1013 (5th Cir. 1983)) (citing *Medellin v. Texas*, 552 U.S. 491, 509 n.5 (2008); *Breard v. Greene*, 523 U.S. 371, 376 (1998) (per curiam)); *see also Egle*, 715 F.2d at 1013

Second, the court concluded that the implementing legislation indicates that Congress thought the treaty has a separate status independent from its implementing legislation.<sup>249</sup> The court pointed to the fact that § 203 of the FAA, dealing with jurisdiction and amount in controversy, states that “[a]n action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States.”<sup>250</sup> Thus, “Congress recognized that jurisdiction over actions to enforce rights under the Convention” could arise from the Convention itself.<sup>251</sup>

Third, the court similarly reasoned that the FAA depends on the New York Convention for its operation. In support of this, the court explained:

It is *the Convention* under which legal agreements “fall”; it is an action or proceeding under *the Convention* that provides the court with jurisdiction; such an action or proceeding is “deemed to arise under the laws *and treaties*” of the United States, the treaty in this case being the Convention; and when chapter 1 of title 9 (the FAA) conflicts with the Convention, *the Convention* applies.<sup>252</sup>

Therefore, because Congress (through the FAA) directed courts to the treaty, there was no congressionally created bar to construing the treaty as the source of law, and it was appropriate to do so.<sup>253</sup>

Finally, the Court turned more directly to the issue of what preemptive power an implemented non-self-executing treaty could have under the Supremacy Clause.<sup>254</sup> Although the result could be interpreted as an implicit finding that a non-self-executing treaty, once implemented, is the “supreme Law of the Land” just as a self-executing treaty is, the court denied making this finding, stating:

[W]e need not and do not undertake to determine the precise or technical contours of how or whether implemented non-self-executing treaty provisions become the “Law of the Land” under the Supremacy Clause. Our task in the present case is to determine if, in enacting the McCarran-Ferguson Act, Congress intended for state law to reverse-preempt federal law that has as its source an implemented non-self-executing treaty.<sup>255</sup>

Nevertheless, the court presented several arguments in opposition to the dissent’s contention that an “*implemented* non-self-executing treaty is not a

---

(“Under our Constitution, treaties and statutes are equal in dignity.” (quoting *Whitney v. Robertson*, 124 U.S. 190, 194 (1888))). The court also quoted *Percheman* in support of the proposition that when interpreting acts of Congress related to the subject of a treaty, the treaty should be taken into account. *See id.* at 723 n.33 (quoting *United States v. Percheman*, 32 U.S. 51, 89 (1833)).

248. *Safety Nat’l*, 587 F.3d at 722–23.

249. *Id.* at 724.

250. 9 U.S.C. § 203 (2006); *Safety Nat’l*, 587 F.3d at 724.

251. *Safety Nat’l*, 587 F.3d at 724.

252. *Id.* at 724–25 (citing 9 U.S.C. §§ 202–03, 205, 208 (2006)).

253. *See id.* at 725 (“The Convention Act directs us to the treaty it implemented, and when we ‘construe’ the Convention, we are faced with the possibility of ‘superseding’ the Louisiana law.”).

254. *See id.* at 725–30.

255. *Id.* at 727.

treaty within the meaning of the Supremacy Clause and cannot preempt state law.”<sup>256</sup>

First, the court outright denied that there was precedent supporting the idea that an implemented non-self-executing treaty did not fall within the Supremacy Clause.<sup>257</sup> The court explained that while Supreme Court precedent established that a non-implemented non-self-executing treaty could not be judicially enforced and could not supersede statute, the cases establishing this did not consider whether this would be true for an implemented non-self-executing treaty.<sup>258</sup> On the other hand, the court reasoned that the Fifth Circuit “ha[d] exhibited an understanding that implemented provisions of a non-self-executing treaty can themselves be given effect by the courts as federal law.”<sup>259</sup> Additionally, the court interpreted statements in *Medellin* as supporting the “commonly-held conception that a treaty provision can itself become domestic law once implemented.”<sup>260</sup>

The court also cited *Missouri v. Holland* in support of its position that Congress did not intend “for state law to reverse-preempt federal law that has as its source an implemented non-self-executing treaty.”<sup>261</sup> The Fifth Circuit reasoned that in *Holland* “[t]he validity of the implementing legislation under the Necessary and Proper Clause turned on the constitutionality of the treaty—even though it was implemented by an Act of Congress.”<sup>262</sup> Therefore, an implemented non-self-executing treaty remains distinct from and should be “viewed as distinct from an Act of Congress.”<sup>263</sup> Further, the court explained *Holland* as standing for the idea that it was the implemented non-self-executing treaty that was binding on the states as well as a source of authority for Congress to pass the legislation.<sup>264</sup> The Fifth Circuit concluded that *Holland* was decided in

---

256. *Id.* at 725.

257. *Id.* at 725–27.

258. *Id.* at 725 n.47.

259. *Id.* at 727; *see also id.* at 727 n.54 (citing cases where the Fifth Circuit used language indicating that an implemented treaty was applicable as federal law or “becomes the supreme law of the land”).

260. *Id.* at 727 n.56. For example, the court quoted as evidence, “[i]n sum, while treaties ‘may comprise international commitments . . . they are not domestic law *unless* Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be ‘self-executing’ and is ratified on these terms.’” *Id.* (alterations in original) (quoting *Medellin v. Texas*, 552 U.S. 491, 505 (2008)).

261. *Id.* at 727–28. *Missouri v. Holland*, 252 U.S. 416 (1920), held that Congress could pass a law that would otherwise be outside of its enumerated powers under the Necessary and Proper Clause, in order to implement a treaty. *See supra* Part I.B.2.

262. *Safety Nat’l*, 587 F.3d at 728.

263. *Id.*

264. *See id.* (“The Court assumed that ‘but for the treaty the State would be free to regulate [migratory birds within its boundaries] itself.’ But the Court explained, ‘[v]alid treaties of course are as binding within the territorial limits of the States as they are elsewhere throughout the dominion of the United States.’ The Court continued, ‘[n]o doubt the great body of private relations usually fall within the control of the State, but a treaty may override its power.’ Because the treaty was constitutional, the Supreme Court ultimately concluded ‘that the treaty and statute must be upheld.’” (alterations in original) (quoting *Holland*, 252 U.S. at 434–35)).

1920, and therefore “when Congress passed the McCarran-Ferguson Act . . . it was well aware that a treaty, even if requiring implementation, was distinct from an Act of Congress and could serve as the source of authority to ‘override [a state’s] power.’”<sup>265</sup>

*b. Treaties Are Not Acts of Congress*

Having explained the court’s rationale for why the treaty could be construed as the source of law, this section deals with the court’s analysis of why the treaty was not an “Act of Congress” within the meaning of the MFA. The court focused on Congress’s intention with regard to the MFA and the use of the phrase “Act of Congress.”<sup>266</sup> The court reasoned that whether the treaty was self-executing<sup>267</sup> was irrelevant because Congress did not intend to include any type of treaty within the meaning of an “Act of Congress.”<sup>268</sup>

LSAT had conceded that if the New York Convention were self-executing, then it would not be “an ‘Act of Congress’ within the meaning of the McCarran-Ferguson Act.”<sup>269</sup> LSAT, however, maintained that the New York Convention could not supersede state law.<sup>270</sup> Having rejected LSAT’s argument that an implemented non-self-executing treaty “has no effect independent of [the] legislation enabling it,”<sup>271</sup> the court analyzed whether the New York Convention could be reverse preempted because it was an “Act of Congress.”<sup>272</sup>

The court found that this would lead to the “untenable” conclusion that Congress meant to exclude one type of implemented treaty<sup>273</sup> from the meaning of “Act of Congress” but not another type of implemented treaty.<sup>274</sup> The court reasoned that “[i]n other federal statutes that are currently in effect, it does not appear that Congress has used the term ‘treaty’ to exclude implemented non-self-executing treaties.”<sup>275</sup> Additionally, the same reasoning that supported the court’s conclusion that the treaty could serve as the source of law to supersede state law also

---

265. *Id.* at 728–29 (alteration in original) (quoting *Holland*, 252 U.S. at 434).

266. *See, e.g., id.* at 723–24.

267. The majority could not determine if Article II of the treaty was self-executing, even though it attempted to apply the reasoning of *Medellin*. *See id.* at 721–22 (“It is unclear to us whether the Convention is self-executing.”).

268. *Id.* at 722–23.

269. *Id.* at 721.

270. *Id.*

271. *Id.*

272. *Id.* at 722–23.

273. *Id.* at 723. In other words, the court conceived of a self-executing treaty as one type of implemented treaty. *See id.* at 723 n.35 (“It would seem that ‘treaty’ would include all implemented treaties, regardless of whether they were self-executing or had required implementing legislation.”).

274. *Id.* at 723–24.

275. *Id.* at 723 n.35.

supported the argument that a treaty is distinct from an “Act of Congress.”<sup>276</sup> The next section explains the opposing viewpoint.

## 2. The Dissent

In *Safety National*, Judge Jennifer Walker Elrod, writing for the dissent, argued that non-self-executing treaties, whether implemented or not, “cannot . . . provide a rule of decision” in U.S. courts.<sup>277</sup> The dissent took the view that a non-self-executing treaty cannot be “promoted to the Supremacy Clause status it would have enjoyed had it been self-executing.”<sup>278</sup> The dissent reasoned that a non-self-executing treaty, like “a model code, [is only] a source of content,” and thus “remains as inert.”<sup>279</sup>

In support of this conclusion, the dissent argued that the majority opinion went against the prevailing interpretation of the Supreme Court’s decisions on treaty execution,<sup>280</sup> failed to support its views with case law,<sup>281</sup> and ignored the consensus of legal scholars.<sup>282</sup> In short, the dissent argued that the majority, without any proper basis, created “a doctrinal novelty” in order to conclude that the New York Convention could be construed as the source of federal law superseding state law.<sup>283</sup> Following is an explanation of the dissent’s reasoning for each argument.

The dissent’s first argument was that there are two kinds of treaties and only one of them can ever be directly enforced in the courts.<sup>284</sup> The dissent argued that the “Supreme Court has repeatedly affirmed that *only* self-executing treaties operate by their own force to provide a rule of decision in the courts.”<sup>285</sup> The dissent relied on language from *Whitney v. Robertson*,<sup>286</sup> the *Head-Money Cases*<sup>287</sup> and *Medellin* to distinguish the two types of treaties<sup>288</sup> and reasoned that because the Supreme Court has

276. *Id.* at 723 (“The fact that a treaty is implemented by Congress does not mean that it ceases to be a treaty and becomes an ‘Act of Congress.’”); *id.* at 724 (“Our conclusion that Congress did not intend the term ‘Act of Congress,’ as used in the McCarran-Ferguson Act, to reach a treaty such as the Convention is buttressed by the terms of the Convention Act.”); *see also supra* notes 249–253, 263 and accompanying text.

277. *Safety Nat’l*, 587 F.3d at 737 (Elrod, J., dissenting). Judges E. Smith and Emilio M. Garza joined in the dissent.

278. *Id.* at 740.

279. *Id.* at 740 & n.13 (describing a model code as a source of content incorporated by reference, but also conceding that “as a matter of international law, the United States is bound by its commitments, including those arising from non-self-executing treaties”).

280. *See id.* at 739–40.

281. *Id.* at 740 (“The court points to no case holding that a non-self-executing treaty can supersede state law.”).

282. *Id.* at 741 (“The court also ignores the consensus of legal scholars regarding the Supremacy Clause status of implemented treaties.”).

283. *Id.* at 738.

284. *See infra* note 289 and accompanying text.

285. *Safety Nat’l*, 587 F.3d at 739 (emphasis added) (citing *Medellin v. Texas*, 552 U.S. 491 (2008); *Foster v. Neilson*, 27 U.S. (1 Pet.) 253, 315 (1829)).

286. 124 U.S. 190 (1888).

287. 112 U.S. 580 (1884).

288. *Safety Nat’l*, 587 F.3d at 739–40 (quoting *Medellin*, 552 U.S. at 505; *Whitney*, 124 U.S. at 194; *Head Money Cases*, 112 U.S. at 598).

consistently made the distinction, “treaties come in two separate and distinct types: self-executing treaties, which can undoubtedly preempt state law in a case like this, and non-self-executing treaties, which cannot.”<sup>289</sup>

Next, the dissent argued that the majority’s opinion failed to find and discuss supporting case law.<sup>290</sup> The dissent explained that there was no case law that could support the majority’s position,<sup>291</sup> and that the majority’s *Holland* analysis failed to provide “support [for] the conclusion that implementation by statute imbues a non-self-executing treaty with preemptive abilities . . . .”<sup>292</sup> In addition, the dissent noted that the majority’s holding conflicts with the Second Circuit’s position in *Stephens*.<sup>293</sup>

Finally, the dissent argued that the majority had ignored the consensus of legal scholars because “commentators overwhelmingly conclude that under current (and longstanding) law, it is only the implementing statute, not the non-self-executing treaty, that can be enforced by the courts so as to be capable of preemption.”<sup>294</sup> The dissent cited several sources for this proposition,<sup>295</sup> including the *Restatement (Third) of the Foreign Relations Law of the United States*, which states, “strictly, it is the implementing legislation, rather than the agreement itself, that is given effect as law in the United States.”<sup>296</sup> The next section explains the Second Circuit’s opinion in *Stephens*, which—like the *Safety National* dissenting opinion—concluded that the New York Convention could not preempt state law.

*C. The Second Circuit Finds Non-Self-Executing Treaties Inapplicable:  
Stephens v. American International Insurance Co.*

*Stephens* involved a dispute between the liquidator of an insolvent reinsurance company and companies that had ceded risk to the reinsurer but refused to pay premiums and other obligations allegedly owed.<sup>297</sup> The

289. *Id.* at 740. The dissent also noted that “[t]here is an argument, based on the text of the Supremacy Clause, that the Constitution should not recognize two species of treaty. . . . But this interpretation has not prevailed.” *Id.* at 739 n.10.

290. *Id.* at 741 (“Indeed, the court does not attempt to argue that *Foster*, *Whitney*, the *Head-Money Cases*, or *Medellin*, or any case interpreting any of them, supports the premise that the non-self-executing Convention is capable of ‘superceding’ state law under the Supremacy Clause.”).

291. *Id.* at 740. The dissent quotes David Sloss’s statement that “to the best of the author’s knowledge, no U.S. court has ever held a treaty provision to be non-self-executing and then applied it directly to decide a case.” *Id.* (quoting David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT’L L. 129, 149 (1999)).

292. *Safety Nat’l*, 587 F.3d at 741.

293. *Id.* at 742–43; see *supra* Part II.C (discussing *Stephens*).

294. *Safety Nat’l*, 587 F.3d at 741.

295. *Id.* at 741–42.

296. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, *supra* note 75, § 111(3) cmt. h. *But see Safety Nat’l*, 587 F.3d at 726 (finding this unpersuasive because it lacks analysis, does not cite to authority, is of “recent vintage,” and because “[t]he Reporter for that [Restatement] was Professor Louis Henkin, arguably an advocate for the enforcement of implemented treaty provisions”).

297. *Stephens v. Am. Int’l Ins. Co.*, 66 F.3d 41, 42 (2d Cir. 1995).



companies “moved to compel arbitration.”<sup>298</sup> At the time, the relevant state law, Kentucky Insurers Rehabilitation and Liquidation Law<sup>299</sup> (Kentucky Law), governed contractual agreements in delinquency proceedings and subordinated any conflicting provisions (including specifically arbitration agreements) to the Kentucky Law.<sup>300</sup> Based on this, the liquidator argued that the arbitration agreements in question were voided by the Kentucky Law, because it (and not the FAA) was applicable under the MFA.<sup>301</sup>

The Second Circuit held that under the three factor *Pireno* test,<sup>302</sup> reinsurance was part of the business of insurance and the Kentucky Law fulfilled the requirements of § 1012(b) of the MFA, because it had the aim of regulating and protecting the relationship between the policy holder and insurer.<sup>303</sup> The court reached this conclusion on the rationale that the Kentucky Law was aimed at managing the performance of an insolvent insurer’s (or reinsurer’s) insurance contracts.<sup>304</sup> The court held that “[i]t is crucial to the ‘relationship between [an] insurance company and [a] policyholder’ that both parties know that in the case of insolvency, the insurance company will be liquidated in an organized fashion,” and “‘protects’ policyholders by . . . assuring” this.<sup>305</sup> Thus, on this argument the MFA would allow the Kentucky Law to reverse preempt the FAA.<sup>306</sup>

The next question, then, is whether the New York Convention can itself have Supremacy Clause effect. The Second Circuit took an opposing view from the Fifth Circuit, holding that the Supremacy Clause did not cause the New York Convention to preempt conflicting state law because the New York Convention “relies upon an Act of Congress for its implementation.”<sup>307</sup> The court concluded that “[t]he [New York] Convention itself is simply inapplicable in this instance.”<sup>308</sup>

The court did not offer an explanation for this position, other than to quote language from *Foster* that “[a] treaty is, in its nature, a contract . . . [and] when either of the parties engage to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract, before it can become a rule for the court.”<sup>309</sup>

---

298. *Id.* at 43.

299. KY. REV. STAT. ANN. § 304.33–010 (LEXIS through 1994 legislation).

300. *See id.* § 304.33–010(6); *Stephens*, 66 F.3d at 43.

301. *Stephens*, 66 F.3d at 43.

302. *See supra* note 217 and accompanying text.

303. *Stephens*, 66 F.3d at 44–45.

304. *Id.* at 45.

305. *Id.* at 44–45 (alterations in original) (quoting U.S. Dep’t of Treasury v. Fabe, 508 U.S. 491, 493, 501 (1993)).

306. *But cf.* *Corcoran v. Ardra Ins. Co.*, 77 N.Y.2d 225 (1990) (holding that the New York Convention did not require enforcement of an arbitration clause where New York law did not empower the state Superintendent of Insurance, acting on behalf of an insolvent insurance company, to participate in arbitration.).

307. *Stephens*, 66 F.3d at 45.

308. *Id.*

309. *Id.* (quoting *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 313–14 (1829)).

### III. TREATIES, WHETHER SELF-EXECUTING OR NOT, CAN HAVE INDEPENDENT SUPREMACY CLAUSE EFFECT

Non-self-executing treaties achieve Supremacy Clause effect once implemented by legislation. In some circumstances, this force of law is within the treaty itself and not just the implementing legislation. This conclusion is supported by the history and purpose of including treaties within the Supremacy Clause, as well as the power structure set up by the Constitution, which gives the national government primary power over foreign policy and limits the actions of the states in this area. The New York Convention is an example of such a treaty.

This part first explains why the New York Convention should be held to have Supremacy Clause effect even though its implementing legislation may not. Next, this part argues that the Second Circuit and Fifth Circuit dissents were incorrect in their analysis of the Supremacy Clause status of non-self-executing treaties. Finally, this part explains how courts should examine the Supremacy Clause effect of implemented treaties.

#### A. *The Case of the New York Convention*

The New York Convention is an Article II treaty that received Supremacy Clause effect by enactment of a federal statute.<sup>310</sup> The MFA is a statute that disables the Supremacy Clause effect of “Acts of Congress.”<sup>311</sup> This means that the FAA, an “Act of Congress” not specific to insurance,<sup>312</sup> cannot preempt state laws that satisfy the MFA requirements of being passed for the purpose of regulating the business of insurance.<sup>313</sup> In other words, the existence of the FAA (a contrary federal statute) no longer binds judges to disregard state law.<sup>314</sup> In this situation, the New York Convention should be found to have Supremacy Clause effect, although the FAA may not, because when both the MFA and the New York Convention by their terms apply, it creates a situation where national foreign policy interests outweigh state interests. That is, the treaty should still bind state (and federal) judges to disregard conflicting state law in order to enforce foreign policy that has not been overridden by a “Law of the Land.”

This argument is explained first by addressing whether anti-arbitration provisions within state insurance laws in fact fulfill the MFA, such that the Supremacy Clause effect of the FAA is disabled; second, by examining when the New York Convention might not apply; and third, by explaining the impact on foreign policy when both the MFA and the treaty apply.

---

310. *See supra* notes 67–70, 163–69 and accompanying text.

311. *See supra* notes 210–14 and accompanying text.

312. *See supra* Part II.A.1.b–c.

313. *See supra* notes 210–15 and accompanying text.

314. *See supra* notes 223–25 and accompanying text.

### 1. State Anti-Arbitration Insurance Provisions Arguably Fulfill the McCarran-Ferguson Act Requirements

First, state insurance laws that have anti-arbitration provisions can usually fulfill the MFA requirement allowing them to reverse preempt the FAA. For example, although in *Safety National* the Fifth Circuit noted that it was not certain that the Louisiana Insurance Code satisfied the MFA requirements,<sup>315</sup> it is likely that the purpose of the Code and others like it do in fact satisfy the MFA. The Fifth Circuit's reasons for uncertainty included: anti-arbitration provisions do not spread or transfer risk; anti-arbitration provisions do not act to protect policy holders; and arbitration is a form of forum selection that does not implicate substantive rights.<sup>316</sup>

The first argument, related to risk spreading, relies on the first factor of a three factor test from the *Pireno* line of cases.<sup>317</sup> However, this test was developed in the context of determining whether a practice is part of the business of insurance and thus exempt from antitrust regulation under the second clause of § 1012(b) of the MFA.<sup>318</sup> In contrast, the primary inquiry for the first clause, the relevant clause here, revolves around the enactment's purpose of regulating the business of insurance.<sup>319</sup> Determining whether a law was enacted for the purpose of regulating the business of insurance is different from determining whether a practice is part of the business of insurance.<sup>320</sup> In order to fail to satisfy the requirement of being enacted for the purpose of regulating the business of insurance, the anti-arbitration provision also must not be aimed at regulating the relationship between the insurer and insured.<sup>321</sup> Whether anti-arbitration provisions spread or transfer risk addresses only one factor in a narrower inquiry.<sup>322</sup> Therefore, this factor cannot bear the weight required to find that the Louisiana Insurance Code does not satisfy the MFA requirements.<sup>323</sup>

The Fifth Circuit's next two arguments come closer to taking the state statute outside of the MFA requirements. Courts have found, however, that anti-arbitration laws specific to insurance contracts are passed in order to protect insurance holders from unequal treatment by insurance carriers who can reach different results for the same policy provision when decisions are made in confidential arbitration proceedings.<sup>324</sup> This resolves the argument regarding protection. Additionally, this goes to the relationship between

---

315. See *supra* notes 235–39 and accompanying text.

316. See *supra* notes 236–39 and accompanying text.

317. See *supra* note 217 and accompanying text.

318. See *supra* notes 217–18 and accompanying text.

319. See *supra* notes 219–22 and accompanying text.

320. See *supra* note 219 and accompanying text.

321. See *supra* note 222 and accompanying text.

322. See *supra* notes 217–19 and accompanying text.

323. See *supra* notes 221–22 and accompanying text.

324. See, e.g., *supra* note 222 (quoting *Nat'l Home Ins. Co. v. King*, 291 F. Supp. 2d 518, 529 (E.D. Ky. 2003); *Randall*, *supra* note 205, at 263) (citing *Randall*, *supra* note 205, at 265 n.49). The *Safety National* petitioners argued that forcing a jury trial had the effect of protecting policy holders. See *supra* note 234 and accompanying text. *But cf. infra* note 328.

insurer and insured, and thus weighs against an argument that the purpose is to regulate the forum selection choice of foreign insurers.<sup>325</sup> On this basis, the MFA would allow a state law to reverse preempt the FAA.

## 2. The New York Convention Exception for Special National Interests

Second, when state law satisfies the MFA, the FAA and the New York Convention will conflict with the state law unless the MFA's policy giving states a broad grant of authority over the business of insurance<sup>326</sup> pulls the arbitration agreement into the realm of non-arbitral subject matter because it is a special national interest.<sup>327</sup> It could be the case that this New York Convention (and thus FAA) exception to enforcement applies to the type of policy concern the MFA arguably represents. Namely, insurance regulation by the states aimed at regulating the relationship between the insurer and insured may be a subject matter best left to judicial rather than arbitral resolution.<sup>328</sup> If this is so, and this interest trumps the national interest of having international arbitral resolution, then under the FAA itself the arbitration agreement would not need to be enforced because the subject matter of the agreement is not capable of settlement by arbitration.<sup>329</sup>

## 3. The New York Convention as the Embodiment of a Foreign Policy Decision Left Unaltered by Its Implementing Legislation

Third, if the MFA does not represent a special enough national policy concern, then the conflict remains, and the MFA would negate the FAA's Supremacy Clause effect.<sup>330</sup> This would result in the violation of an international obligation due to state policy choices that are not even strong enough to trump the national policy interest in favor of settling international commercial disputes through arbitration. If the treaty were not involved (imagine that Congress simply enacted the requirements of the Convention as the FAA but there is no treaty obligation), then no harm occurs when the state law preempts the FAA, even though the policy concerns of the FAA technically trump the MFA's. If Congress thought there were negative

---

325. *See supra* note 220–22 and accompanying text. This legislation contrasts with laws that seek to dictate forum selection between state and federal courts, which could not be said to go to the relationship between insurer and insured. *See supra* note 238.

326. *See supra* note 211 and accompanying text.

327. *See supra* notes 184–91 and accompanying text. From a domestic policy perspective, the issue is the clash between two favored national policies: state regulation of insurance, on the one hand, and the settlement of international commercial disputes through arbitration, on the other. Arguing that the MFA should trump the FAA is analogous to arguing that the policy interest the MFA represents should trump the policy interest the FAA represents. However, there is also foreign policy to consider, i.e., the treaty.

328. *See supra* note 186–89 and accompanying text. The issue must be framed in terms of the relationship between the insurer and insured. If the argument is that the state courts ought to be able to retain jurisdiction over disputes, this becomes a failed forum selection argument because then it does not even fall within the MFA protected interest. *See, e.g., supra* notes 235–38 and accompanying text; *see also supra* notes 210–22 and accompanying text.

329. *See supra* note 188 and accompanying text.

330. *See supra* Part II.A.2.

implications, it could fix them with no other negative result. But with a treaty, foreign policy decisions become unenforceable because the treaty is unenforceable against state action. Thus, if the Supremacy Clause effect of the New York Convention does not survive the loss of the FAA, then the United States is in breach of its international obligations, arguably making it more difficult to enforce treaty benefits for American businesses contracting internationally.<sup>331</sup> This is one precise purpose of the Supremacy Clause and a primary reason the Founders included treaties within the Supremacy Clause.<sup>332</sup> Additionally, the Constitution gives foreign policy power to the national government,<sup>333</sup> and in particular the relevant branches include the President and the Senate as creators of the Article II treaty.<sup>334</sup>

The treaty, as a properly ratified Article II treaty made under the authority of the United States, embodies a foreign policy decision<sup>335</sup> that neither the FAA nor the MFA purports to change.<sup>336</sup> With regard to enforcement of arbitration agreements, key officials, including the President and Senate, thought it necessary to amend the FAA due to procedural difficulties and lack of precedent for compelling arbitration outside the United States.<sup>337</sup> This corresponds to the category of treaties incapable or inappropriate for judicial action, because a political question blank needs to be fulfilled or, more likely, changes to current law would be appropriate to streamline enforcement.<sup>338</sup> Because the implementing legislation in this case does not purport to change what the United States foreign policymakers determined was the United States policy, the treaty itself can and should have Supremacy Clause effect over state laws that would otherwise “impair the effective exercise of the Nation’s foreign policy.”<sup>339</sup> The next section explains why the Second Circuit’s *Stephens* decision and the Fifth Circuit’s *Safety National* dissent were incorrect in their analysis of the status of an implemented non-self-executing treaty.

---

331. See, e.g., *supra* notes 39–42 and accompanying text (explaining that one consequence of state failure to comply with the Treaty of Peace was that states could not benefit from economically valuable forts remaining in British possession).

332. See *supra* notes 35–36, 43–49 and accompanying text.

333. See *supra* notes 50–65 and accompanying text.

334. See *supra* notes 67–68 and accompanying text.

335. See *supra* notes 160–69 and accompanying text (discussing U.S. ratification of the New York Convention); *supra* notes 235–48 and accompanying text (explaining the Fifth Circuit’s position that the New York Convention is distinct from its implementing legislation); see also *supra* notes 61–62, 64–65, 89–92, 150–51 and accompanying text (supporting a view of the Article II treaty process as a foreign relations law making process of the national government).

336. The FAA does not alter the essentials of the New York Convention. Compare *supra* Part II.A.1.b, with *supra* Part II.A.1.c. The MFA is specific in that it applies to Acts of Congress, and an intent to remove inadvertent obstacles stemming from Congress’s (Commerce Clause) power is sufficiently distinct from an intent to remove obstacles stemming from the President’s (foreign relations) power to weigh against concluding the MFA applies to a treaty. See *supra* notes 206–09, 214 and accompanying text.

337. See *supra* note 165–69 and accompanying text.

338. See *supra* notes 127–35 and accompanying text.

339. *Zschernig v. Miller*, 389 U.S. 429, 440 (1968); see *supra* note 62.

*B. The Second Circuit Decision and Fifth Circuit Dissent Incorrectly Analyze Foster Self-Execution Doctrine*

Both the Second Circuit in *Stephens* and the Fifth Circuit dissent in *Safety National* held the view that non-self-executing treaties have no independent Supremacy Clause status.<sup>340</sup> This understanding is incorrect for two reasons. First, it is at odds with the purpose underlying the *Foster* self-execution doctrine, which is to address separation of power concerns.<sup>341</sup> Second, it undermines the Court sanctioned deference shown to foreign relations policy decisions<sup>342</sup> and the balanced power structure created by the Constitution.<sup>343</sup>

As the Fifth Circuit majority opinion in *Safety National* pointed out, *Medellin* and the other Supreme Court treaty execution cases dealt with treaties that did not have implementing legislation.<sup>344</sup> In these cases the Court was not focused on an inquiry into the status of implemented non-self-executing treaties.<sup>345</sup> Instead, the Court was concerned with the violation of separation of powers by engaging in judicial lawmaking.<sup>346</sup> Thus, the analysis of the Court's treaty execution decisions focuses on the self-executing versus non-self-executing distinction to safeguard the power balance set up by the Constitution.<sup>347</sup> The Court noted this in *Medellin*, stating that "[t]he point of a non-self-executing treaty is that it 'addresses itself to the political, not the judicial department.'"<sup>348</sup> If the treaty is non-self-executing, then because there is no legislation, the Court would violate separation of powers principles by directly enforcing the treaty.<sup>349</sup> If, on the other hand, the treaty is self-executing, then the Court need not be concerned that it is stepping into the role reserved to the foreign relations policymakers.<sup>350</sup>

The second problem with the Second Circuit decision in *Stephens* and the Fifth Circuit dissent's position in *Safety National* is that finding that an implemented treaty cannot have Supremacy Clause effect violates the Supremacy Clause and undermines constitutional national foreign policy

340. See *supra* Parts II.B.2 and II.C.

341. See *supra* notes 147–53 and accompanying text. See generally *supra* Part I.C.

342. See *supra* notes 43, 45–49, 54–65 and accompanying text; see also cases cited *supra* notes 75–76; *supra* text accompanying note 92.

343. See *supra* notes 54–65, 114, 127–35, 150–53 and accompanying text.

344. See *supra* notes 257–58 and accompanying text.

345. See generally *supra* Part I.C.

346. See *supra* note 153 and accompanying text.

347. For example, *Foster v. Nielson* is an example of intent-based non-self-execution, in which the policy makers determine that legislation should be enacted prior to judicial enforcement, and therefore enforcing the treaty without legislation would violate separation of powers. See *supra* notes 118–19 and accompanying text. Likewise, *Medellin* can be seen as representing separation of power concerns, similar to those in *Foster*, complicated by aspirational treaties. See *supra* notes 127–32, 141–57 and accompanying text.

348. *Medellin v. Texas*, 552 U.S. 491, 516 (2008) (quoting *Foster v. Neilson*, 27 U.S. (1 Pet.) 253, 314 (1829)); see *supra* notes 148–53 and accompanying text.

349. See *supra* note 153 and accompanying text.

350. See, e.g., *supra* text accompanying notes 113–14.

decisions.<sup>351</sup> This violates the separation of powers balance created by the Constitution,<sup>352</sup> and which the Court has attempted to safeguard through its treaty execution distinction.<sup>353</sup>

The *Safety National* dissent essentially argues that only legislation has preemptive force, likening a non-self-executing treaty to a model code.<sup>354</sup> However, the dissent acknowledges that the treaty also represents the binding international obligation entered into by federal actors charged with foreign relations policy.<sup>355</sup> The purpose of including treaties in the Supremacy Clause was to ensure that foreign relation policy decisions would be enforced.<sup>356</sup> Given this, the treaty is not simply an inert source of content.<sup>357</sup> If the treaty is non-self-executing, the only thing left is for the policymakers to decide how to fulfill their obligations (i.e., how to implement the national foreign policy).<sup>358</sup> Once implemented by legislation, the treaty, along with the legislation, is the manifestation of a national foreign policy decision in action, and it is logical that the obligations incurred by that decision could be directly enforceable under the treaty (if necessary) to carry out national foreign policy.<sup>359</sup>

*C. Focusing on National Foreign Policy in Determining When Treaties Have Supremacy Clause Effect*

Given the purpose of the Supremacy Clause<sup>360</sup> and the reason that the *Foster* distinction between self-executing and non-self-executing treaties exists,<sup>361</sup> *Medellin* is best interpreted as supporting the following conclusion. Non-self-executing treaty stipulations can only be carried out

351. The foreign policy is constitutional because a valid Article II treaty was ratified by the President with advice and consent of the Senate, *see supra* notes 67–68, and the government was structured in a way to give the federal government power to make foreign policy for the nation, *see supra* notes 50–65 and accompanying text.

352. The result is that the court is engaging in a form of policymaking outside its role because it is analogous to law making, *cf. supra* note 151 and accompanying text, and because it involves national foreign policy, *see supra* notes 57–65 and accompanying text, which is arguably exclusive to the Executive and Legislative branches (or at least their decisions are entitled to the greatest weight in this field), *see, e.g., supra* notes 53–55 and accompanying text.

353. *See supra* note 347 and accompanying text.

354. *See supra* text accompanying note 279.

355. *See supra* note 279. It is a mistake to associate the point that a treaty represents an international obligation with the inclusion of Treaties in the Supremacy Clause. Regardless of the Supremacy Clause the whole of a nation (by international law—which is also a part of our law) is bound by a treaty. *See, e.g., supra* note 144. In fact, to point out the international obligation is to acknowledge the national foreign policy decision.

356. *See supra* notes 31–42, 46, 49 and accompanying text; *cf. supra* notes 47–48 and accompanying text.

357. *Cf. supra* notes 89, 245–47 and accompanying text.

358. *See supra* note 114 and accompanying text.

359. In this sense treaties have dormant Supremacy Clause power. The treaty requires implementing legislation to achieve Supremacy Clause effect and principles underlying dormant foreign affairs preemption call for preemptive force of some implemented non-self-executing treaties.

360. *See supra* notes 35–49 and accompanying text.

361. *See supra* notes 344–50 and accompanying text.

judicially (or have Supremacy Clause effect which binds judges) once there is legislation authorizing the treaty's implementation.<sup>362</sup> Then, after implementing legislation is passed, treaty stipulations should be carried out, as a matter of enforcing national foreign relations policy decisions, in accordance with the legislation and the implemented treaty.<sup>363</sup> Important requirements include that the treaty is not one whose result can only be achieved through an Act of Congress,<sup>364</sup> that foreign policymakers did not indicate that the treaty should not have Supremacy Clause effect after implementation (e.g., explicitly specify that the treaty never be directly enforceable even after implemented),<sup>365</sup> and that the implementing legislation does not modify (e.g., differ substantively from the treaty) or constrict the treaty (e.g., explicitly specify that the legislation alone governs the subject matter).<sup>366</sup> If none of these factors are present then the treaty obligations ought to be regarded as enforceable law (with full Supremacy Clause effect) as necessary and reasonable to enforce the national foreign policy decisions made by the federal government as against conflicting state actions.<sup>367</sup> This ensures the benefits of those decisions to the entire nation. To use the distinction in a way that allows state interests to reverse preempt the foreign policy decision (absent congressional intent to do so) subverts the power structure created by the Constitution and is an improper nullification of the Supremacy Clause.<sup>368</sup>

Thus, in the case of an implemented non-self-executing treaty, courts should focus first on whether the reason the treaty was non-self-executing bars direct enforcement, as in the case of the intent of the treaty makers or the unconstitutional without legislation categories.<sup>369</sup> If it is not a bar, then the focus should shift to the national foreign policy decision contained in the treaty and the impact the implementing legislation may have had, if any, on that national policy decision. If the legislation does not alter or constrict the treaty, then the treaty certainly maintains its Supremacy Clause effect independent of the fate of its implementing legislation.

#### CONCLUSION

As evidenced by the actions of the State of Texas in *Medellin*, the concern that states will act in ways to violate the United States' obligations and interfere with national foreign policy and international relations is as real today as it was at the time of the founding. The detriment to the nation as a whole and to other states tend to outweigh the benefits any one state

---

362. See *supra* Part I.C.1.a–b.

363. See *supra* note 114 and accompanying text.

364. See, e.g., *supra* notes 125–26 and accompanying text (discussing obligations that constitutionally require legislation as the vehicle for executing the obligation).

365. This inquiry is similar to the intent based theory of non-self-executing treaties, and can be considered a part of the foreign policy decision. See, e.g., *supra* notes 118–24 and accompanying text.

366. See *supra* notes 121–24 and accompanying text.

367. See *supra* notes 31–42, 46 and accompanying text.

368. See *supra* notes 151–53, 352 and accompanying text.

369. See *supra* notes 364–65 and accompanying text.



may receive from ignoring national policy. Although in *Medellin* no judicial solution to this problem was possible because the treaties in question were not self-executing and had not been implemented, this is not the case when the treaty has been implemented. In such a situation, as this Note argues, courts can in some instances uphold Treaties as the “supreme Law of the Land” and they should do so in order to achieve state compliance with U.S. foreign policy as intended by the Constitution.