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## Treaties and the Presumption against Preemption

*David H. Moore\**

### INTRODUCTION

When deciding whether a federal statute that regulates domestic issues preempts state law, “the Supreme Court presumes that Congress does not intend to displace the traditional regulatory authority of the States.”<sup>1</sup> The question arises whether this same presumption applies when the federal law at issue is an Article II treaty. At this stage, the draft *Restatement (Fourth) of the Foreign Relations Law of the United States* replies that “[t]he case law does not clearly support any presumption regarding preemption of State law by a treaty.”<sup>2</sup> This Article attempts to demonstrate that there is (or should be) more clarity in favor of a presumption against preemption in the treaty context than the draft *Restatement (Fourth)* suggests. Part I summarizes the nature of the presumption against preemption. Part II identifies which of the three types of treaty—self-executing, executed, and non-self-executing—may effect

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1. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 108 reporters’ note 2 (AM. LAW INST., Preliminary Draft No. 4, 2015). *But cf.* Ernest A. Young, “*The Ordinary Diet of the Law*”: *The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253, 278, 307–09, 331 (2011) (noting inconsistent invocation of the presumption against preemption); Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 232 (2000) (arguing that a presumption against preemption is inconsistent with the original understanding of the Supremacy Clause). The Supreme Court has left unresolved whether the same presumption “appl[ies] to statutes that concern foreign affairs.” RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 108 reporters’ note 2 (AM. LAW INST., Preliminary Draft No. 4, 2015). For an argument that it should not, see Jack L. Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 SUP. CT. REV. 175, 181–87, 195–201.

2. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 108 reporter’s note 2 (AM. LAW INST., Preliminary Draft No. 4, 2015); *see also* Michael P. Van Alstine, *Federal Common Law in an Age of Treaties*, 89 CORNELL L. REV. 892, 969 (2004) (discussing how the Supreme Court over time has invoked inconsistent “background assumptions about the preemptive force of treaties”).

preemption. For those treaties that may work preemption, Part III explores whether the presumption against preemption attaches.

### I. DEFINING THE PRESUMPTION

To begin, it is important to understand the nature of the presumption against preemption.<sup>3</sup> The reach of the presumption is not entirely clear. Sometimes the presumption is stated broadly: the presumption is said to apply generally, not just when the state law that might be preempted falls within an area of traditional state regulation.<sup>4</sup> Thus, in *Wyeth v. Levine*, the Court asserted that

[i]n all pre-emption cases, and particularly in those in which Congress has ‘legislated . . . in a field which the States have traditionally occupied,’ . . . we ‘start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.’<sup>5</sup>

The narrower version of the presumption focuses on the particular threat of displacing state authority in areas of traditional state regulation.<sup>6</sup> The Supreme Court invoked this narrower version in *Egelhoff v. Egelhoff ex rel. Breiner* when it stated, “There is . . . a presumption against pre-emption in areas of traditional state regulation such as family law.”<sup>7</sup> While some of the arguments in favor of the narrower version also support the broader version, the draft *Restatement (Fourth)* addresses the narrower version of the presumption.<sup>8</sup> This Article follows suit.

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3. For a quick overview of the history of, and current debates regarding, the presumption against preemption, see Young, *supra* note 1, at 265–78, 307–10.

4. *Id.* at 332–34.

5. 555 U.S. 555, 565 (2009) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)).

6. It thus raises the challenges of identifying areas of traditional state regulation and of deciding the area in which a potentially preemptive federal law operates. See, e.g., Young, *supra* note 1, at 435–37.

7. 532 U.S. 141, 151 (2001).

8. See RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 108 reporter’s note 2 (AM. LAW INST., Preliminary Draft No. 4, 2015) (“[T]he Supreme Court presumes that Congress does not intend to displace the traditional regulatory authority of the States” through “federal statutes that concern domestic matters.”).

## II. WHEN TREATIES MAY PREEMPT

One might read the draft *Restatement (Fourth)* as suggesting that even the narrower version of the presumption against preemption applies less frequently in the treaty context, with the result that treaties tend to preempt state law more readily than do statutes. While it may be true that certain types of treaties preempt more readily than statutes (an issue addressed *infra*), this is not true of all treaties. Treaties generally present in one of three forms:<sup>9</sup> (1) non-self-executing treaty, (2) executed non-self-executing treaty, or (3) self-executing treaty.<sup>10</sup> If any of these treaties lacks power to preempt state law, the presumption against preemption would not apply. Concluding that the presumption does not apply would not mean that treaties preempt more than statutes, but less. The presumption would not apply because the treaty could not effect preemption at all, rather than because the treaty could preempt unobstructed by the preemption.

To understand the work of the presumption against preemption, then, we must ask the preliminary question whether treaties of each type may preempt state law. Self-executing treaties clearly may, as the draft *Restatement (Fourth)* recognizes.<sup>11</sup> *Asakura v. City of Seattle* provides a familiar example.<sup>12</sup> In *Asakura*, a local ordinance sought to prevent a Japanese subject from operating a pawnshop in Seattle notwithstanding a U.S.-Japan treaty of amity securing the rights of Japanese subjects to carry on business in the United States on the

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9. I classify treaties by wholes for simplicity's sake. The reality is that self-execution and implementation are properly determined at the treaty obligation rather than entire treaty level. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. h (AM. LAW INST. 1987). Different obligations within the same treaty may be non-self-executing, non-self-executing but implemented, and self-executing.

10. Although a self-executing treaty might be the subject of facilitating legislation—legislation that, for example, “detail[s] specific legal procedures, burdens of proof, and remedies for courts applying” the treaty—the treaty itself would remain directly enforceable in U.S. courts and should be treated, for preemption purposes, like self-executing treaties that lack facilitating legislation. John F. Coyle, *Incorporative Statutes and the Borrowed Treaty Rule*, 50 VA. J. INT'L L. 655, 666–67 (2010); see also *id.* nn.44–45.

11. *E.g.*, RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES (AM. LAW INST., Preliminary Draft No. 4, 2015) (“[W]hen there is a conflict between State or local law and a self-executing treaty provision, courts will apply the treaty provision.”).

12. 265 U.S. 332, 332 (1924).

same terms as U.S. citizens.<sup>13</sup> Noting that the treaty was self-executing—that is, “operate[d] of itself without the aid of any legislation”—the Court concluded that the offending ordinance was preempted.<sup>14</sup>

Non-self-executing treaties that have been implemented by statute (i.e., executed treaties) may also effect preemption. Formally, it is the statute, not the treaty, that preempts, but preemption effectively enforces the treaty obligations against the preempted law.<sup>15</sup> *Missouri v. Holland* provides an example of this scenario.<sup>16</sup> The United States and Britain entered a treaty to regulate birds that migrated between the United States and Canada.<sup>17</sup> The treaty provided that “[t]he High Contracting Powers agree themselves to take, or propose to their respective appropriate law-making bodies, the necessary measures for insuring the execution of the present Convention.”<sup>18</sup> A treaty obligation to legislate (or here, to propose legislation) is likely to be classified by U.S. courts as non-self-executing.<sup>19</sup> Congress executed the treaty obligation by passing the Migratory Bird Treaty Act.<sup>20</sup> Finding the treaty and statute constitutional, the Court permitted enforcement of the statute in the face of contrary state law.<sup>21</sup>

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13. *See id.* at 339–40.

14. *Id.* at 341.

15. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. h (AM. LAW INST. 1987) (“[S]trictly, it is the implementing legislation, rather than the agreement itself, that is given effect as law in the United States.”).

16. 252 U.S. 416 (1920).

17. *Id.* at 431.

18. Convention between the United States and Great Britain for the Protection of Migratory Birds, (Aug. 16, 1916), 39 Stat. 1702; *see also Holland*, 252 U.S. at 431.

19. *See* JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 73, 80 (2d ed. 2003) (asserting “that all treaties are self-executing except those . . . which, by their terms considered in context, require domestic implementing legislation or seek to declare war”); RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 108 reporter’s note 2 (AM. LAW INST., Preliminary Draft No. 4, 2015). *But cf.* Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT’L L. 695, 709–10 (1995) (reasoning that a treaty may overcome a presumption of self-execution if it “stipulate[s] for some future legislative act” while concluding that a treaty that requires only *necessary* legislation remains self-executing since the Supremacy Clause renders implementing legislation generally unnecessary in the United States).

20. *See Holland*, 252 U.S. at 430–31.

21. *See id.* at 435.

As these brief examples illustrate, the preemptive potential of self-executing and executed treaties is well-established. That is not the case when it comes to non-self-executing treaties. The *Restatement (Third)* speculated that non-self-executing treaties could preempt state law in certain circumstances. Such a treaty, the *Restatement (Third)* reasoned, might evidence a “federal policy superseding State law or policy.”<sup>22</sup> Similarly, a non-self-executing treaty might “occupy a field” and thereby preempt even consistent state law, though that possibility “ha[d] apparently not been adjudicated.”<sup>23</sup> The draft *Restatement (Fourth)* currently does not include this language, nor does it foreclose preemption by non-self-executing treaty.<sup>24</sup>

Yet recent developments suggest that non-self-executing treaties cannot, of themselves, effect preemption. In *Medellín v. Texas*, the Court faced a U.S. treaty obligation to “undertake[] to comply” with judgments of the International Court of Justice (ICJ).<sup>25</sup> In response to a suit by Mexico, the ICJ had ordered the United States to review and reconsider the capital convictions and sentences of José Medellín and other Mexican nationals.<sup>26</sup> Texas criminal procedure barred the review.<sup>27</sup> Consequently, there was a direct

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22. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 cmt. e (AM. LAW INST. 1987); *see also id.* § 1 reporter’s note 5 (“Supremacy implies that State law and policy must bow . . . when inconsistent with federal law or policy . . .”).

23. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 cmt. e (AM. LAW INST. 1987); *see also id.* § 1 reporter’s note 5 (“There are no clear cases, but principle would support the view that the federal government can preempt and exclude the States [—that is, occupy the field—] not only by statute but by treaty or other international agreement, and even by executive acts that are within the President’s constitutional authority.”).

24. The draft *Restatement (Fourth)* explains that self-executing treaties prevail over contrary state law, but does not expressly address the preemptive potential of non-self-executing treaties. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 108 (AM. LAW INST., Preliminary Draft No. 4, 2015); *id.* cmts. a–b; *see id.* reporters’ note 1 (observing that “[c]ourts have frequently found treaty provisions to supersede contrary State or local law, often without addressing the question of self-execution”).

25. U.N. Charter art. 94, ¶ 1; *see also Medellín v. Texas*, 552 U.S. 491, 500 (2008).

26. *See Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12, 72 (Mar. 31); *see also Medellín*, 552 U.S. at 502–03.

27. *See Medellín*, 552 U.S. at 503–04. Medellín’s initial habeas petition was rejected for procedural default based on Medellín’s failure to raise his claims earlier; the habeas petition he

conflict between the United States' treaty obligations and Texas law.<sup>28</sup> It would be impossible for Texas courts to both engage in review and reconsideration and treat Medellín's request as barred. The Court resolved this conflict in favor of state law because the treaty obligation to comply with ICJ judgments was non-self-executing.<sup>29</sup> A non-self-executing treaty obligation, at a minimum, is not enforceable by U.S. courts.<sup>30</sup> Thus, the Court could not engage in the least aggressive form of implied preemption—conflict preemption—based on a non-self-executing treaty.

This conclusion does not bode well for the *Restatement (Third)*'s suggestion that a non-self-executing treaty might work a more aggressive preemption, field preemption. Preemption is ultimately a question of intent.<sup>31</sup> If the Court did not find an intent to preempt in the narrow space where the federal treaty and state law conflicted, it is hard to imagine a non-self-executing treaty demonstrating an intent to occupy a broader sphere. Indeed, congressional intent to occupy a field is often indicated by congressional establishment of a detailed regulatory and remedial scheme.<sup>32</sup> Rather than manifest intent to fill a regulatory and remedial space, a non-self-executing treaty evidences a decision to forego remedies, at least in U.S. courts, until the enactment of implementing legislation.

Intent to occupy a field may also arise from lawmaking in an area of dominant federal interest.<sup>33</sup> In *Medellín*, there were compelling

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filed after the ICJ ruled in Mexico's favor was barred by Texas law's prohibition on successive petitions. *See id.* at 501–04.

28. *See Hillman v. Mareta*, 133 S. Ct. 1943, 1949–50 (2013) (explaining that “a [preemptive] conflict occurs when compliance with both federal and state regulations is impossible”).

29. *See Medellín*, 552 U.S. at 504–06, 522–23.

30. *See, e.g., David H. Moore, Medellín, the Alien Tort Statute, and the Domestic Status of International Law*, 50 VA. J. INT'L L. 485, 491 n.46 (2010).

31. *See, e.g., Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (repeating the established principle that “[t]he purpose of Congress is the ultimate touchstone” in every preemption case”) (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963)).

32. *See, e.g., Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012) (“The intent to displace state law altogether can be inferred from a framework of regulation ‘so pervasive . . . that Congress left no room for the States to supplement it’ or where there is a ‘federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.’”) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

33. *See Hillman*, 133 S. Ct. at 1949–50.

federal interests to support preemption of Texas law. It was undisputed, the Court acknowledged, “that the *Avena* decision—a decision that flows from the treaties through which the United States submitted to ICJ jurisdiction . . . constitutes an international law obligation on the part of the United States.”<sup>34</sup> Securing federal power to comply with national treaty commitments was one of the motivations behind creation and ratification of the Constitution itself and generated provisions such as the Supremacy Clause.<sup>35</sup> Moreover, the Court recognized that in seeking to comply with the ICJ’s judgment,

the President [sought] to vindicate United States interests in ensuring the reciprocal observance of the Vienna Convention, protecting relations with foreign governments, and demonstrating commitment to the role of international law. These interests [were] plainly compelling.<sup>36</sup>

Yet none of these interests traversed the non-self-executing nature of the United States’ treaty commitments to preempt state law. *Medellín* thus undercuts the *Restatement (Third)*’s speculation that non-self-executing treaties may produce field preemption.

*Medellín* likewise suggests that federal policies reflected in non-self-executing treaties will not be given preemptive effect. The notion that federal foreign affairs policies may preempt state law draws support from *American Insurance Ass’n v. Garamendi*.<sup>37</sup> In that case, the United States and Germany, as well as other countries, had entered executive agreements to resolve the problem of unpaid Holocaust-era insurance claims.<sup>38</sup> In its own effort to facilitate the resolution of those claims, California enacted legislation requiring insurance companies to divulge information about Holocaust-era policies.<sup>39</sup> The federal executive complained that California’s

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34. *Medellín*, 552 U.S. at 504 (emphasis in original).

35. See, e.g., U.S. CONST. art. VI; RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 108 cmt. a (AM. LAW INST., Preliminary Draft No. 4, 2015) (“Ensuring the capacity of treaty obligations to supplant inconsistent state laws, particularly in state courts, was a central objective of the Supremacy Clause.”).

36. *Medellín*, 552 U.S. at 524; see also *id.* at 511 (acknowledging that compliance with ICJ judgments involves “sensitive foreign policy decisions”).

37. 539 U.S. 396 (2003).

38. See *id.* at 405–08.

39. See *id.* at 408–10.

legislation interfered with the federal response to the issue.<sup>40</sup> Although the executive agreements did not expressly displace the California law, the Court found the law preempted by “the foreign policy those agreements embody.”<sup>41</sup>

*Medellín* reached the opposite conclusion when the potentially preemptive federal policy derived from non-self-executing treaties. The treaties at issue in *Medellín* could easily be said to reflect a federal policy of compliance with ICJ judgments. By ratifying the Optional Protocol to the Vienna Convention on Consular Relations, the United States agreed to submit itself to ICJ jurisdiction in suits like *Avena*.<sup>42</sup> Pursuant to the UN Charter, the United States “undert[ook] to comply” with the judgment issued in those suits.<sup>43</sup> The United States itself argued that these treaties “create[d] an obligation to comply.”<sup>44</sup> Moreover, while the U.S. withdrew from future ICJ jurisdiction in cases like *Avena*, the President specifically resolved to comply with the *Avena* judgment by having state courts review and reconsider the convictions and sentences of *Medellín* and other Mexican nationals.<sup>45</sup> Accordingly, the executive urged preemption of the obstructing Texas law.<sup>46</sup> Notwithstanding the policy of compliance arguably reflected in the treaties and expressed by the President before and during the litigation, the Court upheld Texas law. The Court seemed to reason that a non-self-executing treaty reflects an understanding by the treaty-makers that preemption will generally derive from future legislation rather than the treaty or executive policy.<sup>47</sup> Requiring the preemption decision to be made through the legislative process would ensure that a single federal

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40. *See id.* at 411.

41. *Id.* at 417; *see id.* at 413, 420–27.

42. *See* Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention, Apr. 24, 1963, 21 U.S.T. 325; *Medellín*, 552 U.S. at 499.

43. U.N. Charter art. 94(1); *Medellín*, 552 U.S. at 500.

44. *Medellín*, 552 U.S. at 525 (quoting Brief for United States of America as *Amicus Curiae* at 11). At the same time, the United States retained authority to veto any efforts to enforce ICJ judgments at the Security Council. *See Medellín*, 552 U.S. at 509–11. This fact cut against classifying the obligation to comply as self-executing, but does not preclude a general policy of compliance. *See id.*

45. *See Medellín*, 552 U.S. at 503.

46. *See, e.g., id.* at 523.

47. *See id.* at 525–30.

actor could not preempt state law.<sup>48</sup> Consistent with this reasoning, the Court concluded that the President “may not rely upon a non-self-executing treaty to ‘establish binding rules of decision that preempt contrary state law.’”<sup>49</sup>

The conclusion that the President could not derive authority from a non-self-executing treaty to preempt state law does not preclude preemption by the President in all circumstances. Both majority and dissent recognized that it would be “difficult to believe that in the exercise of his Article II powers pursuant to a ratified treaty, the President can *never* take action that would result in setting aside state law.”<sup>50</sup> Yet the Court seems to have left little room for this possibility. The Court applied Justice Jackson’s tripartite framework to assess the President’s authority to execute a non-self-executing treaty, concluding that a non-self-executing treaty places the President in category three where he can only prevail if the power he exercises is exclusive to the presidency.<sup>51</sup> Such exclusive powers are limited. They include a (recently endorsed) power to recognize foreign states and governments.<sup>52</sup> The President might also execute a treaty when authorized by statute (at least if the statute is enacted after the treaty).<sup>53</sup> The practical result is that non-self-executing treaties are likely to give rise to state preemption by presidential action in relatively few, if any, situations. Moreover, the preemption would be effected by the President’s independently authorized implementing action, not the treaty itself, placing these treaties in a similar category to treaties implemented by statute. The President’s limited ability to preempt state law in conjunction with a non-self-

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48. *See id.* at 526–30. The requirement of legislative implementation places the preemption decision in the hands of Congress and the President rather than the courts. These lawmakers (President and Congress) include the treatymakers (President and Senate) and are therefore in a better position than the courts to assess whether state laws impede the treaty’s purposes and ought to be preempted.

49. *Id.* at 530 (quoting Brief for United States as *Amicus Curiae* at 5). The Court did recognize that the President could “comply with [non-self-executing] treaty[] obligations by some . . . means [other than converting them into judicially enforceable and preemptive law], so long as [those means] are consistent with the Constitution.” *Medellin*, 552 U.S. at 530.

50. *Id.* at 523 n.13 (quoting dissent of Breyer, J., at 564).

51. *See id.* at 524–25, 527; *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637–38 (1952) (Jackson, J., concurring).

52. *See Zivotofsky v. Kerry*, 132 S. Ct. 2076, 2096 (2015).

53. *Cf. Medellin*, 552 U.S. at 529–30 (searching for statutes reflecting congressional acquiescence in the President’s attempted execution of the ICJ judgment).

executing treaty only confirms the conclusion that such treaties cannot effect preemption on their own.

If all this were not enough to conclude that *Medellin* forecloses preemption by non-self-executing treaty, the *Medellin* Court raised the possibility that a non-self-executing treaty may not even qualify as domestic law.<sup>54</sup> Such an understanding of non-self-execution would provide additional reason not to give the treaty preemptive effect. It would be hard to argue, for example, that the federal government sought to occupy a legal field or to adopt a preemptive policy by ratifying a treaty on the understanding that the treaty's terms would not even enter domestic law.

The result is that a non-self-executing treaty, without more, does not present the issue of preemption to the courts.<sup>55</sup> The presumption against preemption is not relevant, not because the presumption does not apply to treaties, but because non-self-executing treaties do not present the possibility of preemption. *Medellin* endorsed a broad scope for non-self-execution, thus reducing the number of treaties that might effect preemption of state law.<sup>56</sup>

### III. WHEN THE PRESUMPTION ATTACHES

For those treaties that are self-executing post-*Medellin*, or that are executed, the question arises whether the presumption against preemption attaches. As the draft *Restatement (Fourth)* notes, the Supreme Court has been inconsistent on this question, often preempting state law in the face of conflicting treaties but

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54. See, e.g., Moore, *supra* note 30, at 491 n.46 (discussing how *Medellin* generated uncertainty over the meaning of non-self-execution). *But cf.* *Bond v. United States*, 134 S. Ct. 2077, 2084 (2014) (suggesting that a non-self-executing treaty is domestic law that is not judicially enforceable until executed by Congress); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 735 (2004) (indicating that a non-self-executing treaty does “not itself create obligations enforceable in the federal courts”).

55. Similarly, the draft *Restatement (Fourth)* concludes that “[o]nly self-executing treaty provisions can be applied by the judiciary to override a federal statute, since non-self-executing treaty provisions are not directly enforceable in U.S. courts.” *RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES* § 109 reporters’ note 3 (AM. LAW INST., Preliminary Draft No. 4, 2015).

56. See, e.g., Moore, *supra* note 30, at 490–91.

occasionally endorsing a presumption against preemption.<sup>57</sup> The Court's most recent case touching on the question suggests that the presumption attaches to treaties that have been statutorily executed. There are good reasons to apply the presumption to self-executing treaties as well.

#### *A. Executed Treaties*

The Supreme Court's recent decision in *Bond v. United States*<sup>58</sup> suggests that the presumption against preemption applies to non-self-executing treaties that have been executed by statute. That is, the presumption applies even when the statute in question is a statute implementing a treaty.<sup>59</sup> The treaty at issue in *Bond*—the Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction<sup>60</sup>—was non-self-executing.<sup>61</sup> It required “[e]ach State Party . . . in accordance with its constitutional processes, [to] adopt the necessary measures to implement its [Convention] obligations,” including by criminalizing actions that State Parties were prohibited from taking.<sup>62</sup> Congress executed the treaty by enacting the Chemical Weapons Convention Implementation Act, under which petitioner Carol Bond was prosecuted.<sup>63</sup> The Court turned first to the treaty to understand the reach of the Act.<sup>64</sup> The Court was understandably skeptical that the treaty was meant to address Bond's relatively minor use of chemicals against her former friend.<sup>65</sup> Nonetheless, “[e]ven if the treaty [did] reach that far,” Congress

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57. See, e.g., RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 108 reporters' note 2 (AM. LAW INST., Preliminary Draft No. 4, 2015).

58. 134 S. Ct. 2077 (2014).

59. See William S. Dodge, *Bond v. United States and Congress's Role in Implementing Treaties*, AJIL UNBOUND (June 4, 2014, 10:26 AM), <http://www.asil.org/blogs/bond-v-united-states-and-congress%E2%80%99s-role-implementing-treaties> (“The central holding of *Bond* is that statutes implementing treaties are not exceptions to the rules of statutory interpretation that the Supreme Court has developed to protect federalism.”).

60. 1974 U.N.T.S. 317, S. Treaty Doc. No. 103-21.

61. *Bond v. United States*, 134 S. Ct. 2077, 2084 (2014).

62. *Id.* (quoting Convention, Art. VII(1), 1974 U.N.T.S. 331).

63. *Id.* at 2085.

64. *Id.* at 2087.

65. See *id.*

could “observ[e] the Constitution’s division of responsibility between [the federal and State] sovereigns,” leaving matters of traditional state regulation, such as “local crimes[,] to the States.”<sup>66</sup> In other words, even if a non-self-executing treaty does not respect the federalist division of power and attempts to reach areas of traditional state regulation, Congress will be presumed to have implemented in a narrower fashion, consistent with federalism restraints.<sup>67</sup>

The federalist presumption *Bond* applied was not the presumption against preemption. *Bond* was not asking whether the Chemical Weapons Convention Implementation Act preempted state law. Rather, *Bond* asked whether that Act meant to reach an area of traditional state regulation—the regulation of local crime. As a result, the Court applied the “[c]losely related” canon that the federal government must be reasonably explicit if it wishes to alter the federal-state balance of power.<sup>68</sup>

Notwithstanding this difference, there is reason to believe post-*Bond* that the Court would apply the presumption against preemption to implementing statutes. First, the rationale behind both presumptions is the same: maintenance of the federalist allocation of power in the absence of federal decision to alter it.<sup>69</sup> Second, the presumption applied in *Bond* protected against comparatively minor intrusion on state authority. It protected against the extension of federal law into an area of traditional state regulation in a way that would arguably have complemented state law. Even if the Chemical Weapons Convention Implementation Act reached *Bond*’s crime, state law would continue to do so as well. If federalism necessarily constrained, by presumption, the reach of a complementary federal law implementing a treaty, it would presumably constrain the more intrusive reach of a preemptive implementing act.

Indeed, the facts in *Bond* might be perceived as presenting a preemption scenario, providing additional support for application of

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66. *Id.*

67. *But cf. id.* at 2090 (noting that consideration of federalism principles is appropriate in interpreting an ambiguous implementing statute while suggesting that the purpose of the treaty implemented may remove statutory ambiguity).

68. *Id.* at 2089.

69. *See, e.g., id.* at 2088–90.

a presumption against preemption to implementing legislation. The federal implementing act in *Bond* would displace (albeit through prosecutorial discretion) the lesser penalties state law elected for the sort of behavior in which Bond engaged. The Court protected state authority in this scenario by presumption and presumably would do so in more direct preemption cases as well.

There are two significant counterpoints to this conclusion. First, *Bond*'s focus on the reach of the implementing statute resulted from a desire to avoid reaching broader questions about the limits of the federal government's treaty and necessary and proper powers.<sup>70</sup> While three Justices addressed these broader questions,<sup>71</sup> the majority avoided them by construing the implementing legislation to not reach Bond's conduct.<sup>72</sup> Second, *Bond* is only one case—albeit the most recent one—in which the Court has touched on the appropriateness of a presumption against preemption in the treaty context. As noted, the Court has generally preempted state law without reference to the presumption. The Court has also expressed doubt about whether the presumption against preemption applies to statutes bearing on foreign affairs.<sup>73</sup>

If *Bond* itself does not erase that doubt going forward, the doubt has sufficient outlet in the presumption against preemption. As noted, the narrower version of the presumption is tied to whether the state law that is at risk of preemption resides in an area of traditional state regulation. A general concern that state law should not occupy certain areas—such as human rights policy toward Burma—can find full expression in the presumption. At the same time, it is important that the presumption's applicability turn on

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70. See *id.* at 2087 (citing the canon of constitutional avoidance to support focusing on the argument that the implementing statute “does not cover [Bond's] conduct”).

71. See, e.g., *id.* at 2098–2102 (Scalia, J., concurring in the judgment) (concluding that Congress has power to do what is necessary and proper to facilitate the making of treaties, but must rely on its enumerated powers to implement treaties); *id.* at 2103–10 (Thomas, J., concurring in the judgment) (concluding that the treaty power extends only to “matters of international intercourse and [not to] matters of purely domestic regulation”); *id.* at 2111 (Alito, J., concurring in the judgment) (agreeing with Justice Thomas “that the treaty power is limited to agreements that address matters of legitimate international concern”).

72. See *id.* at 2093 (majority opinion).

73. See, e.g., RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 108 reporters' note 2 (AM. LAW INST., Preliminary Draft No. 4, 2015).

whether the state law rests in an issue of traditional state responsibility rather than on whether the state law bears on foreign affairs. The realm of foreign affairs has expanded significantly since the treaty power was delegated to the federal government. One need not try to dial back to an originalist understanding of the scope of foreign affairs to protect state interests from unintentional displacement through a presumption focused on states' traditional realm.

A final observation supports application of the presumption to treaties executed by statute. Non-self-executing treaties may be implemented "through preexisting law."<sup>74</sup> Prior to negotiation of the treaty, these "implementing" statutes would be subject to the presumption against preemption to the same extent as other statutes that exist independent of treaties. There is little reason to believe that this result would change when the statutes became linked to a non-self-executing treaty.<sup>75</sup> At least this subset of statutes, then, would be governed by the presumption against preemption.

### *B. Self-Executing Treaties*

This takes us to self-executing treaties. One unfamiliar with the substantive scope of treaties might be forgiven for wondering whether the presumption by its own terms would reach self-executing treaties. As noted, the presumption in its narrow version applies only when the state law to be preempted sits in an area of traditional state regulation.<sup>76</sup> Treaties inevitably extend beyond the domestic as they involve commitments to, and/or by, at least one foreign state or entity. Nonetheless, treaties have addressed matters of traditional state regulation since before the Founding.<sup>77</sup> Globalization and the expansion of international law have only increased the probability that

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74. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. h (AM. LAW INST. 1987) ("There can, of course, be instances in which the United States Constitution, or previously enacted legislation, will be fully adequate to give effect to an apparently non-self-executing international agreement, thus obviating the need of adopting new legislation to implement it.").

75. If this conclusion is correct, it also undercuts the argument that the existence of an international obligation precludes application of the presumption against preemption. See *infra* paragraph accompanying note 94.

76. See *supra* note 6 and accompanying text.

77. See, e.g., *Ware v. Hylton*, 3 U.S. (1 Dall.) 199, 220–21, 229, 241 (1796) (concluding that the U.S.-Britain Treaty of Peace preempted a Virginia law that addressed the obligations of debtors, a matter that fell within state power).

treaties will address matters of traditional state regulation.<sup>78</sup> Like statutes, then, treaties address subjects of traditional state authority, and do so with increasing frequency.

As noted above, self-executing treaties also effect preemption. The question is whether treaties should effect preemption more readily than statutes. The source of treaties' and statutes' preemptive power is the same—the Supremacy Clause.<sup>79</sup> That Clause does not suggest that either treaties or statutes should have greater preemptive effect than the other. It simply declares that statutes passed pursuant to the Constitution and treaties made before or after ratification of the Constitution “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>80</sup> Consistent with this text, the Supreme Court recognized in *Foster v. Nielson* that although “[a] treaty is in its nature a contract between two nations, not a legislative act,” “[i]n the United States a different principle is established.”<sup>81</sup> A treaty “is . . . to be regarded in courts of justice as equivalent to an act of the legislature, whenever it” is self-executing.<sup>82</sup> The fact that statutes and self-executing treaties share the same preemptive power and present the same threat to traditional state authority suggest that they should be equally subject to the presumption against preemption.

To apply the presumption differently to statutes and treaties would require finding that the treaty power or its product is meaningfully different than the legislative power or its product.<sup>83</sup> No relevant differences appear.

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78. See, e.g., *Bond*, 134 S. Ct. at 2099–2100 (Scalia, J., concurring in the judgment) (noting the expansion of topics addressed by treaties, especially multilateral treaties, since World War II); *id.* at 2110 (Thomas, J., concurring in the judgment) (noting the Restatement of the Foreign Relations Law of the United States' abandonment of a subject matter limitation on the treaty power between the second and third editions).

79. See U.S. CONST. art. VI, § 1, cl. 2.

80. *Id.*

81. *Foster v. Nielson*, 27 U.S. (2. Pet.) 253, 314 (1829).

82. *Id.* This equivalence is also reflected in the last-in-time rule under which a statute or self-executing treaty trumps a prior inconsistent treaty or statute as a matter of domestic law. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 (1-2) cmts. a–c, reporters' note 1–2 (AM. LAW INST. 1987).

83. Cf. Van Alstine, *supra* note 2, at 971–78 (arguing against applying the presumption against preemption to self-executing treaties given the unique nature of treaties and the treaty power).

*1. Treaty Power*

Some would argue that the treaty and legislative powers are distinguishable because the federal power to make treaties is exclusive, while Congress's power to legislate is generally concurrent. Michael Van Alstine, for example, argues that "treaties by their nature represent a formal exercise of the federal government's exclusive authority over the creation of international obligations of the United States. This fundamental difference with the shared legislative powers of Article I substantially undermines the traditional presumption against preemption . . . in the treaty context."<sup>84</sup>

The difference between the treaty and legislative powers ultimately does not support differential application of the presumption against preemption, however. The treaty makers are as bound by the Constitution as are federal legislators and the presumption derives from the Constitution. More particularly, it derives, not from the nature of any one enumerated power, but from the Constitution's federalist structure.<sup>85</sup> Even *Missouri v. Holland* recognized that that structure applies to the treaty power.<sup>86</sup>

Moreover, the legislative power and the treaty power are similar in important respects. Both partake of a two-fold nature. In one sense, the legislative and treaty powers are procedural. They are vehicles for exercising lawmaking and other governmental powers. In another sense, they are substantive. They may address a range of substantive issues. Treaty making as a device is denied to the states.<sup>87</sup> However, the delegation of the treaty procedure to the federal government did not itself displace state substantive authority in areas of traditional state regulation. To conclude otherwise would be to suggest that upon delegation of the treaty power, the states were divested of authority to address any issue that might be addressed by a treaty. No one goes that far. And if it is true that the federal treaty

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84. Van Alstine, *supra* note 2, at 899.

85. See *Bond*, 134 S. Ct. 2077, 2089, 2091 (majority) (noting that the "[c]losely related" "assumption that Congress normally preserves 'the constitutional balance between the National Government and the States' . . . is grounded in the very structure of the Constitution") (quoting *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011)).

86. *Missouri v. Holland*, 252 U.S. 416, 434–35 (1920) (assessing whether the treaty in question was "forbidden by some invisible radiation from the general terms of the Tenth Amendment").

87. See U.S. CONST. art. I, § 10, cl. 1.

power alone does not displace all traditional state authority that might be displaced by an actual treaty, then the rationale behind the presumption applies. The presumption rests on the rationale that even where the federal government has the power to address issues of traditional state regulation, state power should not be displaced without clear federal intent to do so. That is, the presumption turns on the substantive power of the states, not the vehicles retained by the states to exercise that power. The logic of the presumption thus supports its application to both statutes and their domestic law equivalent, self-executing treaties.

The fact that the treaty power might be broader, as a substantive matter, than the legislative power granted to Congress does not alter this conclusion. When Congress enacts a statute it invariably exercises only some of the legislative power it possesses. Congress's additional legislative power remains dormant as to the specific piece of legislation. The fact that Congress has been given additional legislative power does not mean that the enacted statute produces a broader preemptive effect than compelled by the enacted legislation. Similarly, the fact that the federal government may have a subject-matter-unlimited treaty power does not mean that the treaty actually approved should have broader preemptive effect than the treaty-makers intended. Indeed, the fact that the federal government possesses unexercised treaty or legislative power after having enacted a statute or entered a treaty suggests that a presumption against preemption ought to apply. Such a presumption ensures that preemption only follows from federal navigation of the state-protective procedures required to exercise the statute and treaty-making powers rather than from an unintended dormant preemption.<sup>88</sup>

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88. See Michael D. Ramsey, *Congress's Limited Power to Enforce Treaties*, 90 NOTRE DAME L. REV. 1539, 1551 (2015) (arguing that "ambiguous treaty provisions should be construed not to invade traditional powers of the states" to ensure that such invasions only occur with supermajority Senate approval); *Bond*, 134 S. Ct. at 2089 (explaining that "when legislation 'affect[s] the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision'" (quoting *United States v. Bass*, 404 U.S. 336, 344 (1971))); Curtis A. Bradley, *Bond, Clear Statement Requirements, and Political Process*, AJIL UNBOUND (Jun. 3, 2014), <https://www.asil.org/blogs/bond-clear-statement-requirements-and-political-process> ("[R]equiring that Congress expressly consider whether to intrude on state authority, rather than having the courts infer such intrusions, helps ensure that advocates of state authority will

It also ensures that the treaty power does not become a one-way ratchet to erode state authority.<sup>89</sup> Delegation of treaty-making power to the national government was intended to check the states from acting contrary to treaty commitments, not to eliminate the states.<sup>90</sup> The treaty-makers have exercised the treaty power in ways consistent with that understanding. They have routinely respected federalist values in treaty-making.<sup>91</sup> Federalism restraints on the treaty power do not solely serve state interests, however. As the Court repeated in *Bond*, the division of authority between the federal and state governments protects individual liberty.<sup>92</sup> Treaty-makers should be presumed not to have intended to erode those liberty protections unless they do so clearly and, therefore, accountably. Finally, the presumption against preemption serves to moderate the debate over the scope of the treaty power.<sup>93</sup> It need not foreclose the conclusion that the treaty power is subject-matter-unlimited even as it protects state interests against unintended preemption pursuant to that power.

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be able to express their opposition adequately during the legislative process.”); Dodge, *supra* note 61 (noting that “the [*Bond*] Court’s approach has the salutary effect of protecting the political process or, as the Court put it in *Bond*, assuring ‘that the legislature has in fact faced, and intended to bring into issue, the critical matters involved’”) (quoting *Bond*, 134 S. Ct. at 2089).

89. *Cf. Bond*, 134 S. Ct. at 2103 (Thomas, J., concurring in the judgment) (expressing doubt that the treaty power is a vehicle for establishing a federal police power over domestic affairs).

90. *See, e.g.*, MICHAEL D. RAMSEY, *THE CONSTITUTION’S TEXT IN FOREIGN AFFAIRS* 39–40 (2007).

91. *See, e.g.*, Duncan B. Hollis, *Executive Federalism: Forging New Federalist Constraints on the Treaty Power*, 79 S. CAL. L. REV. 1327, 1369–86 (2006) (discussing five ways in which the executive has accommodated federalism in treaty-making: “rejecting the treaty, . . . modifying the treaty, . . . modifying U.S. consent to the treaty, . . . limiting federal implementation of the treaty, and . . . limiting federal enforcement of the treaty”).

92. *See Bond*, 134 S. Ct. at 2091; *id.* at 2101 (Scalia, J., concurring in the judgment); *id.* at 2103 (Thomas, J., concurring in the judgment).

93. For a sense of the debate regarding the scope of the treaty power, compare Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390 (1998), and Curtis A. Bradley, *The Treaty Power and American Federalism, Part II*, 99 MICH. L. REV. 98 (2000), with David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075 (2000), and Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 COLUM. L. REV. 403 (2003).

## 2. *Treaty Product*

As with differences between the treaty and legislative powers, differences in the products of those powers—treaties and statutes—fail to justify differential application of the presumption against preemption. The treaty power produces a product—the treaty—that differs from a statute in that the treaty involves an international law commitment to at least one other country or international entity. Care must be taken not to overstate the difference, however, because the process for creating statutes is widely employed to enter international agreements and because statutes can affect foreign affairs just as treaties can.<sup>94</sup> But perhaps the fact that treaties embrace an international obligation should lead to greater enforcement of treaties against the states.<sup>95</sup> Tellingly, the treaty's international role has not produced this result in the self-execution context. As noted, in *Medellin* the Court adopted a broad notion of non-self-execution, leading to less judicial enforcement of treaties than statutes, notwithstanding treaties' dual nature.<sup>96</sup> The decision suggests that the dual nature of treaties does not require that treaties receive greater application than statutes.

One might argue that because non-self-execution already reduces treaty enforcement, there is no need for an additional presumption against preemption. Yet the two doctrines serve different primary functions. Non-self-execution primarily plays a horizontal role, influencing whether treaties' domestic impact will be decided by the courts or Congress following ratification.<sup>97</sup> The presumption against preemption, by contrast, primarily addresses the vertical distribution of authority between the federal government and the states, protecting states against unintentional displacement in areas of traditional state power.

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94. See, e.g., David H. Moore, *Do U.S. Courts Discriminate Against Treaties?: Equivalence, Duality, and Non-Self-Execution*, 110 COLUM. L. REV. 2228, 2250–53 (2010).

95. See Van Alstine, *supra* note 2, at 971–73.

96. See *supra* text accompanying note 56.

97. Indeed, in a forthcoming book, David Sloss argues that the notion that a non-self-executing treaty does not preempt state law is a post-World War II departure from the traditional understanding of the Supremacy Clause. See DAVID SLOSS, *INVISIBLE CONSTITUTIONAL TRANSFORMATION: THE SILENT DEATH OF THE CONSTITUTION'S TREATY SUPREMACY RULE* (forthcoming) (copy on file with author).

This vertical role has become more relevant as treaties address an expanding range of subject matters. In this sense, application of the presumption against preemption to self-executing treaties parallels application of the presumption to statutes. The expansion of the federal government's legislative power, largely through the Commerce Clause, generated a need for the presumption against preemption as a means of protecting against the concentration of power.<sup>98</sup> So, too, in the treaty context, the use of treaties to address a widening range of issues generates greater demand for the presumption against preemption.

Trends in related areas support this conclusion. Even as international law and foreign affairs have expanded into areas of traditional state concern, the Supreme Court has shown greater solicitude for state sovereignty in the field of dormant preemption.<sup>99</sup> Although the Court had previously engaged in dormant foreign commerce preemption,<sup>100</sup> in *Barclays Bank PLC v. Franchise Tax Board of California* the Court refused to preempt California's approach to the taxation of multilateral corporations, leaving it to Congress to decide whether the California law should be tolerated.<sup>101</sup> Even more pertinent, in *American Insurance Ass'n v. Garamendi*, the Court suggested that dormant foreign affairs preemption (*à la Zschernig*<sup>102</sup>) might only be appropriate when a state acts outside an area of traditional state regulation.<sup>103</sup>

Where, however, a State has acted within . . . its 'traditional competence,' but in a way that affects foreign relations, it might make good sense to require a conflict, of a clarity or substantiality

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98. See Young, *supra* note 1, at 267–68, 320–21.

99. See, e.g., David H. Moore, *Beyond One Voice*, 98 MINN. L. REV. 953, 1012–13 & n.301 (2014) (discussing the trend toward greater respect for state sovereignty in preemption cases as well as hiccups in that trend).

100. See, e.g., *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 453–54 (1979) (sustaining, on dormant foreign commerce grounds, an as applied challenge to a California tax).

101. See 512 U.S. 298, 327–38 (1994).

102. See *Zschernig v. Miller*, 389 U.S. 429, 432 (1968) (engaging in dormant foreign affairs preemption of an Oregon inheritance statute).

103. See *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 419–20 & n.11 (2003).

that would vary with the strength or the traditional importance of the state concern asserted.<sup>104</sup>

In raising this proposition, the Court cited the same case it did in *Bond* for the presumption against preemption: *Rice v. Santa Fe Elevator Corporation*.<sup>105</sup> The trend toward sensitivity to traditional state authority in the dormant context strengthens the case for that same sensitivity in the treaty preemption context.

*Bond* both supports this conclusion and casts some doubt on it, but that doubt is not unavoidable. *Bond* stated in dictum that the federalism canon for interpreting the reach of implementing statutes does not apply to treaties. That is, implementing statutes, *unlike treaties*, “must be read consistent with principles of federalism inherent in our constitutional structure.”<sup>106</sup> Yet it appears this

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104. *Id.* at 419 n.11; *see also id.* at 420 (suggesting that from the conflict preemption perspective, “it would be reasonable to consider the strength of the state interest, judged by standards of traditional practice, when deciding how serious a conflict must be shown before declaring the state law preempted”). Not only has the Court been more sensitive to the states in dormant preemption, but it has recently recognized boundaries on executive preemption of state law as well. *See supra* text accompanying notes 45–53.

105. 331 U.S. 218, 230 (1947); *see Bond*, 134 S. Ct. at 2088–89; *Garamendi*, 539 U.S. at 419 n.11.

106. *Bond*, 134 S. Ct. at 2088. The Court made a similar statement a few months earlier in *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224 (2014). *Lozano* concerned the Hague Convention on the Civil Aspects of International Child Abduction and its implementing statute. *See id.* at 1228–29. The Convention generally mandates the return of an abducted child if the “petition for return [is filed] within one year after the child’s wrongful removal.” *Id.* at 1229. The Court addressed whether this “1-year period is subject to equitable tolling,” as federal statutes of limitations are presumed to be. *Id.* at 1231; *see id.* at 1231–32. In the course of concluding that equitable tolling did not apply, the Court stated that “[e]ven if a background principle is relevant to the interpretation of federal statutes, it has no proper role in the interpretation of treaties unless that principle is shared by the parties to ‘an agreement among sovereign powers.’” *Id.* at 1233 (quoting *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226 (1996)). This statement does not bear on the presumption against preemption, however. The presumption against preemption addresses how a treaty obligation will be implemented domestically. Unless the states parties address that question, it is governed by the U.S. treaty-makers’ intent. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. h (AM. LAW INST. 1987) (“In the absence of special agreement, it is ordinarily for the United States to decide how it will carry out its international obligations.”). The Court rejected the use of domestic background principles to resolve questions of the states parties’ intent. *See Lozano*, 134 S. Ct. at 1232–33 (emphasizing that the parties’ intent governs the interpretation of treaty obligations). The states that enter a treaty cannot be assumed to act against the same legal backdrop that applies to domestic lawmaking. Thus, for example, Congress “legislate[s] against a background of common law adjudicatory principles,” including the principle of equitable tolling, in a way that states parties negotiating

statement was informed by the dual international and domestic nature of treaties. Treaties create obligations under international law and, pursuant to the Supremacy Clause, may also be judicially enforceable domestic law.<sup>107</sup> Unless the parties to a treaty addressed the question of preemption, the issue of preemption would not arise in interpreting the international obligations imposed by the treaty. Consequently, the presumption against preemption would not be relevant in ascertaining the international meaning of the treaty. The presumption would, however, remain relevant in understanding how the treaty would be enforced as a matter of domestic law. This interpretation of the Court's dictum is consistent with the fact that the Chemical Weapons Convention was non-self-executing and therefore would have primarily had an international law effect absent implementation by Congress. It would not have been subject to judicial enforcement as domestic law.

The draft *Restatement (Fourth)* pursues treaty interpretation concerns further in noting that “[a] presumption against preemption of State law could create an interpretation of the treaty that is different from the one shared by other parties to the treaty.”<sup>108</sup> U.S. treaty jurisprudence already assumes this risk in departing from the interpretive rules of international law<sup>109</sup> by, *inter alia*, endorsing

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treaties naturally do not. *Id.* at 1232 (quoting *Astoria Fed. Sav. & Loan Ass'n. v. Solimino*, 501 U.S. 104, 108 (1991)). The Court's statement in *Lozano* was thus correct, but should not be taken out of context to reach background principles, like the presumption against preemption, that attach to domestic questions of U.S. treaty-maker intent.

107. *See, e.g.*, Hollis, *supra* note 91, at 1327–28 (discussing treaties' “double life”).

108. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 108 reporters' note 2 (AM. LAW INST., Preliminary Draft No. 4, 2015).

109. Articles 31 and 32 of the Vienna Convention on the Law of Treaties detail the international law of treaty interpretation. Vienna Convention on the Law of Treaties arts. 31–32, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331. The United States has not ratified the Vienna Convention, but has stated that many of its provisions, including Articles 31 and 32, reflect customary international law that binds the United States. *See, e.g.*, Obligations of Signatories Prior to Ratification, 2001 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW, ch. 4, § B(1) at 212 (noting that “the United States regards [the Vienna Convention] as the authoritative guide to current treaty law and practice”); Conclusion and Entry into Force, 1979 DIGEST OF THE UNITED STATES PRACTICE IN INTERNATIONAL LAW at 692 (quoting the U.S. Ambassador to the Law of the Sea Convention as stating that “[t]he Vienna Convention provisions . . . are for the most part codifications of customary international law”). Jean Galbraith argues that the international and U.S. approaches to treaty interpretation have converged since the *Restatement (Third)*, but partly because international practice has embraced a wider range of interpretive approaches than Article 31 and 32

more immediate recourse to negotiation history and giving weight to the executive's interpretation of a treaty.<sup>110</sup> Further, while it is perhaps not as rare for states parties to consider federalist hurdles to treaty obligations than to consider the question of self-execution, still it seems that states parties will generally not consider, let alone reach, an understanding on the preemptive force of treaties.<sup>111</sup> To the extent they invest negotiating time and energy into reaching such an understanding, it presumably will be reflected in the treaty such that the presumption will be overcome. If any shared interpretation is ambiguous, the presumption secures a significant benefit—checking centralization of power—at a small cost to the treaty-makers—the burden of being clearer.

On a related note, the Draft posits that a presumption against preemption may “make it difficult for the United States to secure domestic compliance with a treaty, which can create foreign-relations difficulties for the United States.”<sup>112</sup> The *Restatement (Third)* made this same argument in supporting a presumption in favor of self-execution.<sup>113</sup> That argument did not outweigh structural constitutional concerns in *Medellín*. Moreover, the treaty-makers themselves apparently see certain foreign relations costs as worthwhile when they reject or negotiate alterations in treaties or attach reservations, understandings, or declarations to U.S. treaty ratification to accommodate federalism concerns.<sup>114</sup> Further, to the extent there is anything to the argument that foreign states can

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originally suggested. See Jean Galbraith, *What Should RESTATEMENT (FOURTH) Say About Treaty Interpretation?*, 2015 BYU L. REV. 1499, 1511–18 (2016). Even if there has been convergence, differences remain.

110. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 325 cmt. g., reporters' notes 1, 4, 5; § 326(2) (AM. LAW INST. 1987).

111. The treaty in *Bond*, for example, was “agnostic between enforcement at the state versus federal level.” *Bond*, 134 S. Ct. at 2087. See generally Hollis, *supra* note 91, at 1374–78 (discussing ways in which the executive has sought to alter the text or understanding of treaties during negotiation to avoid federalism problems).

112. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 108 reporters' note 2 (AM. LAW INST., Preliminary Draft No. 4, 2015).

113. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 reporters' note 5 (AM. LAW INST. 1987).

114. See Hollis, *supra* note 91, at 1372–81 (discussing U.S. rejection, alteration, and ratification of treaties in ways sensitive to federalism interests).

target offending states rather than the nation as a whole, the argument would have traction here as well.<sup>115</sup>

Finally, the Draft suggests that applying the presumption may be unnecessary because the Article II treaty-making process “was designed to protect State interests” and in fact does so, as reflected in the federalism interests that make it into “reservations, understandings, or declarations during the ratification process.”<sup>116</sup> This is an argument against the presumption against preemption generally. The legislative process was also designed to protect state interests<sup>117</sup> and does so—for example, by producing statutes that expressly preserve state law.<sup>118</sup> Yet the presumption against preemption applies to legislation. In accepting constitutional procedure as the primary protection for state interests, the Court did not eliminate a judicial role in the preservation of federalism.<sup>119</sup> The Court has supplemented with canons such as the presumption against preemption that ensure that preemption results from the constitutional process.<sup>120</sup> The previously noted concern of the treaty-makers for federalist interests means that two constitutional

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115. See Moore, *supra* note 99, at 1019 & n.335 (noting this argument as well as the response of its skeptics).

116. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 108 reporters’ note 2 (AM. LAW INST., Preliminary Draft No. 4, 2015).

117. *E.g.*, *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550–54 (1985).

118. *Id.* at 553–54.

119. See Young, *supra* note 1, at 262, 264 (asserting that *Garcia* was not “an abdication of any judicial enforcement of limits on national power” but “a shift from efforts to impose substantive limitations on national power to a focus on process”). *Cf.* William N. Eskridge, Jr., Philip P. Frickey & Elizabeth Garrett, LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 938 (4th ed. 2007) (suggesting that the federalism-based clear statement rule from *Gregory v. Ashcroft*, 501 U.S. 452 (1991), might be justified “on the ground that the Tenth Amendment was underenforced by the Supreme Court, which had rarely invalidated federal laws because they intruded into core state functions”).

120. See, *e.g.*, *Bond*, 134 S. Ct. at 2088–90; Young, *supra* note 1, at 256, 265–69, 321–23 (emphasizing “the critical importance of the ‘presumption against preemption’” where “the courts’ [current] role in protecting federalism . . . focus[es] on facilitating and enhancing the operation of the[] political and procedural checks on national authority”). On occasion, the Court has also recognized substantive limits on congressional powers. See, *e.g.*, *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2585–91 (2012); *id.* at 2642–50 (joint dissent); *id.* at 2677 (Thomas, J., dissenting).

actors view federalism interests as significant in treaty-making.<sup>121</sup> The presumption against preemption serves those interests.

#### CONCLUSION

While the draft *Restatement (Fourth)* suggests that the role of the presumption against preemption is unclear in treaty preemption, recent developments suggest that there is or should be greater clarity. In particular, *Medellin* indicates that the presumption does not apply to non-self-executing treaties—not because treaties preempt more readily than statutes, but because non-self-executing treaties cannot preempt state law at all. *Bond* provides support for the conclusion that the presumption applies to executed treaties. And there are significant arguments that the presumption should apply to self-executing treaties as well. As a result, the *Restatement (Fourth)* need not be so reluctant to embrace the presumption against preemption in the treaty context.

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121. See *Hollis*, *supra* note 91, at 1386, 1392–93 (noting how the executive’s treatment of federalism in treaty-making “offers evidence of treaty power limits from the power-holder’s perspective—limits to which the Court is likely to defer”).

