Articles

Doubly Uncooperative Federalism and the Challenge of U.S. Treaty Compliance

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This Article explores the undertheorized and understudied phenomenon of doubly uncooperative federalism. While most commentary examining the behavior of U.S. states with respect to treaty regimes focuses on cooperative behavior—that is, states that aid in the implementation of duly ratified treaties, or even aid in the implementation of treaties that the federal government has yet to ratify—this Article focuses on settings of doubly uncooperative federalism. There, state action (or inaction) is inconsistent with a duly ratified treaty, and may put the national government in breach of the treaty. The Article elucidates the theoretical underpinnings of doubly uncooperative federalism; discusses doubly uncooperative federalism in practice; explains how constitutional and practical limitations on the federal government's ability to compel state compliance create a space for doubly uncooperative federalism; exposes shortcomings in ways the federal government might try to minimize doubly uncooperative federalism; and discusses the consequences of doubly uncooperative federalism—both positive and negative.

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* Professor of Law, Emory University School of Law. For valuable feedback, I am grateful to Robert Ahdieh, Abdullahi An-Na'im, Thomas Arthur, Jameson Bilsborrow, William Buzbee, Michael Collins, Mary Dudziak, Lee Fennell, Kay Levine, Wayne Logan, Robert Mikos, Lori Nash, Anne Rector, Robert Schapiro, and Liza Vertinsky. I benefited from a presentation at a faculty workshop hosted by Emory University School of Law's Center on Federalism and Intersystemic Governance. Katherine Maddox Davis provided superb research assistance.

INTRODUCTION

Commentators recognize that states can play a critical role[1] in determining whether a national government will be in compliance with, or in breach of,[2] a governing treaty.[3] Nevertheless, most academic commentary discussing the role of states in treaty compliance is focused on settings where states take a cooperative posture toward an international treaty.[4]

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1. *See* Julian G. Ku, *The State of New York Does Exist: How the States Control Compliance with International Law*, 82 N.C. L. REV. 457 (2004); *see also* Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 COLUM. L. REV. 403, 452 (2003) ("[I]t is manifestly harder for a federal government to ensure compliance" with international treaties.).

2. I distinguish treaty breaches from affirmative decisions by a country to exit a treaty regime, *see* Laurence R. Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579, 1613–29 (2005), and also from minor treaty violations not constituting a material breach, *see id.* at 1614 n.81. The Vienna Convention on the Law of Treaties defines a material breach of a treaty as either "[a] repudiation of the treaty" or "[the] violation of a provision essential to the accomplishment of [its] object or purpose." Vienna Convention of the Law of Treaties art. 60(3), May 23, 1969, 1155 U.N.T.S. 331. The Convention empowers (although it does not require) the other parties to the treaty "by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either: (i) [i]n the relations between themselves and the defaulting State, or (ii) [a]s between all the parties." *Id.* art. 60(2)(a).

3. I use the term "treaty" to mean, from the perspective of U.S. domestic law, "Article II treaties" that are signed by the President and ratified by the Senate. I thus distinguish treaties from "congressional-executive agreements" that result from joint legislative and executive action, and from "sole executive agreements" that result from Presidential action and legislative inaction. *See* Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1254–55 (2008). That said, federal power is probably at its apex in respect of fully ratified treaties; federal power to compel states into treaty compliance is, if anything, weaker, in the settings of congressional-executive agreements and sole executive agreements.

4. There are exceptions. For examples in the wake of the litigation culminating in *Medellín v. Texas*, 552 U.S. 491 (2008), see John O. McGinnis, Medellín *and the Future of International Delegation*, 118 YALE L.J. 1712, 1733–36, 1754–57 (2009); David H. Moore, Response, *Law (Makers) of the Land: The Doctrine of Treaty Non-Self-Execution*, 122

Consider first the paradigmatic setting where the federal government ratifies a treaty, and the states cooperate in its execution and enforcement. Subfederal units may enact their own laws and implement their own policies that aid in U.S. treaty compliance.[5] The setting does not suffer from lack of scholarly study.[6]

Another setting finds states going beyond what the federal government calls for. A state might abide by the terms of a treaty even where the federal government has decided against ratification. Here, the state's behavior is somewhat uncooperative, in that it takes a position at odds with the federal government's; still, the state can be seen as cooperating with the international regime. Once again, this setting has received its share of scholarly attention: commentators have documented how subnational actors—including states—sometimes voluntarily comply with international treaties, even those into which the national government has not entered.[7]

HARV. L. REV. F. 32 (2009). *See also* Curtis Bradley & Lori Fisler Damrosch, Discussion, Medellín v. Dretke*: Federalism and International Law*, 43 COLUM. J. TRANSNAT'L L. 667, 684 (2005) (statement of Curtis Bradley) ("[T]he State of Texas has a clear, legitimate federalism interest in preserving [its state law] rules, and I do not see how comity . . . overcomes that.").

5. *See, e.g.*, Tanzina Vega, *Vienna Convention is Part of Criminal Court Routine in Immigrant-Rich Queens*, N.Y. TIMES (Apr. 19, 2015), http://www.nytimes.com/2015/04/20/nyregion/in-immigrant-rich-queens-vienna-convention-is-part-of-criminal-court-routine.html (detailing the policy of the District Attorney of New York City's Queens County to provide all arrestees facing arraignment with written notice of foreign nationals' rights under the Vienna Convention for Consular Relations (even if an arrestee is not a foreign national)).

6. *See* Oona A. Hathaway et al., *The Treaty Power: Its History, Scope, and Limits*, 98 CORNELL L. REV. 239, 320–22 (2013) (providing examples of voluntary state action in furtherance of treaty compliance); Johanna Kalb, *The Persistence of Dualism in Human Rights Treaty Implementation*, 30 YALE L. & POL'Y REV. 71, 99–104 (2011) (providing examples of treaty compliance based on cooperative federalism); Julian G. Ku, *The Crucial Role of States and Private International Law Treaties: A Model for Accommodating Globalization*, 73 MO. L. REV. 1063, 1065 (2008) (discussing state implementation of private law treaties); Ku, *supra* note 1, at 501–04 (discussing state implementation of non-self-executing treaties); *id.* at 505–06 (discussing enforcement of treaties based on cooperative federalism); *id.* at 508–10 (discussing state efforts to implement the Vienna Convention's consular contact requirement).

7. *See* Hathaway et al., *supra* note 6, at 322–24; Judith Resnik et al., *Ratifying Kyoto at the Local Level: Sovereigntism, Federalism, and Translocal Organizations of Local Actors (TOGAs)*, 50 ARIZ. L. REV. 709, 717–20, 724–25 (2008) (describing how subfederal governmental unions have taken steps toward complying with treaties unratified by the United States); *see also* Robert B. Ahdieh, The 2008 Earl F. Nelson Lecture, *Foreign Affairs, International Law, and the New Federalism: Lessons from Coordination*, 73 MO. L. REV. 1185, 1193–96 (2008) (same); Ku, *supra* note 1, at 476 (noting how state legislatures can effectively enact international law by "adopt[ing] 'model codes' or 'uniform laws' promulgated at either the national or international level that are intended to create a uniform

The bulk of existing commentary glosses over settings where states work in opposition to the federal government's treaty obligations. International law's doctrine of state responsibility holds a national federal government responsible for violations of a duly ratified treaty resulting from actions (or omissions) of a subfederal government.[8] Thus, the federal government may find itself in breach of a treaty by virtue of state action (or inaction). The U.S. Constitution—as well as practical considerations—limits the federal government's ability to compel states and other subfederal units into treaty compliance. In short, if—at an extreme—the states can render the national government *de facto* in compliance with the terms of a treaty into which the national government has not entered, so too can the states render the national government in breach of treaties into which the national government *has* entered.[9] And, as we shall see, states often have incentives to engage in behavior that is inconsistent with a duly ratified treaty.[10]

Doubly uncooperative federalism dates back to the Articles of Confederation,[11] and was a substantial motivation underlying the drafting and ratification of the Constitution.[12] Yet doubly uncooperative federalism persisted under the new Constitution, with the Supreme Court confronting the issue in the early years of the Republic in the context of state efforts to undermine the peace treaty with Great Britain.[13]

Recent years have seen doubly uncooperative federalism arise

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system of laws across national borders").

8. *See infra* notes 34–49 and accompanying text.

9. *See infra* note 35 and accompanying text.

10. *See infra* notes 59–61 and accompanying text.

11. *See* David Sloss, Bond v. United States*: Choosing the Lesser of Two Evils*, 90 NOTRE DAME L. REV. 1583, 1590–92 (2015) (detailing problems with state action and federal treaty compliance under the Articles of Confederation); Carlos Manuel Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1101–02 (1992) (discussing the shortcomings of the Articles in restraining states from acting to undermine federal treaties).

12. *See* MARY SARAH BILDER, MADISON'S HAND: REVISING THE CONSTITUTIONAL CONVENTION 45 (2015) (noting Madison's objections to the role of the states in "[v]iolations of the laws of nations and treaties" as a basis for seeking to replace the Articles); Sloss, *supra* note 11, at 1592–93; Vázquez, *supra* note 11, at 1102.

13. *See* Martin v. Hunter's Lessee, 14 U.S. 304, 355–59 (1816) (upholding the Supreme Court's power to examine Virginia high court's determination of title where that determination resulted in inapplicability of treaty provision); Fairfax's Devisee v. Hunter's Lessee, 11 U.S. 603, 626–27 (1813) (holding that Virginia's high court had misconstrued treaties between the United States and Great Britain in holding that the treaties did not apply to title to land held by a British citizen and confiscated by the state under Virginia law).

again with renewed vigor. One current example is state legalization of marijuana that arguably puts the United States in breach of an international narcotics treaty to which it is a party.[14] Another example is the failure of states to provide arrested foreign nationals with notification of their rights under a treaty to contact their home nations' consular offices.[15]

What then explains commentators' tendency to view subnational governments as actors who tend to cooperate with international legal treaties? The question echoes one asked by Professors Jessica Bulman-Pozen and Heather Gerken with respect to commentators' tendency to focus on the cooperative relationship between the federal and state governments in the administration of federal programs.[16] Professors Bulman-Pozen and Gerken observe that commentators who see states as dissenting from and acting contrary to the federal government's preferences generally perceive of states as autonomous sovereigns, distinct from the federal government, with the federal and state governments operating in distinct spheres.[17] They highlight the common, but understudied, phenomenon of "uncooperative federalism"—where states dissent from and act contrary to the federal government's preferences when called upon to participate in the administration of a federal program.[18]

The setting of joint federal-state administration of a federal program studied by Professors Bulman-Pozen and Gerken bears strong similarities to the setting of compliance with a duly ratified international treaty. The combination of (i) the doctrine of state responsibility imputing—for international law purposes—to the national government treaty breaches resulting from state action (or inaction), and (ii) legal and practical limitations on the federal government's ability to preclude such breach-inducing actions (and inac-

14. *See infra* Part I.B.1.

15. *See infra* Part I.B.2.

16. *See* Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1258 (2009). Professors Bulman-Pozen and Gerken were hardly the first to observe the possibility of states working at odds with the federal government, and the benefits that can arise from such interactions. *See, e.g.*, Robert B. Ahdieh, Commentary, *Dialectical Regulation*, 38 CONN. L. REV. 863, 866 (2006); Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1036 (1977); Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 284 (2005); Ronald F. Wright & Marc Miller, *In Your Court: State Judicial Federalism in Capital Cases*, 18 URB. LAW. 659, 660, 693–94 (1986); *see also* William W. Buzbee, *Recognizing the Regulatory Commons: A Theory of Regulatory Gaps*, 89 IOWA L. REV. 1 (2003).

17. Bulman-Pozen & Gerken, *supra* note 16, at 1258.

18. *Id.* at 1260–84.

tions) by states, conspire to provide states with an unavoidable, critical role in national government compliance with many treaties. Involvement of the states in treaty compliance can thus come to resemble the role of states in the administration of a joint federal-state program.

I coin the term "doubly uncooperative federalism" to refer to the state's exercise of its freedom to resist compliance with a treaty duly ratified by the federal government, and it is to that undertheorized and understudied practice that this Article turns its attention. What makes the state's behavior *doubly uncooperative* is the fact that the state government stands alone in opposition to both the federal government and the international treaty. The Article makes four broad contributions.

First, the Article elucidates the undertheorized and understudied concept of doubly uncooperative federalism as a species of federal-state interaction in the context of treaty compliance. It situates doubly uncooperative federalism within the broader swath of federal-state relations in the context of treaty compliance. It identifies the features of international and constitutional law that provide a space for doubly uncooperative federalism. And it elucidates current examples of doubly uncooperative federalism in practice.

Second, the Article highlights the myriad, yet underappreciated, ways—both legal and practical—in which the federal government is impotent in the face of state action (or inaction) resulting in noncompliance. It also elucidates the uncertainty and high costs that dog theoretically viable ways that the national government might try to compel state compliance. While others have explained how domestic law provides opportunity for, and limitations on, the enforcement of international law, this Article surveys this territory with a focus on how the law effectively protects state dissent on treaty compliance.

Third, the Article discusses limitations that inhere in alternatives to attempts at legal compulsion. The Article addresses the possibility of creating incentives for states, and exhorting states, not to engage in doubly uncooperative federalism. The Article also discusses "workarounds" that the national government has used to try to minimize the mismatch between the international doctrine and U.S. federalism. It explores the use of "carve-outs"—that is, treaty provisions, and reservations, understandings, or declarations (collectively, "RUDs") that the government made when it entered into the treaty[19]

19. *See* Vienna Convention on the Law of Treaties, *supra* note 2, art. 2(1)(d) (defining a reservation as "a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving, or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to

that purport to limit the scope of the doctrine of state responsibility—and "breach-curing treaty provisions"—that is, the attempt to apply "liability rules"[20] to discharge treaty breaches by subfederal governmental units.

The Article identifies problems with each of these approaches. Incentives may not discourage states from engaging in doubly uncooperative federalism, and beyond that may encourage states that otherwise would not have engaged in doubly uncooperative federalism to do so (in order to receive a benefit).[21] Exhortation is likely to be similarly unavailing.[22] Treaty provisions and RUDs are unreliable, and may end up obscuring exactly when the treaty applies.[23] Finally, breach-curing treaty provisions that try to "solve" treaty breaches by offering payments of money by the federal government are also problematic: (i) money payments may not offer a sufficient disincentive against treaty noncompliance, but even granting that they might under ordinary circumstances[24] and (ii) the fact that the government that makes the payments (i.e., the federal government) is *not* the government that is choosing noncompliance (i.e., the state government) undermines any incentive effect.[25]

Fourth, the Article highlights possible consequences of a state's choice to engage in doubly uncooperative federalism. For one thing, the United States may find itself in breach of its treaty obligations with the opportunity for correction beyond its reach. Indeed, the obstacles facing the federal government as it tries to get states to comply with international obligations may effectively render some treaty obligations nearly, or even entirely, unfulfilled.[26] Beyond that, doubly uncooperative federalism may breed uncertainty as to whether

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that State"). There are legal issues that attend the effectiveness of RUDs. *See infra* note 216 and accompanying text.

20. Under the canonical understanding, an entitlement is protected by a liability rule when "an external, objective standard of value is used to facilitate the transfer of the entitlement" away from its holder. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1106 (1972). Liability rules are often contrasted with property rules: an entitlement is protected by a property rule when "[n]o one can take the entitlement . . . from the holder unless the holder sells it willingly and at the price at which he subjectively values" it. *Id.* at 1105.

21. *See infra* Part III.A.1.

22. *See infra* Part III.A.2.

23. *See infra* Part III.B.1.

24. *See infra* note 238 and accompanying text.

25. *See infra* notes 237–49 and accompanying text.

26. *See infra* Part IV.A.

the United States is in fact in compliance with a treaty. Indeed, to the extent that courts are called upon to rule on treaty compliance, a federal court may find no treaty violation (under domestic law) notwithstanding an international tribunal finding of a treaty breach.[27] Such an outcome is both unseemly and destabilizing to international law. Finally, doubly uncooperative federalism empowers states to affect the treaties, and the interpretation of treaties, to which the federal government has subscribed.[28] The Article explains how these consequences, often viewed as quite negative, may not be significantly negative and may even include effects that might be considered to be beneficial.[29]

The Article proceeds as follows. Part I explicates doubly uncooperative federalism in theory and in practice. Part II elucidates the limitations, both legal and practical, on the federal government's ability to compel states into treaty compliance. Part III examines shortcomings with methods the federal government might use to coax states into compliance and to structure treaties so as to minimize the impact of doubly uncooperative federalism. Part IV discusses the effects, both negative and positive, of doubly uncooperative federalism.

I. EXPLICATING DOUBLY UNCOOPERATIVE FEDERALISM IN TREATY COMPLIANCE

In this Part, I first unpack the theoretical underpinnings of doubly uncooperative federalism. I then turn to examples of doubly uncooperative federalism in practice.

A. Doubly Uncooperative Federalism in Theory

In this subpart, I explicate the notion of doubly uncooperative federalism in treaty compliance. To do this, I first situate doubly uncooperative federalism in the typology of federal-state relations over treaty compliance. After that, I describe the conditions under which doubly uncooperative federalism might arise.

To develop a typology of federal-state relations in the context of treaty compliance, we begin with a typical federal-state relationship. Although in reality the divide need not be quite so dichotomous, we can conceive of the federal and state governments acting

27. *See infra* Part IV.B.

28. *See infra* Part IV.C.

29. *See infra* note 269 and accompanying text.

either dissonantly or consonantly with one another.

A scenario involving compliance with an international treaty introduces into the mix an additional layer of government—the international treaty. Assuming the existence of an international treaty regime, Table 1 presents a two-by-two matrix of possible combinations of the federal government[30]—and the state government—acting in ways that are consonant, and dissonant, with the treaty regime.[31]

TABLE 1: Typology of federal and state government actions with respect to a treaty regime.

		State	
		Dissonant	*Consonant*
Federal	*Dissonant*	1. No ratified treaty; no voluntary state compliance. *Result:* No compliance	2. **Uncooperative Federalism**: No ratified treaty; state voluntarily acts in line with treaty. *Result:* State over-compliance
	Consonant	3. **Doubly Uncooperative Federalism**: Ratified treaty; state acts inconsistently with treaty. *Result:* State under-compliance	4. **Cooperative Federalism**: Ratified treaty; state acts to ensure compliance. *Result:* Full compliance

The federal and state governments take identical views of the

30. I assume, for simplicity, that the federal government is a monolithic actor when in fact the federal government often includes actors with divergent views on the desirability of a treaty. *See, e.g.*, Iran Nuclear Agreement Review Act of 2015, Pub. L. No. 114-17, 129 Stat. 201 (giving the Houses of Congress authority to vote on the nuclear proliferation agreement the executive branch reached with Iran); Goldwater v. Carter, 444 U.S. 996 (1979) (suit by Senators against the President arising out of disagreement over whether the President should, and had the unilateral constitutional power to, abrogate a duly ratified treaty with Taiwan).

31. If there is no overarching treaty regime in the absence of U.S. ratification—for example, if the would-be treaty is bilateral—then the table looks essentially the same, with the exception that the state in the upper-right-hand quadrant acts in line not with an actual treaty, but with what the treaty would call for had it been ratified.

treaty in the upper-left-hand and lower-right-hand quadrants—that is, quadrants 1 and 4. In quadrant 1, neither the federal nor state government is partial to the treaty. The federal government does not ratify the treaty, and the state is content with that outcome. The result is no compliance with the treaty. In quadrant 4, both the federal government and the state government endorse the treaty. The federal government ratifies the treaty, and the state works to ensure compliance. I assign the moniker "cooperative federalism" to quadrant 4: here, the international treaty, federal government, and state government are all aligned. With this alignment comes full compliance with the treaty.

Quadrants 2 and 3 both describe settings where one government approves of the treaty regime and the other does not. Quadrants 2 and 3 are mirror images of one another. I label quadrant 2 "uncooperative federalism" and quadrant 3 "doubly uncooperative federalism." The relationship between the federal and state governments in both quadrants is uncooperative. What makes quadrant 3 the home to *doubly* uncooperative federalism is the fact that there the state government stands alone in opposition to the federal government and the international treaty (whereas in quadrant 2 the state government acts in opposition to the federal government's wishes, but consistently with the international treaty).

In quadrant 2, the federal government does not approve of the treaty and thus does not ratify it; the state government nonetheless works to signal compliance with what the treaty would call for had it been ratified. The result is state compliance in excess of what domestic law requires—to which I refer as "state over-compliance." Insofar as the federal government has not ratified the treaty, the state's freedom to act in conformity with the treaty regime[32] must result from the state's autonomous sovereign power.

In quadrant 3's setting of doubly uncooperative federalism, the federal government approves of and ratifies the treaty; the state government nonetheless does not take steps to ensure compliance with the ratified treaty. The overall result is compliance below the level that national government ratification of the treaty would suggest—to which I refer as "state under-compliance."

Commentators have tended to focus on quadrant 4's setting of cooperative federalism—where federal and state government align to ensure (as much as possible) compliance with a ratified treaty—and

32. Such freedom would be subject to foreign affairs preemption. *See* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003) (recognizing foreign affairs preemption where state action imposes more than an incidental effect on foreign affairs and where executive has acted affirmatively to establish a federal policy).

quadrant 2's setting of uncooperative federalism—where state governments align with the international community (despite the federal government's failure to ratify the treaty) to produce over-compliance. In both these settings, then, state governments align with the international community (sometimes over the dissent of the federal government). In contrast, my focus here is on quadrant 3's setting of doubly uncooperative federalism.[33] Here, state governments dissent from the alliance of the federal government with the international community.

33. Similar to commentators' focus on settings in quadrants 2 and 4 to the exclusion of doubly uncooperative federalism, Professors Bulman-Pozen and Gerken observe domestic federalism scholars focusing on settings of cooperative federalism and autonomous dissent to the exclusion of settings of what they call uncooperative federalism. *See* Bulman-Pozen & Gerken, *supra* note 16, at 1260–64.

To what extent do the monikers "cooperative federalism," "uncooperative federalism," and "doubly uncooperative federalism" map onto Professors Bulman-Pozen and Gerken's use of the terms "cooperative federalism" and "uncooperative federalism"? Note first that Professors Bulman-Pozen and Gerken use the terms "cooperative federalism" and "uncooperative federalism" to refer to settings where the federal government involves states in the implementation of a federal program, not settings where states act as autonomous sovereigns. *See id.* at 1264 n.18. It seems clear that settings in quadrant 2—where states engage in what I have labeled "uncooperative federalism" by acting in accordance with a treaty that the federal government has not ratified—are settings where the state *is* acting as an autonomous sovereign. *See, e.g.*, Douglas A. Kysar & Bernadette A. Meyler, *Like a Nation State*, 55 UCLA L. REV. 1621, 1631 (2008) (describing how California sought to develop a greenhouse gas emission tradable permit program that was compatible with an existing European Union program). After all, no federal action justifies the state action. That said, quadrant 2 does correspond to Professors Bulman-Pozen and Gerken's "uncooperative federalism" in that the states are presumably engaging in behavior consistent with the unratified treaty at least in part to put pressure on the federal government to change its behavior by ratifying the treaty. *Cf.* Bulman-Pozen & Gerken, *supra* note 16, at 1272 ("[T]he best proxy for distinguishing dissent from routine negotiations is whether the state's action can be fairly understood as an effort to change national policy."). And, much as quadrant 2 generates over-compliance with the treaty (from the perspective of the federal government), so too do Professors Bulman-Pozen and Gerken include as examples of "uncooperative federalism" settings where states go beyond the current implementation of a federal program by the federal government. *See id.* at 1276–78 (discussing state initiatives to regulate greenhouse gas emissions as designed to prompt greater federal regulation in the area).

The settings of "cooperative federalism" and "doubly uncooperative federalism" in quadrants 2 and 3 seem closer to Professors Bulman-Pozen and Gerken's focus: here the state governments can be seen to be acting pursuant to a federal program of sorts—a ratified treaty. To be sure, a ratified treaty is not a "federal program" in the purest sense: the federal government cannot contract or eliminate the states' role at will, and a state is not a "servant" to the federal government in implementing a treaty. Still, as discussed in the text, there are similarities. A state government that decides to buck a ratified treaty may be responding to its home constituents and may in so doing endeavor to cause a change in the federal government's behavior.

This results in state under-compliance.

Where does the state obtain the authority to under-comply with the treaty and (by doing so) the power to put the federal government in breach of the treaty? The answer lies in the interaction between constitutional and practical limits on the federal government's ability to compel state compliance and the international law doctrine of state responsibility. As we shall see, this means that the state's ability results from a combination of its autonomous sovereign power and the fact that it is inextricably nestled in the federal government's compliance efforts.

The state government's "power" to put the federal government in breach of a duly ratified treaty by virtue of its own action (or inaction) is a consequence of the doctrine of state responsibility. The doctrine delivers subnational government action (and inaction) in respect of treaty compliance to the doorstep of the national government.[34] Thus, action (or inaction) by a state can put the United States in noncompliance with a duly ratified treaty.[35]

Under U.S. law, only when the federal government enters into a treaty that is self-executing does the treaty have "automatic domestic effect as federal law upon ratification."[36] The terms of a non-self-executing treaty are not incorporated into domestic law except to the extent that Congress enacts implementing legislation.[37] International

34. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 207(b) (AM. LAW. INST. 1987) ("A state is responsible for any violation of its obligations under international law resulting from action or inaction by . . . the government or authority of any political subdivision of the state.").

35. *See id.* § 207 Reporters' note 3 ("The United States has consistently accepted international responsibility for actions or omissions of its constituent States and has insisted upon similar responsibility on the part of the national governments of other federal states.").

36. Medellín v. Texas, 552 U.S. 491, 505 n.2 (2008). *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(4), § 111 cmt. h; Oona A. Hathaway et al., *International Law at Home: Enforcing Treaties in U.S. Courts*, 37 YALE J. INT'L L. 51, 56 (2012) ("A self-executing treaty is a treaty that creates a domestic legal obligation in the absence of implementing legislation.").

37. On the difficulty of discerning whether a treaty is self-executing or non-self-executing, see, for example, Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 695 (1995). For discussion of the question of whether Congress may be *obligated* to implement properly ratified treaties, see LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 204–06 (2d ed. 1996); *see also* William M. Carter, Jr., *Treaties as Law and the Rule of Law: The Judicial Power to Compel Domestic Treaty Implementation*, 69 MD. L. REV. 344, 365–89 (2010) (arguing that federal courts are empowered to issue writs of mandamus against federal government officials to compel enforcement of non-self-executing treaties, except where the government has clearly opted upon ratification not to have domestic enforcement).

law is blind to this distinction.

Yet, under international law, the doctrine of state responsibility applies irrespective of whether the treaty at issue has been incorporated into domestic law. The doctrine of state responsibility applies whether a treaty is self-executing or non-self-executing.[38] International treaties,[39] treatises and other summaries of international law,[40] and tribunal decisions[41] all recognize the doctrine and give it a wide berth.[42] In short, international law propounds the state responsibility doctrine in strong terms.[43]

The doctrine of state responsibility rests on an expectation

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38. For example, in *Medellín*, the Supreme Court made clear that, even though the Optional Protocol Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487 [hereinafter "Optional Protocol"], was non-self-executing (and, thus, the courts of Texas were not required to give effect to the opinion of the International Court of Justice), the International Court of Justice's opinion—holding that actions by Texas constituted a violation of the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77,596 U.N.T.S. 261 [hereinafter "Vienna Convention"]—was enough to put the national government in breach. *See infra* notes 79–95 and accompanying text.

39. *E.g.*, Vienna Convention on the Law of Treaties, *supra* note 2, art. 27 ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.").

40. *E.g.*, Draft Articles on Responsibility of States for Internationally Wrongful Acts, Int'l Law Comm'n, Rep on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, art. 4 (2001) [hereinafter "ILC Draft Articles"] ("The Conduct of any State organ shall be considered an act of that State under international law, . . . whatever its character as an organ of the central Government or of a territorial unit of the State."); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 207(b); IVAN BERNIER, INTERNATIONAL LEGAL ASPECTS OF FEDERALISM 84–88 (1973) (concluding, after review of international legal sources, that "there can be no doubt that a federal state is responsible for the conduct of its member states").

41. *E.g.*, LaGrand Case (Ger. v. U.S.), 2001 I.C.J. Rep. 466, ¶¶ 50–52 (June 27); Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion, 1932 P.C.I.J. (ser. A/B) No. 44, at 24 (Feb. 4) ("A state cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force.").

42. The United States Supreme Court's decision in *Medellín v. Texas*, 552 U.S. 491 (2008), also evinces a broad understanding of the state responsibility doctrine. *See infra* note 93 and accompanying text (elucidating *Medellín*'s holding that, in effect, Texas had it within *its* power to determine whether the *federal government* lived up to its (i.e., the federal government's) international law obligation).

43. *E.g.*, Swaine, *supra* note 1, at 450 ("It is easy to cite chapter and verse illustrating international law's indifference to federalism."). *But cf.* Peter D. Szigeti, *Territorial Bias in International Law: Attribution in State and Corporate Responsibility*, 19 J. TRANSNAT'L L. & POL'Y 311, 332 (2010) ("Strict liability has been denied even when there was a plausible interpretation of a treaty between the parties that created strict liability.").

that, in fact, the national government has the power to compel subnational governmental units into treaty compliance. The doctrine arose out of historical understandings,[44] and is sometimes said to be justified on the ground that it facilitates treaty formation.[45] But the continued vitality of that justification is open to question.[46]

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44. The state responsibility doctrine grew out of the historical importance of the concept—and, to a large degree, the reality—of the unitary state to the development, and legitimacy, of international law. *See* Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649, 668 (2002) ("In the old world, th[e] [state responsibility] doctrine both reflected and reinforced a reality of central government control and centralized relations among states in the international arena."). For centuries, international law saw national states as the only relevant actors. *See, e.g.*, Edith Brown Weiss, *Invoking State Responsibility in the Twenty-First Century*, 96 AM. J. INT'L L. 798, 798 (2002). The prototypical "Westphalian state" had absolute power to rule within its borders, and absolute authority to enter into agreements—with other Westphalian states—on the international stage. The state responsibility doctrine follows logically from this understanding.

Ironically, though the Westphalian understanding of nation-states recognizes strong, unitary national governments, it at the same time anticipates a federal system of government at the international level: international agreements can harmonize legal rules across states, while legal rules outside the purview of the agreements remain within the province of each individual nation-state. *See* Roderick M. Hills, Jr., *Federalism as Westphalian Liberalism*, 75 FORDHAM L. REV. 769, 781–93 (2006) (describing how the Peace of Westphalia "us[ed] territorial jurisdictions to define power over religious disputes"); *cf.* Robert A. Schapiro, *Federalism as Intersystemic Governance: Legitimacy in a Post-Westphalian World*, 57 EMORY L.J. 115, 131 (2007) ("Dual federalism attempted to preserve a Westphalian conception of sovereignty by making states sovereign in their own spheres, while the federal government enjoyed exclusive authority in others.").

45. At a time when unitary states in fact dominated the international stage, it would have been difficult for foreign governments—especially those not organized as federal systems—to grasp how a federal system functioned such that a subnational unit could be responsible for a treaty breach, let alone to identify which subnational unit bore responsibility, *see* Spiro, *supra* note 44, at 668 ("Against the backdrop of thin communication networks and diverse systems of government, it would have been highly inefficient to require states to interact with component units of other states."), let alone (assuming that were possible) exact retaliation solely against the responsible subnational unit, *see id.* ("It would . . . have been difficult for states to enforce obligations against those [governmental] component units, for their leverage would, in most cases, have been minimal."). Thus, treaty breaches by a subnational unit were likely to elicit responses directly against the entire nation. Chy Lung v. Freeman, 92 U.S. 275, 279–90 (1875); *see* Spiro, supra note 44, at 691. One might say that, under those circumstances, a robust doctrine of state responsibility facilitated treaty formation.

46. If they ever did, circumstances today may not justify the doctrine on efficiency grounds. As Professor Peter Spiro has observed, globalization has catalyzed the disaggregation of the national state and integrated the world's economy. *See* Spiro, *supra* note 44, at 667–73. Non-federal states are much more familiar with federal systems. *See id.* at 692. In many cases foreign States have the ability to identify subnational breaches and to target retaliation accordingly. *See id.* Further, the rise of international law development and implementation by associations that include subfederal governmental units, *see* Resnik et al.,

The expectation on which the doctrine of state responsibility rests—that the national government is empowered to compel subnational governmental unit treaty compliance—is a fiction. For many nations, the gap between the state responsibility doctrine's assumptions about national government power and the reality of limited national government power is generally a rather large one.[47] And that is no less the case for the United States, where constitutional and practical limitations combine to create a substantial gap between the expectations of the doctrine of state responsibility and the reality of federal government ability to compel state treaty compliance. I offer a much more thorough catalog of these limitations in Part II;[48] for now I provide a brief overview of constitutional limitations, and then note how practical considerations further restrain federal government action.

Simply put, the doctrine of state responsibility and vertical separation-of-powers do not mesh. The U.S. Constitution establishes a federal government but also presupposes the continued existence of state governments as distinct sovereigns within the federal system.[49] The national government is a government of limited powers,[50] and the Tenth Amendment mandates that the powers not specifically delegated by the Constitution to the federal government are reserved for the states and the people.[51] In turn, the Supreme Court has interpreted the Tenth Amendment to give rise to the anticommandeering principle, which restricts federal legislative capacity to compel states and state officials to take affirmative steps to implement federal law.[52] While the federal government can create incentives for states to

supra note 7, at 717–20, 724–25, has corresponded to the marginalization of negotiations between and among central governments, *see* Spiro, *supra* note 44, at 669 (arguing that negotiations between and among central governments have become empirically less important to the development of international law). The costs of including subfederal governmental units in the establishment of international law have decreased. *See id.* at 669–70.

47. *See* Swaine, *supra* note 1, at 451–53.

48. *See infra* Part II.

49. *See, e.g.*, Bradford R. Clark, *Translating Federalism: A Structural Approach*, 66 GEO. WASH. L. REV. 1161, 1192 (1998) ("Throughout its text, the Constitution presupposes the continued existence of the states.").

50. *See, e.g.*, *id.* at 1177.

51. 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.").

52. *See* New York v. United States, 505 U.S. 144, 188 (1992); Printz v. United States, 521 U.S. 898, 919–20 (1997).

change their laws[53] and "conditionally preempt" state laws that do not comply with federal requirements,[54] it cannot absolutely mandate that the states affirmatively enact laws themselves.[55]

The same concerns of comity that animate the constitutional protection of state autonomy also may convince the federal government to refrain from undertaking action in respect of the states that the Constitution would permit. Beyond simple respect for the state governments, it may be that a desire to encourage state cooperation (writ large) discourages the government from impinging on state sovereignty even when it is constitutionally free to do so.

The doctrine of state responsibility, and limitations on the federal government's ability to compel states into treaty compliance, thus provide an *opportunity* for states to engage in doubly cooperative federalism. But do they have a *motive* to do so?

In fact, states may at times find it in their self-interest to flout treaty requirements. Even if the federal government endorses a treaty—and indeed even if there is a strong national constituency supportive of the treaty—that may not be enough to sway a state whose constituents feel especially strongly about behavior that violates a

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53. *See generally* South Dakota v. Dole, 483 U.S. 203 (1987) (upholding the constitutionality of a federal statute that hinged the award of federal funds on states setting the drinking age at the level set in statute); Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 858–65 (1998).

54. *See* Hills, *supra* note 53, at 866 ("Under [a] system [of conditional preemption], Congress enacts a general regulatory scheme, delegating implementation to the states on the condition that the states submit an acceptable implementation plan to the federal government."); *see generally id.* at 866–71.

55. To be sure, the Tenth Amendment does not preclude Congress from enacting laws that apply to state governments. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546–47 (1985) (overruling Nat'l League of Cities v. Usery, 426 U.S. 833 (1976)). *Garcia* does not go so far, however, as to empower Congress to enact a law that forces states to enact their own laws. Beyond that, while not a constitutional restriction, a canon of statutory construction—the so-called federalism avoidance canon—directs that, absent a clear statement from Congress, courts should interpret statutes if possible to avoid infringing upon traditional areas of state and local government sovereignty. *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 456–70 (1991).

Also, the Supremacy Clause directs that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." U.S. CONST. art VI, cl. 2. However, the Supremacy Clause simply directs that any law that the national government promulgates is binding on the states. It does not empower the national government to compel the states to enact laws. Nor does it aggrandize the national government's limited, enumerated powers. *See* Armstrong v. Exceptional Child Ctr., Inc., 135 S. Ct. 1378, 1383 (2015).

treaty's provisions.[56]

Now the benefit a state (or more precisely a state government and its officials by satisfying the preferences of the state citizenry) may gain by flouting a treaty requirement potentially may be offset by the reaction of a foreign nation (or multiple foreign nations) to that breach. Historically, the ability of a foreign nation to target a breaching subnational governmental unit for retaliation was limited: obstacles plagued efforts both to identify the responsible subnational unit and also (even if that were possible) to target successfully that subnational unit for retaliation.[57] To a large degree, however, that is no longer the case.[58]

Still, the age of globalization bears witness to substantial incentives for subnational units to breach treaties. Diplomatic pressure from a foreign nation and economic retaliation—a foreign government's best "hammer" against a state—both may prove fruitless if either (i) the state has too little economic dealing with the foreign country for trade sanctions to matter,[59] or (ii) whatever the size of the economic dealings put at issue, the people of the state care more about the behavior that gives rise to the treaty breach.[60]

B. Doubly Uncooperative Federalism in Practice

Part of the genesis for the Constitution was state behavior inconsistent with the treaties entered into by the United States under the Articles of Confederation.[61] But recent years have seen their own prominent examples of doubly uncooperative federalism. In this Section, I discuss two of them: the statewide legalization of marijuana

56. *Cf.* Bulman-Pozen & Gerken, *supra* note 16, at 1270 ("Even when state officials carry out federal programs, their constituencies are based within the state.").

57. *See supra* note 45.

58. *See supra* note 46.

59. One can imagine two general possibilities. First, some states—like California—have such large and diversified economies that, if left to their own devices, would have substantial leverage on the international stage and is unlikely to be subject to successful retaliation, at least by a single nation or small group of countries. *See* Peter J. Spiro, *The States and Immigration in an Age of Demi-Sovereignties*, 35 VA. J. INT'L L. 121, 168 (1994). Second, there may be some states—in general more likely than not smaller states—that simply have too few economic dealings with a particular country or group of countries to make successful retaliation a likely prospect. *See id.* at 168.

60. *See* Jonathan Remy Nash, *Null Preemption*, 85 NOTRE DAME L. REV. 1015, 1058–61 (2010) (discussing ways in which federal and state governments may validly differ on matters of policy, including in the foreign policy context).

61. *See supra* note 11 and accompanying text.

as inconsistent with international narcotics treaties ratified by the U.S. government and states' failure to provide arrested foreign nationals with consular access in violation of a duly ratified international treaty.

1. State Legalization of Marijuana

Consider first the Single Convention on Narcotic Drugs,[62] to which the United States is a party. The Convention calls for signatories "to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs,"[63] and indeed to criminalize drug possession and trafficking.[64] How does the decision by a growing number of states to decriminalize marijuana[65]—a substance that falls within the ambit of the Convention[66]—affect the nation's compliance with the treaty? Even if the federal government continues to prohibit marijuana possession and trafficking as federal crimes, the anticommandeering principle would seem to preclude the possibility that the federal government could force states to reinstate *state legislation* criminalizing possession and distribution of marijuana.[67] And it is

62. Single Convention on Narcotic Drugs, Mar. 30, 1961, 18 U.S.T. 1407, 520 U.N.T.S. 151 [hereinafter "Single Convention"].

63. *Id.* art. 4(c).

64. *Id.* art. 36(1). It is sometimes argued that, though punishment may technically be required, the Convention allows underenforcement of existing laws. *See, e.g.*, Steven B. Duke, *The Future of Marijuana in the United States*, 91 OR. L. REV. 1301, 1316–17 (2013) (explaining that the "common belief that the drug control treaties . . . prohibit any signatory state from legalizing the drugs covered by the treaty" is the reason "why it is often said that the Netherlands does not legalize the distribution of marijuana but merely declines to prosecute the 'coffee houses' that openly serve the drug to consumers").

65. *See, e.g.*, Thomas Fuller, *Californians Legalize Marijuana in Vote that Could Echo Nationally*, N.Y. TIMES (Nov. 9, 2016), http://www.nytimes.com/2016/11/09/us/politics/marijuana-legalization.html (noting that California, Massachusetts, and Nevada have now joined Alaska, Colorado, Oregon, Washington, and the District of Columbia as jurisdictions that have legalized recreational marijuana). A much larger number of U.S. jurisdictions have decriminalized the use of marijuana products for medical purposes. *See* Sam Kamin & Eli Wald, *Public Lawyers and Marijuana Regulation*, PUB. LAW., Winter 2015, at 14, 14 (noting that twenty-three states along with the District of Columbia have legalized marijuana for medical purposes).

66. Cannabis, defined in article 1, is listed on Schedule I of the Single Convention. Single Convention, *supra* note 62, art. 1, sched. I.

67. *See* Duke, *supra* note 64, at 1305–06; Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1446 (2009); *infra* note 119 and accompanying text. The federal government is free to ban activities that the states affirmatively do not criminalize.

doubtful that the Court's holding in *Missouri v. Holland*[68]—that Congress has greater breadth to enact laws when it acts pursuant to a ratified treaty—extends to grant Congress the greatest possible commandeering power: the power to force states to enact laws.[69]

Limits on federal government power notwithstanding, strict application of the doctrine of state responsibility would seem to mean that U.S. state actions have put the United States in breach. The doctrine is understood to apply regardless of whether the federal government has any power to control subfederal governmental units. Indeed, shortly after Colorado and Washington decriminalized marijuana, Raymond Yans, the President of the International Narcotics Control Board,[70] "stated that 'these developments are in violation of the international drug control treaties . . . .'"[71] More recently, Yury Fedotov, the executive director of the United Nations Office on Drugs and Crime, told reporters, "I don't see how [the new laws] can be compatible with existing conventions."[72]

See, e.g., Gonzales v. Raich, 545 U.S. 1 (2005) (upholding Congress' power under the Commerce Clause to criminalize the production and use of home-grown marijuana even where the marijuana in question would fall within a state's medical marijuana exception). This, however, only results in the federal government criminalizing the activity; it does not compel the state to conform.

68. 252 U.S. 416 (1920); *see infra* notes 106–16.

69. *See infra* note 119 and accompanying text. The Court recently signaled it might be, if anything, open to reining in *Holland*. *See infra* notes 114–17 and accompanying text.

70. "The International Narcotics Control Board (INCB) is an independent, quasi-judicial expert body established by the Single Convention on Narcotic Drugs of 1961 . . . ." *About*, INT'L NARCOTICS CONTROL BD., http://www.incb.org/incb/en/about.html (last visited Nov. 26, 2016).

71. Press Release, Int'l Narcotics Control Bd., INCB President voices concern about the outcome of recent referenda about non-medical use of cannabis in the United States in a number of states (Nov. 15, 2012), http://www.incb.org/documents/Publications/PressRelease/PR2012/press_release_151112.pdf. Yans also cited "the commitment of the Government of the United States to resolve the contradiction between the federal and state levels in the implementation of that country's obligations under the drug control conventions." *Id.* *See also* M. Wesley Clark, *Can State "Medical" Marijuana Statutes Survive the Sovereign's Federal Drug Laws? A Toke Too Far*, 35 U. BALT. L. REV. 1, 26 (2005) (to the same effect). *Cf.* Int'l Narcotics Control Bd., Rep. of the Int'l Narcotics Control Bd. for 2012, U.N. Doc. E/INCB/2012/1, at 66 (Mar 5, 2013), http://www.incb.org/documents/Publications/AnnualReports/AR2012/AR_2012_E_Chapter_III_Americas.pdf ("The Board requests that the Government of the United States take effective measures to ensure the implementation of all control measures for cannabis plants and cannabis, as required under the 1961 Convention, in all states and territories falling within its legislative authority.").

72. *U.S. States' Pot Legalization Not in Line with International Law: U.N. Agency*, REUTERS (Nov. 12, 2014), http://www.reuters.com/article/2014/11/12/us-usa-drugs-un-

Others have argued that the terms of the treaty break the causal chain between a state violation of the treaty and a breach by the federal government.[73] The Convention expressly makes the obligation to criminalize drug activity "subject to [a signatory's] constitutional limitations."[74] Maybe, the argument goes, the constitutional status of the anticommandeering principle[75] thus protects the federal government from a breach.

My point here is not to resolve these disputes, but rather to highlight how this setting can readily be seen as an example of uncooperative federalism. The legalizing states' actions seems inconsistent with the Single Convention; the only question is whether the Single Convention itself excuses state conduct, and thus provides an exception to the doctrine of state responsibility.

2. Rights of Arrested Foreign Nationals

Another illustrative example is provided by the application of the Vienna Convention on Consular Relations ("Vienna Convention")[76] to defendants in state criminal proceedings. The Vienna Convention—to which the United States is a signatory—mandates that a national of one country arrested in another be given the opportunity to notify his or her national consulate of his or her arrest.[77] In 1998, the Supreme Court held that claims raising Vienna Convention violations are subject in federal habeas review to ordinary state procedural default rules: absent a showing of cause and prejudice, the

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idUSKCN0IW1GV20141112.

73. *See* Jacob Sullum, *An Anti-Drug Treaty Cannot Authorize the Feds to Make States Ban Marijuana*, REASON.COM: HIT & RUN BLOG (Nov. 23, 2012, 9:49 AM), http://reason.com/blog/2012/11/23/a-treaty-cannot-authorize-the-feds-to-ma (noting Patrick Gallahue's argument that the fact that the Convention is "subject to [a signatory's] constitutional limitations" allows U.S. states to legalize marijuana without putting the nation in breach).

74. This could mean a limitation under *Holland* itself, or a limitation read into *Holland* by virtue of the treaty language. *See infra* text accompanying notes 219–20.

75. Single Convention, *supra* note 62, art. 36(1)(a). The anticommandeering principle emanates from the Tenth Amendment. *See* Printz v. United States, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144 (1992); *supra* notes 49–55 and accompanying text.

76. Vienna Convention, *supra* note 38.

77. *See id.* art. 36(1)(b) ("[I]f he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. . . . The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph.").

argument is waived unless the defendant raises it in a timely fashion before the state courts.[78] Then, in a pair of rulings in the early 2000s, the International Court of Justice ("ICJ") held that the United States had violated the Vienna Convention when state law enforcement officials failed to advise fifty-one named foreign nationals of their consular notification rights.[79] The ICJ further held that the Vienna Convention entitled those named individuals to reconsideration of their state court convictions and sentences, notwithstanding the fact that their Vienna Convention claims were procedurally defaulted under state law.[80] At the time of these decisions, the United States was a signatory to the Optional Protocol Concerning the Compulsory Settlement of Disputes ("Optional Protocol"),[81] which awarded jurisdiction to the ICJ to resolve "[d]isputes arising out of the interpretation or application of the [Vienna] Convention" in suits brought by parties to the Optional Protocol.[82] Shortly after the ICJ's second decision, the United States gave notice of its withdrawal from the Optional Protocol.[83]

Subsequent to the ICJ rulings, the Supreme Court reaffirmed its earlier holding that state procedural rules trumped Vienna Convention claims,[84] even where the person claiming the benefit of the

78. *See* Breard v. Greene, 523 U.S. 371, 375–76 (1998) (per curiam).

79. Avena and Other Mexican Nationals (Mex. v. U.S.) ["Avena"], Judgment 2004 I.C.J. 12 (Mar. 31); LaGrand (Ger. v. U.S.), Judgment 2001 I.C.J. Rep. 466 (June 27).

80. The ICJ reasoned that the application of procedural default to Convention claims "prevent[s] 'full effect'" from being given to Vienna Convention rights. *LaGrand*, 2001 I.C.J. at 497–98, ¶ 91 (quoting Vienna Convention art. 36(2)); *accord Avena*, 2004 I.C.J. at 57, ¶ 113.

81. Optional Protocol, *supra* note 38.

82. *Id.* art. I.

83. Letter from Condoleezza Rice, Sec'y of State, to Kofi A. Annan, Sec'y–Gen. of the U.N. (March 7, 2005), http://www.state.gov/documents/organization/87288.pdf.

84. *See* Sanchez-Llamas v. Oregon, 548 U.S. 331 (2006). There, a foreign national—Mario Bustillo, a Honduran national not named in either ICJ case—advanced a Vienna Convention violation based on the ICJ's holdings. The Supreme Court heard the case on appeal from the Virginia state courts, which had denied Bustillo post-conviction relief on the ground that he had waived his claim under state law by failing to raise it before the trial court or on direct review. *See id.* at 340–42, 351. The Supreme Court rejected Bustillo's argument, reasoning that, (i) while the ICJ holdings were entitled to "'respectful consideration,'" *id.* at 355 (quoting Breard v. Greene, 523 U.S. 371, 375), they were not binding on U.S. courts, *see Sanchez-Llamas*, 548 U.S. at 353–55, and (ii) *Breard* was better reasoned than the ICJ decisions, *see id.* at 356–57. The Court explained that the ICJ was wrong to say that procedural default rules fail to give "full effect" to Vienna Convention rights, noting that the very same rule applies to rights guaranteed by the U.S. Constitution. *See id.* at 356. It also observed that the ICJ reading of the Convention "sweeps too broadly, for it reads the 'full effect' proviso in a way that leaves little room for Article 36's clear

Convention was himself a party purportedly awarded relief by the ICJ.[85] The Court in *Medellín v. Texas* acknowledged that the ICJ's decisions created a binding international legal obligation on the United States.[86] The *Medellín* Court emphasized, however, that the question before it was the *distinct* question of whether the ICJ's decisions had any domestic legal effect.[87] On that score, the Court concluded that the Optional Protocol was non-self-executing[88] and that, as a consequence, it had no domestic legal effect in the absence of implementing legislation by Congress.[89] As such, the Texas state courts had acted appropriately in denying Medellín relief.

The *Medellín* majority opinion highlights Texas's authority to engage in doubly uncooperative federalism. Accepting that Texas's failure to afford Medellín his consular rights clearly constituted a violation—attributable to the United States government—of the Vienna Convention, consider the extent to which Texas's decision to subject assertion of Convention rights to procedural default constituted a *second* violation of law. The ICJ's decisions confirm that there was indeed a second violation, but the view from domestic law was fractured. While the Supreme Court in *Medellín*—as well as Justice Stevens's concurrence—acknowledged the resulting international law

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instruction that Article 36 rights 'shall be exercised in conformity with the laws and regulations of the receiving State.'" *Id.* at 357 (quoting Vienna Convention, *supra* note 38, art. 36(2)).

85. *See* Medellín v. Texas, 552 U.S. 491 (2008). *Medellín* raised a question left open by *Sanchez-Lopez*: whether the result might be different if a procedurally defaulted Vienna Convention claim were advanced by a national actually named in one of the ICJ cases (Medellín, a Mexican national). *See Sanchez-Llamas*, 548 U.S. at 355.

86. *See Medellín*, 552 U.S. at 504 ("No one disputes that the *Avena* decision—a decision that flows from the treaties through which the United States submitted to ICJ jurisdiction with respect to Vienna Convention disputes—constitutes an *international* law obligation on the part of the United States.").

87. *See id.* ("The question we confront here is whether the *Avena* judgment has automatic *domestic* legal effect such that the judgment of its own force applies in state and federal courts.").

88. A self-executing treaty is incorporated into domestic law immediately upon ratification. A non-self-executing treaty is not; its incorporation requires implementing legislation. *See supra* notes 37–38 and accompanying text.

89. *See Medellín*, 552 U.S. at 522–23 ("[W]hile the ICJ's judgment in *Avena* creates an international law obligation on the part of the United States, it does not of its own force constitute binding federal law that pre-empts state restrictions on the filing of successive habeas petitions."); *see generally id.* at 504–23. Consistent with the notion that a non-self-executing treaty requires implementing legislation, the *Medellín* Court went on to hold that executive action by the President alone was insufficient to make the *Avena* holding binding domestic law. *See id.* at 523–32.

violation (attributable again to the United States),[90] the Court held that the Optional Protocol—that made the ICJ's decisions binding on the United States as a matter of international law—was non-self-executing,[91] which rendered it a nullity for purposes of *domestic* law. This left Texas free not to abide by the ICJ's decisions, even though that choice put the United States in breach of the Optional Protocol.

The aftermath of the decision in *Medellín* confirms the extent to which doubly uncooperative behavior can be robust and immune from federal government efforts to modify it. Despite an executive order calling upon states to give effect to the *Avena* decision[92]—and a Supreme Court Justice's plea that Texas act so as to "[protect] the honor and integrity of the Nation"[93]—Texas refused to commute Medellín's sentence. With Congress also taking no action, the path was clear for Medellín's execution.[94]

As these examples indicate, doubly uncooperative federalism can generate a substantial failure of treaty enforcement, lack of clarity over treaty compliance, and conflicting judicial pronouncements over treaty compliance. Importantly, the problem shows no signs of dissipating. To the contrary, it seems likely that the problem will only continue to grow in the years to come. As Professor Julian Ku has explained, "[A]s international treaties begin to regulate activities previously considered within the traditional jurisdiction of the states, treaties that result in state control over international law obligations will likely become more commonplace."[95] And, with greater state control over international obligations will come more opportunities for state disobedience.

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90. *See id.* at 536 (Stevens, J., concurring) ("Having already put the Nation in breach of one treaty, it is now up to Texas to prevent the breach of another."). *See generally supra* note 59 and accompanying text.

91. *See supra* notes 87–88 and accompanying text.

92. The President intended the executive order to bind the state courts, but the Supreme Court in *Medellín* found the order to lack binding effect. *See Medellín*, 552 U.S. at 523–32.

93. *Id.* at 537 (Stevens, J., concurring) ("When the honor of the Nation is balanced against the modest cost of compliance, Texas would do well to recognize that more is at stake than whether judgments of the ICJ, and the principled admonitions of the President of the United States, trump state procedural rules in the absence of implementing legislation.").

94. *See* Manuel Roig-Franzia, *Mexican National Executed in Texas*, WASH. POST (Aug. 6, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/08/06/AR2008080600007.html.

95. Ku, *supra* note 1, at 463.

II. THE RESILIENCE OF DOUBLY UNCOOPERATIVE FEDERALISM: CONSTRAINTS ON THE FEDERAL GOVERNMENT'S ABILITY TO COMPEL SUBNATIONAL GOVERNMENTS INTO COMPLIANCE WITH TREATIES

The previous Part discussed briefly the anticommandeering principle, and alluded to other limitations on the federal government's power to compel states into compliance with treaties into which the federal government has duly entered. In this Part, I explore those limitations, both legal and practical.

Three preliminary notes are in order. First, it is important to explain the limited scope of my claim here. I do not assert that states will never voluntarily comply with treaties on their own accord; to the contrary, they often do.[96] My focus here is on the converse setting—where states engage in doubly uncooperative federalism and affirmatively do not comply. It is in those settings that the doctrine of state responsibility will hold the national government responsible for state noncompliance.

Second, the discussion below refers (except as specifically noted) to both self-executing and non-self-executing treaties. There are two reasons for this. For one thing, as I have noted above, the doctrine of state responsibility applies irrespective of whether a treaty is self-executing or non-self-executing.[97] For another, the mere fact that a treaty is self-executing does not mean that would-be violations are automatically eradicated. Just because there exists in theory a domestic legal obligation does not mean that that obligation cannot be flouted.[98] The question becomes (assuming states do not want to cooperate in treaty compliance) the extent to which, and by whom, domestic legal obligations under self-executing treaties are enforcea-

96. *See supra* note 5 and accompanying text.

97. *See supra* note 38 and accompanying text.

98. *Cf.* Dale A. Nance, *Guidance Rules and Enforcement Rules: A Better View of the Cathedral*, 83 VA. L. REV. 837, 865 (1997) ("From the Holmesian ['bad man'] point of view, the nominal remedy cannot be determinative of conduct unless it is effective."). To be sure, Professor Nance highlights the importance of "guidance rules" that guide actors who wish to follow the law because of its legitimacy, even absent the prospect of enforcement. *See generally id.* at 858–61. Here, we are more concerned with the 'bad man' setting, since we have assumed that we are dealing with subfederal governmental units that are on their own unlikely to comply with treaty obligations. *Cf.* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897) ("If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.").

ble against states.[99] Legal and practical limitations constrain the enforcement option.

Third, I advert to the anticommandeering principle at various points throughout the discussion below.[100] This is because—whatever the method of treaty enforcement and the branch(es) of the federal government on which the method relies—the anticommandeering principle to some degree at least constrains the federal government's ability to compel a state to enact a law, even if the terms of a treaty call for such state action.

A. Action by the Federal Government Directly Against States

1. Federal Legislation Directed Toward the States

Let us consider first the possibility of federal legislation designed to force states into treaty compliance. If Congress enacts valid legislation, that legislation displaces contrary state law under the Supremacy Clause.[101] The question becomes, then, how broadly Congress may legislate to enforce a treaty.

To begin, Congress may act, as always, pursuant to one of its ordinary enumerated powers under Article I, and subject to the Tenth Amendment's proviso that "[t]he 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."[102] In the treaty context, however, current Supreme Court precedent provides an even wider berth. Justice Holmes' famous opinion in *Missouri v. Holland* explained that ratification of a treaty empowers Congress to act in areas that, but for the treaty, would be reserved to the states under the Tenth Amendment.[103] Owing to the Constitution's Treaty[104] and

99. *Cf.* Carlos Manuel Vázquez, *Treaties and the Eleventh Amendment*, 42 VA. J. INT'L L. 713, 737 (2002) ("[T]he Eleventh Amendment does not limit the federal government's power to impose primary obligations on the States. It merely denies the federal government the power to give efficacy to those obligations by subjecting States to certain forms of remedial obligations.").

100. *See infra* notes 102–22, 127, and 136 and accompanying text.

101. *See* U.S. CONST. art. VI, cl. 2.

102. U.S. CONST. amend. X.

103. Missouri v. Holland, 252 U.S. 416, 432–35 (1920) (holding that the Tenth Amendment imposes no limitation on Congress's power to legislate under a treaty). Indeed, the breadth of *Holland* is all the more remarkable in light of the fact that any international or global motive behind the treaty was lacking. *See* Ahdieh, *supra* note 7, at 1205–06 ("[N]egotiation and adoption of the relevant treaty was not motivated by any international impulse. Rather, it arose out of Elihu Root's sense that such a treaty was the best means to

Necessary and Proper Clauses,[105] Congress has greater constitutional latitude to enact domestic laws when it acts pursuant to a ratified treaty.[106] *Holland*'s scope was limited somewhat by the 1957 decision in *Reid v. Covert*,[107] where the Court held that neither a treaty, nor legislation enacted pursuant to a treaty, may contravene any provision of the Bill of Rights.[108]

Following decades of robust debate over the merits of *Holland* by politicians[109] as well as legal practitioners and scholars,[110] the Supreme Court recently indicated in granting certiorari its willingness to reconsider *Holland*'s vitality.[111] In the end, however, the Court decided the case without disturbing the holding in *Holland*.[112]

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defend the underlying U.S. legislation against constitutional challenge." (footnotes omitted)).

104. U.S. CONST. art. II § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . .").

105. *Id.* art. I, § 8, cl. 18 ("The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.").

106. *See Holland*, 252 U.S. at 432 ("If the treaty is valid there can be no dispute about the validity of the statute . . . as a necessary and proper means to execute the powers of the Government.").

107. 354 U.S. 1 (1957).

108. *Id.* at 16–18.

109. *See* Hathaway et al., *supra* note 6, at 260–62 (detailing history of the various forms of the "Bricker Amendment," a proposed constitutional amendment (one form of which nearly became law) that would have alternatively restricted the government's ability to enter into self-executing treaties, Congress's ability to enact executing legislation beyond its non-treaty-based constitutional powers, and the government's ability to enter into treaties that are inconsistent with the Constitution); *see also* Jide Nzelibe, *Strategic Globalization: International Law as an Extension of Domestic Political Conflict*, 105 NW. U. L. REV. 635, 658–74 (2011) (elucidating the partisan nature of the Bricker Amendment debates).

110. *Compare* Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390 (1998) (arguing that *Holland* might appropriately be overruled), *and* Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867 (2005) (arguing that the holding in *Missouri v. Holland* is wrong), *with* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 302 cmt. d ("[T]he Tenth Amendment, reserving to the several States the powers not delegated to the United States, does not limit the power to make treaties or other agreements."), *and* 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) (defending *Holland*).

111. *See* Petition for Writ of Certiorari at *i–ii*, Bond v. United States, 134 S. Ct. 2077 (2014) (No. 12-158), 2012 WL 3158880, at **i–ii*.

112. *See Bond*, 134 S. Ct. at 2077, 2093–94 (deciding the case on the ground that the

Thus, *Holland* remains good law, at least for the time being.[113]

But whatever the scope of Congress's power to enact legislation pursuant to a ratified treaty, the constitutionally protected role of the states in the federal system renders mandatory federal legislation less viable. Tenth Amendment anticommandeering doctrine restricts federal legislative capacity to compel states and state officials to implement federal law.[114] At the same time, most commentators agree that the federal government's Treaty Power provides Congress with more leeway when it comes to requiring states to comply with treaty requirements.[115] Additionally, Congress may find it possible to employ "conditional preemption"—that is, a federal law that preempts state law only to the extent that state law does not conform to treaty requirements.[116] All that being said, the federal government's power to commandeer is at a nadir when it tries to compel a state to enact laws, even if a treaty would be violated by a state's failure to enact laws called for by the treaty regime.[117]

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criminal statute there at issue would not be presumed to reach purely local conduct); *id.* at 2087 (noting the *Holland* issue, but explaining that the constitutional issue need not be reached since the case can be decided on another ground).

113. Three concurring Justices in *Bond* indicated that the Court's extant jurisprudence affords Congress too much domestic power under the Treaty Clause. *See id.* 134 S. Ct. at 2094 (Scalia, J., concurring); *id.* at 2102 (Thomas, J., concurring); *id.* at 2111 (Alito, J., concurring).

114. *See supra* notes 50–55 and accompanying text.

115. *See* Carlos Manuel Vázquez, Breard, Printz, *and the Treaty Power*, 70 U. COLO. L. REV. 1317, 1346–48, 1350–58 (1999) (suggesting limits on the anticommandeering doctrine in the treaty context). Other commentators question the applicability of the doctrine in the treaty context at all. *See* Hathaway et al., *supra* note 6, at 273–74 (noting "many reasons to think the anticommandeering doctrine does not apply with full force in the treaty context"); Gerald L. Neuman, *The Global Dimension of RFRA*, 14 CONST. COMM. 33, 52 (1977) (suggesting "the inapplicability of *New York v. United States* to exercises of the treaty power"); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1260 (1995) (describing "the enactment of directives commandeering the states as such" as "a limit not applicable, of course, to the treaty power"). *See also* Swaine, *supra* note 1, at 423–33 (describing it as unclear whether the anticommandeering doctrine applies at all in the treaty context, but suggesting that even if it does it is subject to some limitation).

116. *See* New York v. United States, 505 U.S. 144, 174 (1992) (upholding federal law that gave state choice between agreeing to administer a federal regulatory regime and having state law preempted by federal law); Vázquez, *supra* note 115, at 1324–50 (discussing the possible use of conditional preemption in the context of treaties). Not everyone agrees that conditional preemption will always satisfy the anticommandeering rule in the treaty context. *See infra* note 254 and accompanying text.

117. *See, e.g.*, LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 193–94 (2d ed. 1996) ("There are perhaps remnants of state sovereign immunity that might

Indeed, that result likely obtains even if the government exercises its prerogative to enter into a self-executing treaty. The terms of a self-executing treaty automatically become part of domestic law, and preempt inconsistent state law, by virtue of being federal law.[118] However, a self-executing treaty cannot otherwise amend *state law*,[119] nor can it mandate states to enact laws consistent with the treaty.

Beyond this, even if Congress has the power to compel a state to comply with a treaty, that does not mean that Congress will exercise that prerogative.[120] Consider the *Medellín* case, where the Supreme Court held both that the actions of the state of Texas put the United States in breach of an international obligation, and that the President could not unilaterally compel Texas to remedy matters.[121] The Court's emphasis on separation-of-powers implied that Congress could act to set things right. Yet, though it had time to act after the Court invalidated the President's unilateral action, in the end, Con-

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stir questions about . . . a treaty that commands state legislatures to adopt laws or that coopt state officials."); Mikos, *supra* note 67, at 1446 ("[T]he anti-commandeering rule constrains Congress's power to preempt state law in at least one increasingly important circumstance—namely, when state law simply permits private conduct to occur—because preemption of such a law would be tantamount to commandeering."); Vázquez, *supra* note 115, at 1356 (describing the notion that the federal government might require states to enact laws as "something even dissenters in *Printz* regarded as unconstitutional."). *But cf.* Hathaway et al., *supra* note 6, at 272 (seeming more dubious on the question, by noting that, "[a]pplied to the treaty context, anticommandeering *might appear* to prevent the federal government from using treaties to force state legislatures to pass regulations") (emphasis added).

118. Insofar as a self-executing treaty is one that has "automatic domestic effect as federal law upon ratification," Medellín v. Texas, 552 U.S. 491, 505 n.2, that "domestic effect" applies to the states by virtue of the Supremacy Clause.

119. Whether governing federal law (including a treaty) validly preempts state law, or is unable to force a state into compliance, can be a difficult call. Professor Robert Mikos argues that congressional power turns on whether the state law departs from the "proverbial state of nature": "Congress may drive states into—or prevent states from departing from—this state of nature (preemption), but Congress may not drive them out of—or prevent them from returning to—the state of nature (commandeering)." Mikos, *supra* note 67, at 1448. *Cf.* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372–88 (1999) (finding that a federal statute governing the relationship with a foreign country occupied the field and thus validly preempted state law prohibiting that state from purchasing goods or services from companies that did business with the foreign country).

120. *See* Jack Goldsmith, *Should International Human Rights Law Trump US Domestic Law?*, 1 CHI. J. INT'L L. 327, 332–35 (2000) (identifying numerous costs that would result from an attempt to incorporate the International Covenant on Civil and Political Rights into domestic law); Duncan B. Hollis, *Executive Federalism: Forging New Federalist Constraints on the Treaty Power*, 79 S. CAL. L. REV. 1327, 1382–84 (2006) (discussing how the federal government has declined to try to use federal law to implement various treaties).

121. *See infra* note 126 and accompanying text.

gress did not take up that invitation.[122]

2. Executive Order Directed Toward the States

The power of executive orders to compel state compliance with a treaty is limited. The Court in *Medellín* made clear that the President lacks the unilateral power to convert a non-self-executing treaty into domestic law.[123] The Court emphasized that Congress had to be involved in a decision to make a treaty effective domestically—whether by ratifying a self-executing treaty or by enacting executing legislation pursuant to a non-self-executing treaty.[124] For this reason, the President's attempt to achieve the same goal via executive order ran afoul of constitutional separation of powers.[125] The *Medellín* Court left open the possibility that the President might validly exercise such power in other settings, such as where a treaty was self-executing or where Congress has indicated some intent to have a non-self-executing treaty apply domestically through the enactment of executing legislation.[126]

Of course, whatever leeway the President enjoys via executive power is necessarily circumscribed by the anticommandeering

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122. In rejecting a subsequent request for a stay of execution, the Court explained:

> Congress has not progressed beyond the bare introduction of a bill in the four years since the ICJ ruling and the four months since our [initial] ruling . . . . This inaction is consistent with the President's decision in 2005 to withdraw the United States' accession to jurisdiction of the ICJ with regard to matters arising under the Constitution.

Medellín v. Texas, 554 U.S. 759, 760 (2008). In dissent, Justice Breyer responded by offering reasons why Congress might not earlier have seen the need to promulgate legislation on point. *See id.* at 764–65 (Breyer, J., dissenting).

123. *See Medellín*, 552 U.S. at 523–32 (2008) (rejecting arguments based on the treaty and the President's role in representing the country before the United Nations, congressional acquiescence, the President's foreign affairs power, and the "Take Care" clause). *But see* Edward T. Swaine, *Taking Care of Treaties*, 108 COLUM. L. REV. 331, 342–72 (2008) (arguing that that the "Take Care" Clause vests in the President the power to enforce even some non-self-executing treaties, subject to pre-ratification limitation by treatymakers and post-ratification limitation by Congress).

124. *See Medellín*, 552 U.S. at 526–27.

125. *See id.* at 527–28.

126. *See id.* at 523 n.13 ("agree[ing]" with the dissent that it is "'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'" (quoting 552 U.S. at 564 (Breyer, J., dissenting))). *Cf.* United States v. Belmont, 301 U.S. 324, 330–31 (1937) (upholding executive agreement—assigning claims inherited by Soviet Union from Russia against Americans to the U.S. federal government—that accompanied diplomatic recognition of Soviet Union).

principle.[127] Surely the President cannot compel a state to act on his own if he could not achieve the same goal together with Congress.

3. Lawsuit Brought by the Federal Government Directly Against a State

Consider next whether the federal government might sue to compel a state to comply with a treaty. The federal government's ability to proceed will be at its maximum in the rare settings where Congress has explicitly authorized such actions.[128]

Consider now the possibility of having the federal government obtain an injunction against a state to compel compliance with a self-executing treaty.[129] While sovereign immunity poses no bar,[130] the rest of the legal landscape here is less than clear. The Supreme

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127. *See supra* notes 102–13 and accompanying text.

128. For example, legislation implementing the North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 289 (chs. 1–9), 32 I.L.M. 605 (chs. 10–22) [hereinafter "NAFTA"], "grants federal authorities exclusive power to challenge state laws for asserted incompatibility with NAFTA obligations." Robert B. Ahdieh, *Between Dialogue and Decree: International Review of National Courts*, 79 N.Y.U. L. REV. 2029, 2104 (2004). *See* 19 U.S.C. § 3312(b)(2) ("No State law, or the application thereof, may be declared invalid as to any person or circumstance on the ground that the provision or application is inconsistent with the Agreement, except in an action brought by the United States for the purpose of declaring such law or application invalid.").

129. That the federal government could not successfully sue a state for noncompliance with a non-self-executing treaty (absent implementing legislation) seems clear: since a non-self-executing treaty has no impact on domestic law, a court would have no basis to rule against the state. *Cf.* Hathaway et al., *supra* note 36, at 104 (referring to a 2011 Senate Committee on Foreign Relations report on a proposed bilateral investment treaty with Rwanda that recognized that portions of the treaty were non-self-executing, and thus "endorsed the views of the Director of the Office of Investment Affairs for the State Department, who had explained to Congress that 'should an arbitral decision [issued pursuant to the treaty's dispute resolution mechanism] conclude that law of a U.S. state is inconsistent with the BIT, the U.S. government could, if necessary, choose to initiate a legal action against the state to ensure compliance with a self-executing provision of the BIT'" (quoting Treaty Between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Rwanda, at 11, Feb. 19, 2008, S. Treaty Doc. No. 110-23)).

130. States enjoy no immunity from suits brought directly against them by the federal government. *See, e.g.*, Vázquez, *supra* note 99, at 737. The Supreme Court's current, if controversial, view is that sovereign immunity predates, and survives, the ratification of the Constitution. *See, e.g.*, Carlos Manuel Vázquez, *What is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683, 1714–44 (1997). However, because there was no federal government before the Constitution, state sovereign immunity does not apply to claims brought by the federal government. *See, e.g.*, United States v. Texas, 143 U.S. 621, 644–45 (1892).

Court has recognized the federal government's standing to bring such an action only in dicta.[131] At the same time, lower federal courts have allowed such suits,[132] to the applause of some commentators.[133]

Still, the legality of such suits is not without controversy. The federal government has argued before the ICJ that, even where action by a state might result in a breach of an international obligation, as a consequence of federalism, "Federal Government officials do not have the legal power to stop [that action] peremptorily."[134] Indeed, the questionable legality of such suits—perhaps combined with the public reaction to such efforts—may itself be a barrier to such litigation being pursued.[135]

Once again, it seems that the anticommandeering principle limits the national government's ability to harness the federal judiciary to compel states to enact laws (even if a treaty calls for the enactment of such laws).[136] Were that not the case, the government would have access to an end-run around the principle.

B. Private Lawsuits Against States and Their Officials

If the federal government itself does not want to (or cannot)

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131. Sanitary Dist. of Chi. v. United States, 266 U.S. 405, 425 (1925) (Holmes, J.) (noting that the federal government had "standing . . . to carry out treaty obligations to a foreign power bordering upon some of the Lakes concerned," but ultimately resolving the case solely on constitutional and statutory grounds). "Despite the breadth of Justice Holmes's assertion in *Sanitary District*, the Supreme Court has not directly revisited the issue of whether the United States can sue state and local governments to enjoin them from violating treaty obligations." Hathaway et al., *supra* note 36, at 102.

The Court has also recognized in dicta the constitutional authority of the federal government to criminalize actions that deprive individuals of their rights under an international treaty. *See* Baldwin v. Franks, 120 U.S. 678, 685–86 (1877) (while ultimately invalidating federal criminal prosecution of local officials, recognizing power of Congress to make criminal conspiracy to expel foreign nationals in violation of treaty).

132. *See, e.g.*, United States v. County of Arlington, 669 F.2d 925, 929 (4th Cir. 1982).

133. Hathaway et al., *supra* note 36, at 101–05 (arguing in favor of the "Public Right of Action" as a basis for federal government suits against noncompliant states and political subdivisions).

134. Counter-Memorial of the United States of America, LaGrand (Ger. v. U.S.), ¶¶ 121–24 (Mar. 27, 2000), http://www.icj-cij.org/docket/files/104/8554.pdf. Even if litigation is a viable option, moreover, the anticommandeering doctrine may limit the available relief. *See supra* notes 117–18 and accompanying text.

135. *See* Ku, *supra* note 1, at 461 (finding it "plausible" that "federal policymakers have avoided exploring the limits of their constitutional powers over the states by deferring to state control over international law").

136. *See supra* notes 102–13 and accompanying text.

force a state to comply with a treaty, it can create in others the ability either (i) to enforce treaty requirements, or (ii) to create incentives for states to come into compliance. It is theoretically possible for suits to be brought against states, state officials, intrastate governmental units (such as counties and municipalities), and those exercising color of state law. One might conceive of such suits being brought by nations who allege harm by virtue of a state breach, or by foreign nationals who allege such harm.

I offer a preliminary word on one issue that cuts across these various types of suits: state sovereign immunity. Under the Constitution,[137] states enjoy sovereign immunity against suits by private parties in federal court,[138] and against suits under federal law brought by private parties in state court.[139] Congress's ability to abrogate[140] that immunity is severely circumscribed,[141] emanating only from the Fourteenth Amendment.[142] Though the Court has never addressed

137. Though the Eleventh Amendment is often cited as the source of state sovereign immunity, the majority view on the Supreme Court understands state sovereign immunity to predate, and to survive under, the Constitution. *See, e.g.*, Sossamon v. Texas, 563 U.S. 277, 283–84 (2011). On this understanding, the Eleventh Amendment simply corrected an aberrant early Supreme Court decision (Chisholm v. Georgia, 2 U.S. 419 (1793)) and confirmed the broad vitality of state sovereign immunity. *See* Alden v. Maine, 527 U.S. 706, 712–30 (1999); Hans v. Louisiana, 134 U.S. 1 (1890).

A minority view subscribes to the "diversity theory" of the Eleventh Amendment—that the Eleventh Amendment provides for sovereign immunity in diversity cases, and that sovereign immunity is not otherwise constitutionally protected. *See, e.g.*, Atascadero State Hosp. v. Scanion, 473 U.S. 234, 258–99 (1985) (Brennan, J., dissenting); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983). *Cf.* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 183–84 (1996) (Souter, J., dissenting) (arguing that, while *Hans* was wrongly decided, its holding was worthy of stare decisis; but also arguing that the holding in *Hans* ought to be neither constitutionalized nor extended any further).

138. *See Seminole Tribe*, 517 U.S. at 54.

139. *See Alden*, 527 U.S. at 731–40.

140. If Congress does not abrogate immunity, states are free to waive it voluntarily as they see fit. *See, e.g.*, Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 675–76 (1999).

141. The limitations apply even with respect to federal claims litigated in a state's own courts. *See Alden*, 527 U.S. at 741–57.

142. *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 452–56 (1976). The Court has ruled that the Commerce Clause provide no source of congressional power to abrogate. *See Seminole Tribe*, 517 U.S. at 59–73 (overruling Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989)). Even Congress's Fourteenth Amendment power to abrogate is limited. *See, e.g.*, Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 629–47 (1999) (valid abrogation under Fourteenth Amendment requires Congress to "identify conduct

the issue, the consensus among commentators seems to be that the Treaty power does not give rise to any power to abrogate.[143]

The barriers imposed by state sovereign immunity are thus substantial. That said, *Ex parte Young*[144] allows for suits against state officials (though technically not the state) for prospective injunctive relief.[145] Additionally, sovereign immunity applies only to states, not governmental subunits within states.[146] Thus, suits for both injunctive relief and damages can be brought against municipal and county governments, and their officials.[147]

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transgressing the Amendment's substantive provisions, and [to] tailor its legislative scheme to remedying or preventing such conduct"; abrogation there at issue was not effective because Congress had not met this standard); Quern v. Jordan, 440 U.S. 332, 343–45 (1979) (absent clear statement by Congress that it intended to rely on its Fourteenth Amendment abrogation powers, section 1983 does not validly abrogate state sovereign immunity).

143. Following *Seminole Tribe*'s lead—and recognizing that the Treaty Clause, like the Commerce power, lies in the original Constitution and predates the Eleventh Amendment—numerous commentators have concluded that the Treaty power similarly gives rise to no abrogation power. *See* Swaine, *supra* note 1, at 433–41; Vázquez, *supra* note 99, at 741–42. Others have argued, to the contrary, that the Treaty power is exceptional and begets a power to abrogate. *See* Susan Bandes, Comment, *Treaties, Sovereign Immunity, and "The Plan of the Convention"*, 42 VA. J. INT'L L. 743, 744–49 (2002) (questioning whether the fundamental differences between treaties and statutory law might imbue the latter with power to abrogate state sovereign immunity); 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, 1815 n.215 (2004); Peter S. Menell, *Economic Implications of State Sovereign Immunity from Infringement of Federal Intellectual Property Rights*, 33 LOY. L.A. L. REV. 1399, 1460–61 (2000) ("Because state sovereignty has never been understood to extend to international affairs, the Eleventh Amendment would not appear to limit this aspect of Congress's Article I powers.") (footnotes omitted). There is also an argument—that the Court also has yet to address—that the Court's holding that the Constitution's Bankruptcy Clause itself abrogated state sovereign immunity in bankruptcy proceedings, *see* Cent. Va. Comm. Coll. v. Katz, 546 U.S. 356 (2006), extends to the treaty power. *See* Philip Tassin, Comment, *Why Treaties Can Abrogate State Sovereign Immunity: Applying* Central Virginia Community College v. Katz *to the Treaty Power*, 101 CALIF. L. REV. 755 (2013).

144. 209 U.S. 123 (1908).

145. *See, e.g.*, Vázquez, *supra* note 99, at 737 ("Congress would also be able to authorize suits for prospective relief against state officers who are violating obligations imposed by treaties.").

146. *See, e.g.*, Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 369 (2001) ("[T]he Eleventh Amendment does not extend its immunity to units of local government.").

147. *See, e.g.*, Vázquez, *supra* note 99, at 737 ("Congress could also authorize suits for damages against state officers who have violated treaty-based obligations."). Suits for damages are subject to defendants' assertion of qualified immunity. *See infra* note 176–177 and accompanying text.

1. Lawsuits by Foreign Governments Against U.S. States

One solution could be to have a foreign state that claims to be harmed[148] by virtue of the action of a U.S. state sue the state directly in a U.S. court for relief.[149] Professor Thomas Lee has argued that the U.S. Supreme Court in fact has original and exclusive jurisdiction to hear cases of this sort.[150] The Supreme Court, however, has never so held. And, to the contrary, the Supreme Court *has* held—in a case that apparently remains good law,[151] notwithstanding Professor Lee's arguments to the contrary[152]—that states enjoy sovereign immunity

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148. The ILC Draft Articles purport to authorize a foreign state "other than an injured States" to seek relief for treaty violations. Article 48 of the ILC Draft Articles provides:

> Any State other than an injured State is entitled to invoke the responsibility of another State . . . if:
>
> (a) The obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or
>
> (b) The obligation breached is owed to the international community as a whole.

ILC Draft Articles, *supra* note 40, art. 48. Even if that is valid international law—and even assuming a foreign state that was truly injured by virtue of a treaty breach could bring an action for relief in federal court—it is unclear whether a state that has not itself suffered injury could proceed in federal court. Under U.S. law, a plaintiff in federal court must establish that it has proper "standing," including that it has suffered a cognizable "injury in fact." It is thus questionable whether a foreign state that was not itself aggrieved would meet the requirements for "standing" in federal court. *See generally* Jonathan Remy Nash, *Standing's Expected Value*, 111 MICH. L. REV. 1283, 1284–85 (2013).

149. *But cf.* Ann Woolhandler, *Treaties, Self-Execution, and the Public Law Litigation Model*, 42 VA. J. INT'L L. 757, 785–87 (2002) (arguing against expanding standing for foreign governments to sue over individual rights, on the grounds that (i) individuals already can pursue such claims, (ii) "[g]overmental standing . . . frequently represents an attempt to evade existing defenses to individual cases," and (iii) governmental standing raises the specter of retroactive holdings that are entirely unanticipated in the absence of legislation).

150. *See* Lee, *supra* note 143 (arguing that suits by foreign countries against U.S. states for treaty violations lie within the Supreme Court's Article III original jurisdiction). That jurisdiction is understood to vest automatically (though it is subject to congressional limitation). *See Ex parte* McCardle, 74 U.S. 506, 512–13 (1868). With respect to non-self-executing treaties, the argument proceeds, the self-executing status of the Court's original jurisdiction obviates the need for treaty-executing legislation.

151. Principality of Monaco v. Mississippi, 292 U.S. 313, 320–31 (1934).

152. *See* Lee, *supra* note 143, at 1818–38. The *Monaco* Court also raised in dicta the question of whether at least certain disputes between foreign governments and U.S. states were properly heard by the courts or, instead, should be resolved by diplomats. *See* 292 U.S. at 331 (asking whether "a controversy growing out of the action of a State, which involves a matter of national concern and which is said to affect injuriously the interests of a foreign State, or a dispute arising from conflicting claims of a State of the Union and a foreign State as to territorial boundaries, should be taken out of the sphere of international negotiations and adjustment through a resort by the foreign State to a suit" in court). Professor Lee

to such suits (unless they choose to waive that immunity or Congress validly abrogates it).[153]

2. Lawsuits by Foreign Citizens Against U.S. States

In enacting legislation to implement treaties, Congress has allowed for private enforcement of treaty obligations.[154] Generally, however, these implementing statutes allow for suits against private, not government, actors (perhaps because the underlying treaties themselves concern more private than government action). That said, there are generally applicable statutes on the books—statutes authorizing federal courts to grant habeas corpus relief, and § 1983—that some courts and commentators argue provide the basis for private lawsuits against state governments and their subsidiaries and officials.

Consider first federal habeas corpus review as a means to compel states to comply with treaty obligations that may arise in connection with state criminal prosecutions. A plain reading of the federal statute authorizing federal court review of state criminal convictions[155] confirms that it is available for challenges based upon

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challenges the weight of this argument as well. *See* Lee, *supra* note 143, at 1838–49. *See also* Breard v. Greene, 523 U.S. 371, 377–38 (1998) (rejecting claim by Paraguay under § 1983 against a state to vindicate violation of the Vienna Convention against one of its citizens on the ground that the Vienna Convention does not "clearly provide[] a foreign nation a private right of action to set aside a criminal conviction and sentence for violation of consular notification provisions," and also based on state sovereign immunity; and rejecting claim by Paraguayan Consul General on the grounds that Paraguay is neither a "person" nor "within the jurisdiction" of the United States, as required by § 1983).

153. Professor Lee answers the sovereign immunity argument primarily with reliance on the notion that the states waived sovereign immunity to such suits when they ratified the Constitution. *See* Lee, *supra* note 143, at 1824–33. Professor Lee further argues that, to the extent that the Eleventh Amendment (which of course postdated the Constitution) restored states' immunity to suits by foreign states for treaty violations, Congress would be left to try to abrogate that immunity under Article I, a power he concedes that Congress probably lacks. *See id.* at 1815 n.215.

154. *See* Hathaway et al., *supra* note 36, at 77–78.

155. As Professor Oona Hathaway and her coauthors note, § 2255—which provides for post-conviction review of federal court criminal cases (just as § 2254 provides for post-conviction review of state court criminal cases)—does not expressly extend to treaty violations. *Id.* at 80 n.181. However, 28 U.S.C. § 2241—the underlying statute that authorizes federal courts to issues writs of habeas corpus—*does* expressly extend to treaty violations. *See* 28 U.S.C. § 2241(c)(3). Noting that courts have held the two sections are coextensive in their reach, Professor Hathaway and her coauthors "assume[]" that federal prisoners may allege treaty violations "under either § 2241 or § 2255." Hathaway et al., *supra* note 36, at 80 n.181. Since § 2254 expressly extends to treaty violations, *see infra*

treaty violations,[156] and the Supreme Court in *Breard v. Green*[157] endorsed (if implicitly) such a reading.[158]

Lower federal courts have allowed § 2254 claims based on treaty violations to proceed only if certain conditions are met. Most courts of appeals to have examined the question have held that, for a treaty to provide the basis for a valid § 2254 claim, (i) the treaty must be self-executing,[159] and (ii) the treaty must confer individually enforceable rights.[160] As the Third Circuit has pointed out in the context of a federal petition under § 2241,[161] it is hard to discern why § 2241 and § 2254 could not themselves be implementing legislation for non-self-executing treaties.[162] After all, both sections state that

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note 156, this is a nonissue in the context of state prisoners.

156. The statute provides: "The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws *or treaties of the United States*." 28 U.S.C. § 2254(a) (emphasis added). Though habeas relief may be available from federal district courts for treaty violations, there is an argument that decisions by federal district courts denying such relief are not appealable. *See* Vicki C. Jackson, *World Habeas Corpus*, 91 CORNELL L. REV. 303, 355–56 (2006) (noting arguments, advanced by federal and state governments to that effect, insofar as the Antiterrorism and Effective Death Penalty Act of 1996 makes a "certificate of appealability" a prerequisite for appeal of a habeas denial but authorizes issuance of a certificate only "if the applicant has made a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2)). Appeals by states require no certificate. *See* FED. R. APP. P. 22(b)(3).

157. 523 U.S. 371 (1998).

158. In *Breard*, a Paraguayan national sought federal habeas relief on the ground that he had been not been informed of his right to contact the Paraguayan consulate—a right to which he was entitled under the Vienna Convention, a treaty duly ratified by the United States. After his state court conviction became final, Breard sought habeas relief in federal court under § 2254. The Court in *Breard* did not hold that vindication of a treaty right was not cognizable on habeas. Rather, it rejected Breard's claim on the merits. *See id.* at 375–77 (rejecting Breard's petition on the grounds that (i) it was "clear that Breard [had] procedurally defaulted his claim," (ii) the Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254(a), (e)(2), barred Breard "from establishing that the violation of his Vienna Convention rights prejudiced him, and (iii) it was "extremely doubtful that the violation should result in the overturning of a final judgment of conviction without some showing that the violation had an effect on the trial," and in any event "no such showing could even arguably be made").

159. *See, e.g.*, Beazley v. Johnson, 242 F.3d 248, 267 (5th Cir. 2001).

160. *See, e.g.*, Cardenas v. Dretke, 405 F.3d 244, 253 (5th Cir. 2005).

161. Ogbudimkpa v. Ashcroft, 342 F.3d 207 (3d Cir. 2003). *See also* Atuar v. United States, 156 Fed. Appx. 555, 563 n.12 (4th Cir. 2005) (opinion of Stamp, J.) (also raising but not resolving the issue).

162. *Ogbudimkpa*, 342 F.3d at 218 n.22.

relief is available where the petitioner is held "in custody in violation of the . . . treaties of the United States";[163] the language discloses no intent to limit itself to "self-executing treaties."[164]

Section 1983 is another possible avenue by which individuals aggrieved by virtue of state actors' failure to comply with treaty requirements might seek redress. Unlike § 2254, § 1983's language makes no mention of treaty requirements.[165] On the other hand, neither does the language foreclose application to treaties.[166] Indeed, Supreme Court and lower court decisions have assumed, without deciding, that the "laws" to which the provision refers include duly ratified treaties.[167]

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163. *See* 28 U.S.C. § 2241(c)(3) ("The writ of habeas corpus shall not extend to a prisoner unless— . . . He is in custody in violation of the Constitution or laws *or treaties of the United States* . . . .") (emphasis added); *id.* § 2254(a) ("The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws *or treaties of the United States*.") (emphasis added).

164. *See Ogbudimkpa*, 342 F.3d at 218 n.22. Though the court questioned the weight of authority going the other way, the Third Circuit did not definitively resolve the question; its resolution was unnecessary to the decision in the case. Professor Steven Vladeck amplifies *Ogbudimkpa*'s strong suggestion that the habeas provisions in fact serve to implement non-self-executing treaties. *See* Stephen I. Vladeck, Case Comment, *Non-Self-Executing Treaties and the Suspension Clause After* St. Cyr., 113 YALE L.J. 2007, 2010–12 (2004). However, he takes matters a step even further, arguing that the Court's Suspension Clause jurisprudence requires, in order for habeas jurisdiction *not* to inhere with respect to a non-self-executing treaty, "a superclear statement . . . from the President and the Senate" to that effect. *See id.* at 2012–13.

165. The statutory text refers only to "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983.

166. *See* John T. Parry, *A Primer on Treaties and § 1983 After* Medellín v. Texas, 13 LEWIS & CLARK L. REV. 35, 40–43 (2009) (reviewing statutory text, and finding it inconclusive); Penny M. Venetis, *Making Human Rights Treaty Law Actionable in the United States: The Case for Universal Implementing Legislation*, 63 ALA. L. REV. 97, 130–36 (2011) (same).

167. *See, e.g.*, Breard v. Greene, 523 U.S. 371, 378 (1998) (dismissing Paraguay's claim under § 1983 for violation of the Vienna Convention not because § 1983 does not apply to treaties, but because Paraguay was neither a "person" nor "within the jurisdiction" of the United States as required by § 1983); Earle v. District of Columbia, 707 F.3d 299, 304 (D.C. Cir. 2012) (while "express[ing] no opinion on whether the VCCR is a 'law[]' within the meaning of section 1983," not withholding judgment based on the general question of whether § 1983 extends to treaties, but rather on the narrow question of "whether it is either self-executing or the subject of implementing legislation by the Congress"); Gandara v. Bennett, 528 F.3d 823, 827–29 (11th Cir. 2008) (finding that § 1983 did not support vindication of Vienna Convention rights not because § 1983 does not extend to treaties, but based on finding that the Vienna Convention on Consular Relations ("VCCR") does not give

More recently, lower federal courts have confronted the issue squarely and held that the "laws" to which § 1983 refers include duly ratified treaties.[168] Courts typically require, before § 1983 can be invoked, that the treaty (i) be self-executing,[169] (ii) "provide rights to individuals rather than only to states,"[170] and (iii) afford a private remedy to individuals.[171] On the other hand, with respect to the first prong, the reasoning that argues that the habeas statutes can themselves be executing legislation for non-self-executing treaties would seem equally applicable to § 1983.[172]

Even if § 1983 facially provides to an individual a cause of action for treaty enforcement, other considerations yet might limit the scope of available § 1983 relief. Consider that a plaintiff must have

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rise to individual rights); Mora v. New York, 524 F.3d 183, 199 n.23 (2d Cir. 2008); Cornejo v. County of San Diego, 504 F.3d 853, 858 n.8 (9th Cir. 2007). *Cf.* Baldwin v. Franks, 120 U.S. 678, 693–94 (1886) (stating in dicta that "[t]he United States are bound by their treaty with China to exert their power to devise measures to secure the subjects of that government lawfully residing within the territory of the United States against ill treatment, and if in their efforts to carry the treaty into effect they had been forcibly opposed by persons who had conspired for that purpose, a state of things contemplated by the [criminal civil rights] statute would have arisen"). *See also* Jogi v. Voges, 480 F.3d 822, 826 (7th Cir. 2007) (noting that the United States, as amicus, "concede[d]" that its argument—that the word "laws" in § 1983 did not extend to treaties—was "novel"). *See generally* Parry, *supra* note 166, at 43–49 (reviewing case law on the question and finding it inconclusive); *but see* Vazquez, *supra* note 11, at 1146–47 (arguing that § 1983 applies by its terms to treaty violations, and observing that "[t]he lower federal courts that have considered the issue have concluded that section 1983 confers a right of action of violation of treaty-based rights"). For the argument that different conceptions of international law may inform the question of whether § 1983 should be available to remedy treaty violations—whether overall, or on a treaty-by-treaty basis. *See* Jeremy Lawrence, *Treaty Violations, Section 1983, and International Law Theory*, 16 SW. J. INT'L L. 1 (2010).

168. *See Jogi*, 480 F.3d at 826–27. *But see* Parry, *supra* note 166, at 62 ("[T]he *Medellín* Court's apparent default position that treaties are not self-executing and its suggestion that non-self-executing treaty provisions are not fully federal law could extend beyond limiting habeas rights and could also frustrate the use of § 1983 to enforce treaties.").

169. *See Cornejo*, 504 F.3d at 856–67; *Jogi*, 480 F.3d at 827.

170. *Jogi*, 480 F.3d at 827; *see Gandara*, 528 F.3d at 826–29; *Cornejo*, 504 F.3d at 856. *See also* Parry, *supra* note 166, at 66–67 (suggesting that, in the wake of the Court's *Medellín* decision, lower courts have been less likely to find that even a self-executing treaty confers individual rights).

171. *See Gandara*, 528 F.3d at 828; *Jogi*, 480 F.3d at 827. The court in *Jogi* made short work of this prong. *See Jogi*, 480 F.3d at 835 (importing the holding of *Gonzaga University v. Doe*, 536 U.S. 273, 284 (2002), with respect to statutory enforcement to the context of treaties, and explaining that, once a treaty is found to give rise to an individual right, that right is presumptively enforceable under § 1983).

172. *See supra* notes 164–67 and accompanying text.

standing to pursue a claim for relief.[173] This requirement will severely limit the ability of a plaintiff to obtain an injunction directing government actors to comply with a treaty, even if the plaintiff has had his or her rights under the treaty violated by government actors. Specifically, the Supreme Court has explained that mere violation of a federal right is not a sufficient basis for standing in a suit for injunctive relief unless the plaintiff can show that such violations are almost certain to occur in all future settings, or that the government has ordered or authorized its agents to act in that way.[174] This is a very high standard to meet. As a result, § 1983 relief is likely to be limited to damages (to the extent it is available at all).

But, to the extent that a treaty provides a basis for a plaintiff to pursue damages under § 1983, that relief is unavailable when the true defendant is the state. Indeed, sovereign immunity precludes even suits for injunctions where what the injunction sought would in effect order the payment of monies out of the state treasury.[175] Finally, the availability of qualified immunity may frustrate § 1983 claimants,[176] including those advancing arguments grounded in treaties.[177]

Even if damages are available to claimants, it is unclear how valuable such a remedy is if the goal is treaty compliance. As an initial matter, one might question the extent to which an award of damages itself rectifies the treaty violation. On the one hand, the availa-

173. *See generally* Nash, *supra* note 148, at 1284–85.

174. In *City of Los Angeles v. Lyons*, plaintiff Lyons, having been subjected to a chokehold during an earlier arrest, sought to enjoin the Los Angeles Police Department from employing chokeholds to facilitate arrests in the absence of the threat of deadly force from the suspect. 461 U.S. 95, 98 (1983). The Court explained that, to establish standing, Lyons would have "to allege that he would have another encounter with the police," *id.* at 105–06, and also make the incredible assertion either (1) that all police officers in Los Angeles always choke any citizen with whom they happen to have an encounter, whether for the purpose of arrest, issuing a citation, or for questioning, or (2) that the City ordered or authorized police officers to act in such manner. *Id.* at 106.

175. *See* Edelman v. Jordan, 415 U.S. 651, 665–74 (1974) (noting that the Eleventh Amendment precluded injunction against state on grounds of "equitable restitution," ordering payment of public aid improperly withheld by state).

176. *See, e.g.*, Pearson v. Callahan, 555 U.S. 223, 231 (2009) ("The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'") (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

177. *See* Venetis, *supra* note 166, at 144; *but see* Vázquez, *supra* note 99, at 737 ("Under current doctrine, state officials are entitled to a qualified immunity which protects them from damage liability unless they violated clearly established federal law, but this immunity is widely regarded as sub-constitutional and thus alterable by Congress.").

bility of damages protects the rights afforded by the treaty by means of a liability rule.[178] But commentators debate whether a damage award truly expunges a treaty violation, or simply serves as a "fallback" of sorts that leaves the original treaty breach in place (and perhaps offers the possibility of a second treaty breach if the damages are not paid).[179]

More importantly, damage awards are unlikely to be successful at inducing subfederal governmental units to change behaviors (or to deter them from adopting such behaviors in the first place) that give rise to treaty breaches (or to deter them from adopting such behaviors in the first place). First, § 1983 damage awards are likely to be too small to generate sufficiently large deterrent effects.[180] In-

178. *See supra* note 20 and accompanying text.

179. Scholars have debated this question in the context of the dispute resolution mechanism under the World Trade Organization ("WTO"), under which a final order from the relevant tribunals leaves a nation free to adjust its laws to comply with the terms of the order or (if it refuses) instead allows the complaining nation to implement retaliatory trade measures. *Compare* John H. Jackson, Editorial Comment, *The WTO Dispute Settlement Understanding*, 91 AM. J. INT'L L. 60, 60–61 (1997) (arguing that the "'compensation' (or retaliation) approach is only a fallback in the event of noncompliance"), *with* Warren F. Schwartz & Alan O. Sykes, *The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization*, 31 J. LEGAL. STUD. 179, 189–92 (2002) (arguing that the losing party has an option to compensate in response to the treaty breach and that the system thus "is best seen as one embracing a liability rule rather than a property rule"); *see* Joel P. Trachtman, *The WTO Cathedral*, 43 STAN. J. INT'L L. 127, 146 (2007) (characterizing this debate in terms of property and liability rules, and (i) noting that "[a]lthough it is not free from doubt," the property rule understanding "is probably the better interpretation of existing WTO law," but also (ii) noting that "as a matter of fact and practice, if not as a matter of legal doctrine, the WTO legal system is best characterized as employing a liability rule, rather than a property rule").

The debate over whether a damage award expunges the violation boils down to the debate over whether (i) liability rule protection is coextensive with the entitlement itself (in which case payment of damages could be said to remedy the transfer of the entitlement), or instead (ii) a liability rule simply provides a means of enforcing the entitlement (in which case payment of damages is simply evidence of a transfer of the entitlement). For discussion, see, for example, Jules L. Coleman & Jody Kraus, *Rethinking the Theory of Legal Rights*, 95 YALE L.J. 1335, 1367 (1986) (suggesting that property and liability rules should not be treated "as ways of protecting rights," but rather "as normative rules specifying the content of rights within the transactional domain"); *see also* Madeline Morris, *The Structure of Entitlements*, 78 CORNELL L. REV. 822, 843 (1993) (Calabresi & Melamed's "rules themselves *constitute* the particular entitlement"); Nance, *supra* note 98, at 853 ("[P]roperty, liability, and inalienability rules should be considered prescriptions concerning what people should do, not descriptions of what they can or must do."); Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1749 (2004) ("Property rules and liability rules are properly thought of as different ways of defining the scope of entitlements in the domain of transfer, rather than simply as 'remedies' protecting entitlements.").

180. *See* Lawrence, *supra* note 167, at 24–25 ("It would seem unlikely, in a case such as

deed, it has been argued that courts systematically "underprice" the damages for legal violations in cases brought against governmental units.[181]

Second, even if courts correctly "price" damage awards in treaty breach cases, scholars—most prominently Professor Daryl Levinson—have argued that even sizeable damage awards may not faze governmental units, insofar as governments do not respond to price incentives as we would expect a rational actor to respond.[182] Monetary charges imposed on the public fisc do not change politicians' behavior; politicians deal in political capital.[183]

Third, scholars have noticed an asymmetry that makes it hard to understand why damage awards against governments would deter government behavior giving rise to the awards: on the one hand, proponents of the damage award approach assume that "governments must compensate those who lose from a regulation in order to value and internalize the costs of the measure with accuracy," and yet at the same time also inconsistently assume that "governments accurately value and internalize the benefits of the measure without being compensated for such benefits by those who gain from the regulation."[184]

Medellín's, that a § 1983 action would result in anything more than nominal damages, given that the Constitution provides substantially similar procedural safeguards as the VCCR. Furthermore, it is hard to imagine that nominal § 1983 damages would have much effect on state officers' behavior.").

181. *See* Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 350–52, 373 (2000) (arguing that, to the extent that courts mishandle cost-benefit analyses in the context of constitutional tort litigation, they may misprice, and thus suboptimally deter, undesirable government behavior).

182. *See id.* at 347 (arguing that, even if courts can impose proper monetary penalties for undesirable government behavior, government actors simply do not respond to monetary incentives as do private actors; rather, they respond to incentives in political capital); *see also* Vicki Been & Joel C. Beauvais, *The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International "Regulatory Takings" Doctrine*, 78 N.Y.U. L. REV. 30, 91–96 (2003); *but see* Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845, 858–67 (2001) (arguing that, even if Professor Levinson is correct that monetary penalties in constitutional tort litigation are inaccurate and do not optimally deter government actors, these monetary penalties do have at least some rough proportional translation into political capital; and further arguing that, even if monetary penalties do not provide optimal deterrence, they do provide deterrence and that deterrence is generally desirable).

183. *See* Levinson, *supra* note 181, at 347 ("Because government actors respond to political, not market, incentives, we should not assume that government will internalize social costs just because it is forced to make a budgetary outlay.").

184. Been & Beauvais, *supra* note 182, at 96.

To put it more concretely in the treaty context, the argument in favor of § 1983 damage awards' deterrent effect rests on the notion that internalization is required for the government to take account of the costs of its action. Presumably, however, there is some benefit from the state action that results in the treaty breach: in the Vienna Convention context, for example, perhaps the benefit is that (at least from one perspective) guilty people do not go unpunished, and perhaps that benefit is enjoyed by the people of the state. If that is true, it is unclear why the state should be expected to value the benefit even though those who truly benefit do not compensate the state for it, while at the same time the state should be expected to avoid contested behavior only if it is forced to compensate those who suffer as a result of it.[185]

3. Defensive Use of Treaties by Private Individuals in Lawsuits Brought by the State and State Officials

It is also possible for a defendant to invoke a treaty and argue that the case against him, her, or it is inconsistent with the treaty. Thus, for example, a defendant can raise a treaty-based defense to a state criminal prosecution.[186] This tactic is available even if the trea-

185. See generally id. at 96–97.

186. *See, e.g.*, State v. Martinez-Rodriguez, 33 P.3d 267, 272–74 (N.M. 2001) (denying criminal defendant relief under Vienna Convention not on the ground that defendant lacked standing to raise argument, but rather on the ground that the treaty does not confer individual rights); *see* State v. Navarro, 659 N.W.2d 487, 491 (Wis. Ct. App. 2003) (same); *see also* Commonwealth v. Gautreaux, 941 N.E.2d 616 (Mass. 2011) (finding, based on ICJ's *Avena* decision, merit in defendant's argument that the Vienna Convention was violated when he was not notified of his right to consular access (though not ruling that the Convention grants individual rights), and that he was, as a consequence, entitled to post-trial review of conviction, but then proceeding to conclude that he, nevertheless, was not entitled to a new trial under standard state procedural rules); Domingues v. State, 961 P.2d 1279, 1280 (Nev. 1998) (rejecting argument of criminal defendant that executing someone who committed capital offense while under eighteen was violative of the International Covenant on Civil and Political Rights not on the ground that the argument was facially off limits to the defendant, but rather on the ground that the argument was "negate[d]" by the Senate's express reservation on the issue); Commonwealth v. Padilla, 80 A.3d 1238, 1261–63 (Pa. 2013) (rejecting criminal defendant's claims of Vienna Convention violations on the merits).

An empirical study by Professor David Sloss finds that criminal defendants in both federal and state courts overwhelmingly lose cases where they raise a treaty-based defense. *See* DAVID SLOSS, *United States*, *in* THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT: A COMPARATIVE STUDY 504, 549–50 (David Sloss ed. 2009). At the same time, it may be, as Professor Sloss notes, that this is less a function of courts' general unwillingness to consider treaty-based defenses, as much as "a tough-on-crime attitude that is prevalent among U.S. judges," *id.* at 550, or the fact that "criminal defense attorneys tend

ty in question does not provide rights for individuals.[187] So-called "defensive enforcement"[188] in suits brought by states and state actors may help effectively enforce treaties against states.[189] But its scope is limited to settings where the defense is relevant to a pending lawsuit and is properly raised.

C. Federal Judicial Interpretation of the Interaction Between State Law and Treaties in Private Lawsuits

The proper interpretation of a treaty and the treaty's interplay with state law also may arise in a lawsuit between private litigants. For example, disputes over title to property sometimes turn on whether state law, or a treaty, produces the valid title.[190] While the court's ruling technically only determines the rights of the litigants to the suit, the court's reasoning and broader holding may have implications for the ability of state law to frustrate treaty compliance.

One might anticipate that a state court hearing such a case might interpret state law in a way that might frustrate treaty compli-

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to raise treaty-based defenses disproportionately in cases where defendants have a very weak case," *id.*

187. *See* Hathaway et al., *supra* note 36, at 83–87 (discussing defensive enforcement).

188. *See id.* (discussing defensive enforcement).

189. Professor David Sloss has argued that defensive enforcement may extend to at least some non-self-executing treaties. *See* David Sloss, Ex Parte Young *and Federal Remedies for Human Rights Treaty Violations*, 75 WASH. L. REV. 1103, 1111–23 (2000) [hereinafter *Federal Remedies*] (arguing that non-self-executing declarations may be seen to foreclose affirmative causes of action based on treaties, but not defensive use of treaties). He further has argued that treaty-based defenses have constitutional stature, and as such may not be overridden by either statutory authority purporting to limit defensive reliance on treaties or non-self-executing declarations. *See* David Sloss, *The Constitutional Right to a Treaty Preemption Defense*, 40 U. TOL. L. REV. 971, 986–94 (2009) [hereinafter *Constitutional Right*] (arguing that, to the extent that the NAFTA Implementation Act, *see* 19 U.S.C. § 3312(b)(2), purports to preclude criminal defendants from raising defenses based on a federal treaty, the statute is unconstitutional under the Due Process Clause); *Constitutional Right*, *supra* at 994–97 (extending the argument to declarations upon ratification that treaties are non-self-executing).

190. *See, e.g.*, Foster & Elam v. Neilson, 27 U.S. (2 Pet.) 253 (1829) (dispute over land, the resolution of which depended on the application of a treaty between the United States and Spain); Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603 (1812) (dispute over land, the resolution of which depended on the application of the treaty between the U.S. and Great Britain terminating the Revolutionary War); Smith v. Maryland, 10 U.S. (6 Cranch) 286 (1810) (same); *see* Woolhandler, *supra* note 149, at 767 (noting that historically "treaties generally created no causes of action in and of themselves, but they might create duties that could be adjudicated in a common law case by a party with a common law injury").

ance. The Supreme Court has interpreted the Constitution, and statutes granting the federal courts jurisdiction, in ways that constrain state court freedom in this regard. First, the Supreme Court has long confirmed that the Constitution authorizes,[191] and congressional statutes empower,[192] the Court to determine the validity of state court interpretations of federal treaties.[193] Second, the Court has further understood its jurisdiction to extend not just to issues of actual treaty interpretation, but beyond that to *interpretations of state law* that determine whether a treaty has application in the first place.[194]

Finally, the freedom of state courts in private litigation to frustrate treaty compliance is frustrated not only by the prospect of Supreme Court review, but by the availability of the lower federal courts as alternative fora in which to litigate cases that implicate treaty compliance. Ordinarily a state law cause of action does not "arise under" federal law within the meaning of Congress's grant of federal question jurisdiction,[195] and thus cannot be heard in federal district court absent some other basis for jurisdiction.[196] However, the Su-

191. Article III of the Constitution extends the federal judicial power "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." U.S. CONST. art. III, § 2.

192. The original Judiciary Act of 1789 affirmatively extended the Supreme Court's appellate jurisdiction to review state court decisions allegedly inconsistent with applicable treaties. *See* Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85–87. Technically, the Constitution vests appellate jurisdiction in the Supreme Court unless Congress legislates an exception to that jurisdiction. It thus is more accurate to say that Congress did not divest of jurisdiction to hear cases where the state court below issued a decision contrary to a treaty. *See Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 513 (1868). The current successor to § 25 of the 1789 Judiciary Act authorizes the Supreme Court to hear an appeal from a state court implicating a treaty (whether or not the lower court holding is contrary to the treaty). *See* 28 U.S.C. § 1257(a).

193. *Hunter's Lessee*, 11 U.S. (7 Cranch) at 627–28 (holding that Virginia's high court had misconstrued treaties between the United States and Great Britain in holding that the treaties did not apply to title to land held by British citizen and confiscated by the state under Virginia law); *See Smith*, 10 U.S. (6 Cranch) at 304–05 (explaining that the Supreme Court has jurisdiction to review a state court decision that drew in question interpretation of a treaty).

194. *See* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat) 304, 355–59 (1816) (upholding Supreme Court's power to examine Virginia high court's determination of title where that determination resulted in inapplicability of treaty provision).

195. *See* 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.").

196. A state law cause of action can be heard in federal district court where the requirements of the diversity jurisdiction statute are met, *see id.* § 1332, or where the state law cause of action is sufficiently related to another cause of action for which there is an independent basis for federal court jurisdiction, *see id.* § 1367.

preme Court has held that a state law claim "arises under" federal law—and thus *can* be heard in lower federal court[197]—if within that state law claim "a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress."[198]

A 2005 Supreme Court case confirms that state law actions to quiet title—much like the ones in Supreme Court cases involving the application of treaties to property disputes[199]—can "arise under" federal law and thus qualify for lower federal court jurisdiction.[200] And, while the dispute in *Grable* qualified for federal question jurisdiction on the basis of a substantial federal *statutory* question, there seems little doubt that the same jurisdictional result would obtain were the substantial federal question one of potentially governing treaty law.[201]

III. MITIGATING DOUBLY UNCOOPERATIVE FEDERALISM

If the federal government cannot, or is reluctant to, compel doubly uncooperative subfederal governmental units to comply with a treaty, two alternative paths present themselves. First, the national government could take steps to *induce* (without compelling) subfederal units into treaty compliance. Second, the national government could try to address matters instead by tinkering with the treaty regime itself so as to limit the extent to which subfederal unit action (or inaction) results in national government noncompliance.

197. That the case *can* be heard in federal district court does not mean that it has to be heard there. State courts generally enjoy concurrent jurisdiction with the federal courts over federal claims. *See, e.g.*, Yellow Freight Sys., Inc. v. Donnelly, 494 U.S. 820, 823–26 (1990). Plaintiffs thus are generally free to file suit in either federal or state court. To the extent that a plaintiff chooses to file federal claims in state court, the defendant is entitled to remove the claims (and related claims) to federal district court. *See* 28 U.S.C. §§ 1441(a), (c)(1).

198. Gunn v. Minton, 133 S. Ct. 1059, 1065 (2013). The *Gunn* Court elucidated that "[t]he substantiality inquiry . . . looks . . . to the importance of the issue to the federal system as a whole." *Id.* at 1066.

199. *See supra* note 13 and accompanying text.

200. Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308 (2005).

201. The statute conferring federal question jurisdiction to the district courts brings within the jurisdictional fold not only civil actions arising under "the Constitution" and "laws," but also the "treaties of the United States." 28 U.S.C. § 1331.

A. Inducing States out of Doubly Uncooperative Federalism

There are two avenues by which the national government might seek to induce states out of doubly uncooperative federalism and into treaty compliance. The national government could reward subfederal units that opt to comply, or the national government could exhort subfederal units to comply. Neither of these alternatives seems likely to achieve widespread, let alone complete, compliance. I consider each in turn.

1. Carrots

If the stick of mandatory compliance is unavailable or undesirable, the national government could exchange the stick for a carrot. It might offer subsidies to jurisdictions that voluntarily complied with treaties.[202] There are at least four problems here. First, given the growing number of treaty obligations over which state and other subfederal governmental units have influence,[203] compensating jurisdictions could prove to be an expensive proposition. Second, to the extent that wealthy jurisdictions turn out to exact large payment, some might at some point object to what would be in effect the transfer of wealth from poorer jurisdictions to wealthier ones.[204] Third, compensating jurisdictions that are otherwise unwilling to comply with treaty obligations may discourage other jurisdictions—that otherwise would voluntarily comply with those obligations—from in fact complying voluntarily; in short, the payments might "crowd out" voluntary action.[205] Last, and certainly not least, there is of course no guarantee that such an approach would actually yield substantial, let alone complete, compliance with treaty obligations.[206]

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202. *See* Vázquez, *supra* note 115, at 1325.

203. *See supra* note 95 and accompanying text.

204. *Cf.* Eric A. Posner & Cass R. Sunstein, *Climate Change Justice*, 96 GEO. L.J. 1565, 1610 (2008) (identifying the problem in the context of a proposal to have other nations compensate the United States to accede to an international global warming regime, noting that such an arrangement would be "politically delicate").

205. *Cf.* STEVEN KELMAN, WHAT PRICE INCENTIVES? ECONOMISTS AND THE ENVIRONMENT 62–69 (1981) (describing how commodifying environmental amenities may reduce altruism and spontaneity).

206. *See* Vázquez, *supra* note 115, at 1325 (noting that monetary "encouragement could be quite effective, but it would still leave open the possibility that states would refuse to comply and thus produce a treaty violation").

2. Exhortation

Another possibility is for the national government—or some branch or official thereof—to exhort subfederal governmental units to comply with treaty obligations. While exhortation may work in some cases, there is certainly no guarantee that exhortation will work on a regular basis. State responses to federal exhortation with respect to violations of the Vienna Convention on Consular Relations are instructive. On the one hand, after the ICJ handed down its decision in *Avena*, Oklahoma's Governor agreed to commute the death sentence of an individual whose consular notification rights were denied, in part in response to "the U.S. State Department [having] urged his office to give careful consideration to the United States' treaty obligations."[207] On the other hand, Texas took no such action with respect to Medellín, despite an executive order calling upon states to give effect to the *Avena* decision,[208] and a Supreme Court Justice's plea that Texas act so as to "protect[] the honor and integrity of the Nation."[209]

B. Working Around Doubly Uncooperative Federalism

This subpart discusses "workarounds"—that is, ways that the federal government might try to avoid treaty breaches even in the face of a state that threatens to engage in doubly uncooperative federalism. This subpart highlights two workarounds, and the problems attendant to each. First, the federal government might resort to "carve-outs"—that is, treaty provisions or federalism-based RUDs that purport to limit the applicability of the doctrine of state responsibility. Second, the federal government might include "breach-curing treaty provisions" in treaties themselves. These provisions provide an "escape valve" under which what would otherwise be deemed a treaty breach can be cured by the federal government. Neither of these workarounds provides a full answer to state engagement in doubly uncooperative federalism.

1. Carve-outs: Ensure that Doubly Uncooperative State Action Does Not Result in a National Government Breach

Consider first that the United States might ensure that the

207. Medellín v. Texas, 552 U.S. 491, 537 n.4 (2008) (Stevens, J., concurring).

208. The President intended the executive order to bind the state courts, but the Supreme Court in *Medellín* found the order to lack binding effect. *See id.* at 523–32.

209. *Id.* at 536 (Stevens, J., concurring); *see supra* note 93 and accompanying text.

treaty into which it enters renders the general rule—attributing state violations to the national government—inapplicable. Under this approach, by the terms of the treaty itself, the action (or omission) of a state does not put the national government in breach. To attain this result, the federal government would negotiate for the inclusion of appropriate provisions,[210] and refuse to enter into the treaty unless such provisions were present.[211]

More common than calling for an explicit statement in a treaty overcoming the attribution rule is for the United States to assert an RUD[212] that purports[213] to restrict breach based upon the doctrine of state responsibility. Such a federalism-based RUD asserts that the United States' agreement to the treaty is conditioned on the notion that matters within the purview of the states are not the responsibility of the federal government and will not be deemed to give rise to a treaty breach.[214]

Indeed, the United States has done just this with respect to several human rights treaties.[215] For example, the United States en-

210. *See* Hollis, *supra* note 120, at 1374–78.

211. *See id.* at 1372–74.

212. *See supra* note 19 and accompanying text.

213. A reservation is not always effective. A reservation cannot be incompatible with the object and purpose of the treaty to which it is attached. *See* Vienna Convention on the Law of Treaties, *supra* note 2, art. 19. Scholars debate whether an invalid reservation (i) leaves the treaty intact with the exception of the provision(s) to which the reservation related, (ii) nullifies the country's ratification of the treaty altogether, or (iii) means that the invalid reservation should be severed, with the treaty thus applying with full force. *See* Ryan Goodman, *Human Rights Treaties, Invalid Reservations, and State Consent*, 96 AM. J. INT'L L. 531, 531 (2002); *see id.* at 533–60 (arguing that the latter result is most sensible absent evidence of a ratifying state's intent to the contrary); *see also* Edward T. Swaine, *Reserving*, 31 YALE J. INT'L L. 307, 323–64 (2006) (discussing how existing reservation law disadvantages non-reserving states, and surveying reforms to change that).

214. *See* Hathaway et al., *supra* note 6, at 318–19; Hollis, *supra* note 120, at 1378–81.

215. *See* Johanna Kalb, *Dynamic Federalism in Human Rights Treaty Implementation*, 84 TUL. L. REV. 1025, 1059 (2010) ("Four of the major international human rights treaties were adopted with a 'federalism' clause, which purports to leave implementation of treaty rights to the states in those areas that historically have been under state control."). The precise import of the reservation is open to debate. *See* Louis Henkin, Editorial Comment, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341, 346 (1995) ("International law requires the United States to carry out its treaty obligations but, in the absence of special provision, does not prescribe how, or through which agencies, they shall be carried out. . . . [T]he United States [can] leave the implementation of any treaty provision to the states . . . [while] remain[ing] internationally responsible for any failure of implementation."); Kalb, *supra* at 1061 ("In practice, the federalism understanding has been viewed primarily as working to limit the incorporation of human rights treaties in U.S. domestic law because it purports to obviate the need for federal

tered a federalism-based RUD when entering into the International Covenant on Civil and Political Rights ("ICCPR").[216] In a subsequent compliance report, the federal government explained that, by including the RUD to the Covenant, the United States had put other governments worldwide on notice that:

> [T]he United States will implement its obligations under the Covenant by appropriate legislative, executive and judicial means, federal or state, and that the federal government will remove any federal inhibition to the abilities of the constituent states to meet their obligations in this regard.[217]

The United States has made similar federalism-based RUDs with respect to other treaties, including the Convention on the Elimination of All Forms of Discrimination Against Women.[218]

Even in the absence of an explicit carve-out (whether by treaty or RUD), sometimes the language of a treaty allows for the argument that the treaty *implicitly* recognizes an exception to the doctrine of state responsibility. For example, it has been argued that state legalization of marijuana does not put the United States in breach of the Single Convention on Narcotic Drugs because the treaty specifically places a member country's obligation to enact criminal penalties for narcotics "subject to [the country's] constitutional limitations."[219] And reference to relevant U.S. constitutional law suggests there is such a limitation: notwithstanding the apparent breadth of congressional power under *Missouri v. Holland*, it seems that the anticommandeering principle precludes the federal government from compelling states to enact particular laws.[220] Alternatively, even if *Holland* somehow does grant Congress that power, perhaps the language in the treaty itself is meant to refer to constitutional limitations that predate the treaty, thus rendering *Holland*'s augmentation of

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action to implement the treaty in areas traditionally reserved to the states.").

216. SENATE COMM. ON FOREIGN RELATIONS, REPORT ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, S. EXEC. REP. NO. 102-23, at 1 (1992) (reporting favorably on five reservations); *see generally* International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

217. Rep. of the Hum. Rts. Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Initial Reports of States Parties Due in 1993 Addendum: United States of America, at ¶ 4, U.N. Doc. CCPR/C/81/Add.4 (Aug. 24, 1994).

218. *See* Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564, 1637 n.349 (2006).

219. *See supra* note 73 and accompanying text.

220. *See supra* note 69 and accompanying text.

congressional power by virtue of treaty ratification irrelevant for this purpose.

In the end, reliance on a carve-out (whether in the form of a treaty provision or an RUD) will only be as effective and clear as is the carve-out itself.[221] Very often—as exemplified by the debate over whether state legalization of marijuana gives rise to a breach of the Single Convention on Narcotics[222]—the carve-out does little to resolve matters definitively.

2. Breach-Curing Treaty Provisions

A second possibility is for the federal government to ensure that the treaty has an "escape valve" of sorts, a means to cure what would otherwise be a breach originating in subnational governmental action or inaction. The paradigmatic means by which the federal government might remedy a breach would be to pay money damages,[223] i.e., to buy its way out of the breach.[224] The monetary payment

221. *See* Hollis, *supra* note 120, at 1362 (noting that the federalism RUD to the U.N. Convention Against Transnational Organized Crime "does not state that federalism *requires* the United States to decline obligations out of deference to states' rights," but merely "is framed in descriptive terms, explaining the distribution of criminal jurisdiction between federal and state authorities."); Kalb, *supra* note 215, at 1061 ("[T]he federalism understanding does not explicitly attempt to excuse the United States from its treaty obligations . . . .").

222. *See supra* Part I.B.1.

223. One could theoretically imagine other means by which a breach could be remedied. After all, a treaty may recite that almost anything can cure a breach. Still, the universe of realistic possibilities seems small. For example, it is not inconceivable that a treaty regime could declare a breach resolved simply if the offending country formally accepted responsibility for it and apologized. How often countries would voluntarily enter into such a treaty would presumably depend upon the value a country would gain from having another country accept responsibility and apologize.

224. It is important to note the distinction between this possibility and the scenario under which the federal government pays money to another country that was injured by virtue of a state's breach but only because the breach has already occurred and so the best the federal government can do is offer the money as an acceptance of responsibility *after the fact*. *See* Detlev F. Vagts, *The United States and Its Treaties: Observance and Breach*, 95 AM. J. INT'L L. 313, 330 (2001) ("Between 1890 and 1914, various western states failed to prevent mobs from lynching Italian nationals in violation of a bilateral treaty. All the presidents could do was to send apologies and funds to Rome for episodes they genuinely regretted."); Charles H. Watson, *Need of Federal Legislation in Respect to Mob Violence in Cases of Lynching of Aliens*, 25 YALE L.J. 561, 570–71 (1916) (arguing that failure of federal government to protect Italian nationals from lynching constituted treaty violation); *see* Vagts, *supra*, at 332 (describing other instances where the United States has paid money to another country in response to a perceived treaty breach).

could be made either to a private party in a foreign country harmed by the violation, to a foreign country harmed by the breach, or to some international fund.[225]

For example, the North American Free Trade Agreement ("NAFTA")[226] among Canada, Mexico, and the United States—like some other investment treaties[227]—provides for government payment of damages[228] to the extent that a foreign investor's investment is "expropriated."[229] The payment obligation falls to the national government even if a subfederal governmental unit is actually responsible for the expropriation.[230] In some sense, then, the United States accepts responsibility for subfederal expropriations (that breach NAFTA) and—by agreeing to make appropriate cash payments[231]—attempts to "right" those wrongs.

There are substantial problems with this approach from a compliance perspective. For one thing, to the extent that the award system itself "corrects" breaches, it does so only by means of a liabil-

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A different setting is also presented when the national government does not agree that there was a breach, but nonetheless (perhaps out of diplomatic motives) pays money. *See* Watson, *supra*, at 576 (noting payments made to Italy in response to lynching of Italian nationals, but also noting that the payments were made without acknowledging liability of the United States under governing treaty or international law).

225. One could imagine, for example, upon finding itself in breach of an environmental treaty by virtue of an action (or omission) of a state, the United States making a payment to the United Nations Environment Programme.

226. NAFTA, *supra* note 128.

227. While a treaty for international law purposes, NAFTA is a congressional-executive agreement, *see supra* note 3, for domestic law purposes. *See, e.g.*, Hathaway, *supra* note 3, at 1247.

228. NAFTA's "investor-state dispute mechanism" calls upon arbitral tribunals to resolve expropriation disputes. *See* NAFTA, *supra* note 128, art. 1120; Been & Beauvais, *supra* note 182, at 44–47. NAFTA empowers arbitral tribunals to award only two kinds of relief: "monetary damages" and "restitution of property." NAFTA, *supra* note 128, art. 1135(1)(a)–(b). However, even when an award of restitution is entered, "the award shall provide that the disputing Party may pay monetary damages and any applicable interest in lieu of restitution." *Id.* art. 1135(1)(b). Thus, as Professor Joel Trachtman explains, "the presumptive remedy for violation of investor rights is calculation of a cash payment." Trachtman, *supra* note 179, at 163.

229. *See* NAFTA, *supra* note 128, art. 1110.

230. *See* Ahdieh, *supra* note 128, at 2058.

231. Technically, the respondent country need not always simply acquiesce in an arbitral award. Still, as Professor Robert Ahdieh explains, "monetary liability is difficult for state respondents to resist." *Id.* at 2058; *see id.* at 2058 n.121 ("[E]nforcement [of monetary damages] is not automatic, . . . but is easier to accomplish than would be enforcement of any form of injunctive relief, with the likely need for some form of legislative or regulatory intervention." (citation omitted)).

ity rule, not a property rule.[232] It does not confer (as would property-rule protection) any right on investors to actually change or enjoin the challenged subfederal governmental behavior.[233]

Nor is such a regime at all likely to induce subfederal governmental units to change their behaviors, or to decide against adopting behaviors that breach the treaty in the first place. First, all the reasons, discussed above, that damage awards under § 1983 are unlikely substantially to affect state behavior—including that awards tend to be too small to make a difference, and that (even if they are large) politicians do not react to monetary penalties against the government as do private actors[234]—apply equally here.[235]

Second, and moreover, the damages in this setting (as opposed to § 1983) are imposed upon the federal government, not the subfederal government that engaged in the expropriation. Thus, even if damages lodged against a governmental unit might convince that government to change its ways, here that is unlikely to be the case: insofar as the damages are paid not by the offending subfederal government but by the national government, any deterrent effect is misplaced.[236]

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232. *See* Ahdieh, *supra* note 128, at 2057 (NAFTA relies "on a regime of liability rules of a sort—rather than property rules."); *supra* note 20 and accompanying text; *see generally* Trachtman, *supra* note 179, at 147–52 (discussing property and liability rules in the context of international agreements).

233. *See supra* note 20.

234. *See supra* notes 180 and 183 and accompanying text.

235. Professor Jide Nzelibe translates Professor Levinson's argument to the setting of damage awards under international treaty regimes, explaining:

> [A] monetary fine remedy . . . is unlikely to have a disciplining effect on politicians in the scofflaw state because the burden of the fine is likely to be borne by diffuse weak groups. A key feature of a good enforcement strategy is its ability to mobilize a powerful domestic interest group against the interests of the disfavored domestic interest group. A retaliatory strategy that focuses on the suspension of trade concessions possesses this feature, but monetary fines do not. In the case of monetary fines, it is a fairly dispersed group of taxpayers in the scofflaw state that is very likely pick up the tab. Ultimately, politicians facing mounting pressures by domestic protectionist groups to breach trade commitments are unlikely to be deterred by the prospect of having to pay fines from a general revenue fund.

Jide Nzelibe, The Credibility Imperative: The Political Dynamics of Retaliation in the World Trade Organization's Dispute Resolution Mechanism, 6 THEORETICAL INQUIRIES L. 215, 229 (2005) (citations omitted). *But see* Trachtman, supra note 179, at 164 (explaining that Nzelibe's argument "assumes that the state's actions are a kind of aggregate of interest group pressures, and further assumes that dispersed interest groups, like taxpayers, are unable to affect policy," and arguing that "these assumptions may not accurately portray the qualities of representative government in particular cases").

236. *See* Been & Beauvais, *supra* note 182, at 37 ("The fact that liability for violations

Proper internalization (along with whatever incentives accompany it) could be achieved if the national government were allowed to sue to collect payment from the responsible subfederal unit for any outlays.[237] It does seem that Congress could authorize such lawsuits[238] without running afoul of the Constitution. Sovereign immunity is not available to states when they are sued by the federal government,[239] and there is no apparent commandeering problem with ordering states to reimburse the federal government for monies actually paid out to compensate for harms caused by state actions and regulations.[240]

Despite the absence of a constitutional impediment, the notion of having the federal government sue states for reimbursement for damage awards still faces hurdles. Remaining with NAFTA as a paradigmatic example, there are both legal and political obstacles. First, from a legal perspective, under the current structure of NAFTA and NAFTA claims, claimants simply name the national government as a respondent; they need not identify exactly which state or locality is actually responsible for the alleged breach.[241] Thus, at least as things currently stand, the legal issues raised by a contribution action might be more complicated than it might at first blush have seemed.

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of the [international investment] agreements is imposed on the signatory state, rather than directly on its local governments or regulatory agencies, makes . . . internalization especially unlikely.").

237. *See, e.g.*, Vicki Been, *NAFTA's Investment Protections and the Division of Authority for Land Use and Environmental Controls*, 20 PACE ENVTL. L. REV. 19, 50 (2002) (noting that the federal government could "pass the cost of [a NAFTA] award on to the state or local government responsible for the [expropriating] regulation" by "su[ing] the state or locality for contribution or indemnification, deduct[ing] the amount of the award from federal monies that would otherwise be granted to the state or locality, or order[ing] the state or local government to pay the award directly to the successful claimant").

238. "Such claims would require legislative grounding," Ahdieh, *supra* note 128, at 2104, but "[n]othing in the legislation passed to implement NAFTA clearly authorizes the federal government to sue a state or locality to recover damages imposed upon the federal government for a state or locality's violation of NAFTA," Been, *supra* note 237, at 50.

239. *See* Been, *supra* note 237, at 50–51 (making the point in the NAFTA contribution context); *supra* note 132 and accompanying text.

240. *See* Been, *supra* note 237, at 53. Professor Been also notes that Congress could appropriately ground legislation authorizing such lawsuits on the Interstate Commerce Clause. *See id.* at 53–54.

241. *See* Been & Beauvais, *supra* note 182, at 90–91 ("[A]rbitral complaints and awards need not be, and often are not, as precise as litigation in U.S. courts, so it is far from clear how the national government would decide how much of the award to pass through to which party. Because the respondent in an arbitration is the signatory party, neither the notice of claim nor the award need specify which level of government, or which agency within a particular government, is responsible for how much of each alleged infringement.").

Second, along the lines of the discussion above,[242] the federal government might be reluctant to enforce contribution claims against subfederal units.[243]

The imposition of money damages on the federal government may create an incentive[244] for the federal government to act so as to minimize those awards. And the way to reduce awards against the federal government to compensate for subfederal unit action is to prohibit or deter subfederal units from engaging in such actions. Thus, in short, one might imagine that a liability regime with the federal government as payor might lead the federal government to try—more assiduously than it otherwise would—to compel or induce subfederal units not to breach the treaty. Not surprisingly, then, commentators speak about some of the possible ways to compel or induce compliance that we have discussed above: relying on implementing legislation to try to compel states to change their law,[245] conditioning the provision of some federal funds to states,[246] and conditional preemption.[247] While the federal government's obligation to pay out monetary penalties may create a greater incentive for it to avail itself of one or more of these possibilities (itself a questionable proposition in light of Professor Levinson's critique of damage awards' limited effects on government actors),[248] they certainly remain subject to the same legal hurdles, and political disincentives, discussed above.[249]

IV. CONSEQUENCES OF DOUBLY UNCOOPERATIVE FEDERALISM

The previous two Parts elucidated limits on the federal government's ability to eliminate, or even curtail, doubly cooperative federalism. In this Part, I explore the effects of doubly cooperative federalism—effects that, in light of the previous two Parts, cannot be fully avoided.

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242. *See supra* notes 123–25 and accompanying text.

243. *See* Been & Beauvais, *supra* note 182, at 90 ("[A]ny effort to recover the cost of the award from state or local governments would be quite sensitive politically."); *see also id.* (discussing political barriers encountered in Canada and Mexico).

244. Implicit here again is the assumption that the imposition of damages creates incentives for politicians to act. *See supra* notes 182–83 and accompanying text.

245. *See* Ahdieh, *supra* note 128, at 2104; *supra* Part II.A.1.

246. *See* Been, *supra* note 237, at 53–54; *supra* Part III.A.1.

247. *See* Been, *supra* note 237, at 53–54; *supra* note 116 and accompanying text.

248. *See supra* notes 181–83 and accompanying text.

249. *See supra* Part II.

First, doubly uncooperative federalism may result in a substantial failure of treaty enforcement. Second, it may contribute to lack of clarity over whether a treaty breach has in fact occurred. And, third, it may empower states to effect changes in the treaties—and the interpretation of those treaties—to which the United States is a signatory. Each of these effects has a clear negative side, but a potentially positive side as well.

A. Substantial Failure of Enforcement of Treaties

The multifarious limitations on the federal government's ability to force states into compliance with a treaty may in some cases render portions of treaties substantially unenforceable.

One problem is the penchant of the U.S. government to include upon ratification of treaties (perhaps especially human rights treaties) both (i) a non-self-executing RUD and (ii) a federalism RUD. The non-self-executing RUD effectively shields domestic law from the treaty absent implementing legislation (and absent voluntary action by states). The federalism RUD announces the federal government's intention *not* to apply implementing legislation to the states; this means that, "in certain circumstances, the responsibility for passing the required legislation will be shouldered by the states rather than the federal government."[250] The two RUDs in tandem seem to work to frustrate any notion that the treaty will be followed by states, other than voluntarily. Or, from the vantage point of international law, the two RUDs together seem to promise (assuming in fact that the treaty is to be enforced) that the federal government will in fact "commandeer state legislatures to pass the laws the treaty requires,"[251] even though "[s]uch a requirement is something even dissenters in *Printz* regarded as unconstitutional."[252]

Even leaving the possible limitations of a federalism RUD to the side, it remains unclear how the national government could, consistent with the anticommandeering rule, mandate that subfederal governmental units comply with the terms of some treaties. Consider, for example, how the federal government might try—assuming it wanted to do so—to force the states to comply with the consular notification requirements of the Vienna Convention on Consular Relations. Assuming that outright commandeering of state legislatures is off the table, Professor Carlos Vázquez suggests that the federal gov-

250. Vázquez, *supra* note 115, at 1355.

251. *Id.* at 1356.

252. *Id.*

ernment could leave states the option of either (i) providing foreign nationals whom they arrest with the required information about consular notification, or (ii) declining to arrest foreign nationals.[253] While this would (if followed) technically eliminate all treaty violations, it seems both far-fetched and dismissive of anticommandeering doctrine.[254]

Consider as well whether the national government could force states to comply with the Single Convention on Narcotic Drugs. Anticommandeering doctrine is at its apex in precluding the national government's ability to force a state to enact laws.[255] Thus, to the extent that the Single Convention calls for all states (and not just the federal government) to criminalize narcotics possession and use, complete compliance seems impossible absent voluntary state action.[256]

The possibility that a treaty might not apply to subfederal governmental units (despite the terms of the treaty) might draw in question the legitimacy of the treaty or even of international law itself. And that, in turn, could have ramifications both domestically and globally.

That said, it may be that, even if there are barriers that make it unlikely (or even impossible) that some treaties (or provisions of treaties) will be effective as against subfederal governmental units, the ratification of the treaty nevertheless performs what is seen as an important function. Professor Oona Hathaway has emphasized the importance of the expressive function of joining a treaty regime: ratification of a treaty affirms the national government's commitment to the issues raised by the treaty,[257] which can have ramifications both

253. *Id.* at 1325–26. Professor Vázquez further argues that this outcome results from the Vienna Convention itself as a self-executing treaty, without implementing legislation. *See id.* at 1326 ("[E]nactment of a law giving the states the choice between not arresting aliens and arresting but notifying aliens would appear to be unnecessary, as the Vienna Convention itself, properly read, gives the states precisely that choice.").

254. *See* Mark Tushnet, *Federalism and International Human Rights in the New Constitutional Order*, 47 WAYNE L. REV. 841, 867–68 (2001) (asserting that Professor Vázquez's proposal "has the effect of trivializing the anti-commandeering rule").

255. *See supra* note 117 and accompanying text.

256. *See supra* note 67 and accompanying text.

257. Professor Hathaway elucidates:

> When a country joins a human rights treaty, it engages in what might be called "position taking," defined here as the public enunciation of a statement on anything likely to be of interest to domestic or international actors. In this sense, the ratification of a treaty functions much as a roll-call vote in the U.S. Congress or a speech in favor of the temperance movement, as a pleasing statement not necessarily intended to have any real effect on outcomes. It declares to the world that the principles outlined in the treaty are consistent

domestically and globally.[258] Especially because the treaties with federalism and non-self-executing RUDs tend to fall within the ambit of human rights, it may be that the national government feels that entering into a treaty that is unlikely to have effect in many settings still is valuable in that it allows the national government to reaffirm the importance of the principles raised by the treaty, and to some extent without having actually bound itself.

B. Lack of Clarity over Treaty Compliance

Another possible consequence of the interplay between strict application of the doctrine of state responsibility and U.S. federalism is a lack of clarity over whether subfederal governmental unit action (or inaction) has triggered a treaty breach. As an example, consider that, as discussed above, the legalization of marijuana in several U.S. jurisdictions might have put the U.S. in breach of the Single Convention.[259]

Lack of clarity over treaty compliance may, like having some treaties rendered not fully enforceable, adversely affect the legitimacy of the treaty in question and international law writ large.[260] Moreover, to the extent that the national government entered into the treaty primarily for the treaty's expressive function,[261] lack of clarity over

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with the ratifying government's commitment to human rights.

Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 2005–06 (2002) (footnotes omitted). Professor Hathaway does caution that the inducement to enter into a treaty for expressive purposes "is at its greatest for precisely those countries not already in compliance with the treaty—those countries may have more to gain, and perhaps less to lose than those with good practices and hence good reputations." *Id.* at 2011. This in general may make the United States less of a candidate to enter into treaties with which it does not intend to comply across the board.

258. *See* Oona Hathaway, *Testing Conventional Wisdom*, 14 EUR. J. INT'L L. 185, 195 (2003) ("The act of speaking (via treaty ratification) holds the potential to transform the understandings and practices of not only the state that engages in that speech (by solidifying, or perhaps opening the door to, internalization of those norms) but also the international community (by shaping the shared understanding of acceptable state practice).").

259. *See supra* Part I.B.1.

260. Professor Jack Goldsmith has argued that actual U.S. practice in complying with a human rights treaty does not adversely affect the international human rights law movement, criticizing arguments in favor of such a view as overly legalistic. *See* Goldsmith, *supra* note 120, at 335–38. Goldsmith, however, assumes that state actions that decline to adhere to a treaty norm will be overt. *See, e.g.*, *id.* at 336 ("[W]hen the United States refuses to consent to a small number of treaty norms . . . , it takes international law very seriously because it declines to make a legal commitment it cannot uphold.").

261. *See supra* notes 257-58 and accompanying text.

compliance may even serve to undermine that value.[262]

Depending on the nature and content of the particular treaty, lack of clarity over treaty compliance may also affect the ability of private actors to predict how a subfederal governmental unit will act. That, in turn, may lead private actors to change their behaviors in ways that might be costly—socially, monetarily, or both.[263]

One response to the problem of lack of clarity over whether a treaty breach has arisen is to invite judicial tribunals to resolve the compliance issue. Here, however, a distinct problem arises: judicial tribunals faced with questions about how to square the doctrine of state responsibility with federalism may end up rendering conflicting pronouncements on treaty compliance. Since we have assumed that we are dealing with a recalcitrant state, we expect both (i) a ruling from an international tribunal that finds state action to result in a treaty breach (on the part of the national government); and (ii) domestic court decisions validating the challenged state action. In many cases—as in the *Medellín* case[264]—there will be state court decisions upholding the state action, with federal courts subsequently called upon to choose sides, and (since we are assuming conflicting decisions and a federal court's final decision would trump the state courts) ultimately siding with the state.

Thus, while it might seem that having an international tribunal resolve treaty compliance would serve to clarify, that is not the case (at least where the treaty recognizing the international tribunal's

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262. *Cf.* Cass R. Sunstein, *The Storrs Lectures: Behavioral Economics and Paternalism*, 122 YALE L.J. 1826, 1859 n.129 (2013) (citing Robert A. Kagan & Jerome H. Skolnick, *Banning Smoking: Compliance Without Enforcement*, *in* SMOKING POLICY: LAW, POLITICS, AND CULTURE 69, 72 (Robert L. Rabin & Stephen D. Sugarman eds., 1993)) (noting how law's expressive function fosters compliance with the law).

263. Lack of clarity could deter private actors from engaging in valid behavior. For example, in the context of the Single Convention on Narcotics, the determination that the decision by states to decriminalize marijuana conceivably could lead the national government to over-enforce *federal* marijuana criminal laws in those states (in order to reduce the risk of a finding that the treaty was violated), thus potentially deterring valid behavior by private actors. Lack of clarity over treaty violations also can impose monetary costs. This is perhaps clearest in the context of economic-centered treaties (such as tax treaties and investment treaties). But monetary costs can arise in other settings as well. Consider, for example, how lack of clarity over whether government investigatory techniques are valid under a treaty might invite private actors to eschew cheap, but risky, ways of doing things in favor of more expensive alternatives. *Cf.* Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1145–46 (2013) (noting respondents' argument that the "threat of [government] surveillance" had "compel[led] them to travel abroad in order to have in-person conversations" rather than "certain telephone and e-mail conversations").

264. *See* Medellín v. Texas, 552 U.S. 491, 501–04 (2008) (detailing numerous state and federal court decisions at odds with the holding of the ICJ).

jurisdiction to rule definitively is not self-executing):[265] a state can be in compliance with international law from the perspective of the federal courts (as the Supreme Court found Texas to be in *Medellín* when it found the right of consular notification had been procedurally defaulted), yet out of compliance from the perspective of the international tribunal. And it is the tribunal's view that determines whether the United States is in breach (by virtue of the state's noncompliance).

Once again, conflicting judicial pronouncements on compliance may jeopardize the legitimacy of a treaty, or even more generally the legitimacy of international law. Domestic courts' rulings that treaties are not breached tend to undercut international tribunal holdings to the contrary, and along with them the underlying treaties themselves. And, like lack of clarity over treaty compliance, conflicting judicial pronouncements may in some cases threaten to undermine even the expressive functional value of entering into a treaty in the first place: the expressive value a country gains by joining a treaty is diluted, it seems, when a court of that country issues a decision that rejects the holding of an international tribunal. This tends to undercut the expressive value of a treaty domestically. Moreover, what is seen as the domestic flouting of international law would seem to undercut global expressive value.

In addition, the announcement of a view of treaty compliance that differs from that of another tribunal may thrust a court and its judges into a position to which they are not accustomed and for which they are ill-equipped to function. For example, in the *Medellín* case, the Supreme Court found itself as the intermediary between the

265. The *Medellín* Court justified reaching a conclusion in conflict with the ICJ on the ground that the Optional Protocol—that gave the ICJ jurisdiction to hear and issue a ruling in the *Avena* case, and into which the United States had entered—was non-self-executing. *See id.* at 504–23. One accordingly might think that an answer here would be for the United States to make the treaty empowering the international tribunal to rule a *self-executing* one.

There are, however, at least two reasons to think that such a solution is unlikely to work—one practical and one legal. First, it seems politically unimaginable that the United States would grant affirmative power to an international tribunal to issue rulings that are immediately binding as a matter of domestic law. *Cf. supra* note 83 and accompanying text (noting that the United States has since withdrawn from the Optional Protocol entirely).

Second, even if the political branches were somehow inclined in this direction, it is unclear whether such an option is constitutional. The fact that the Constitution vests "the judicial power of the United States" in the federal courts makes it questionable whether definitive judicial power could ever be ensconced in an international tribunal. *Cf.* Sanchez-Llamas v. Oregon, 548 U.S. 331, 334 (2006) (referring to Article III's Vesting Clause, U.S. CONST. art. III, § 1, in the context of analyzing whether to consider an ICJ judgment as binding authority).

national government—which argued that it was in breach of the Vienna Convention under international law by virtue of the actions of the state—and the state government—which argued that it was free under U.S. law to act as it did.[266] Even more oddly, the Court was also effectively the intermediary between the ICJ—which the Supreme Court recognized had the power to rule that the U.S. national government was in breach[267]—and the state courts—that the Court recognized were within their own legal rights in proceeding as they did.[268]

At the same time, one can see an upside to this lack of clarity. The fact that courts can differ in their assessments of whether a treaty breach has occurred invites an intersystemic dialogue. And that dialogue may end up enhancing society's understanding of the relevant issues[269] (even if it does not end up yielding a single answer).

C. Agency for Change

Another consequence of doubly uncooperative federalism can be a change in the law. State involvement in federal treaty compliance gives states a voice that can imbue their dissent with a force for change.

The action (or inaction) of a state in defying a treaty that the federal government has ratified is an act of dissent. It is, however, the combination of the doctrine of state responsibility and the preservation of the state role in treaty compliance that converts ordinary "outsider" dissent—in which any private actor might engage and that the federal government can readily ignore[270]—into an act of which the federal government is more likely to take notice.[271]

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266. *See* Ahdieh, *supra* note 7, at 1195 n.51 ("It bears emphasizing that the Court did not question the ability of Congress and the President, acting jointly, to impose their will on state authorities.").

267. *See supra* note 86 and accompanying text.

268. *See supra* note 89 and accompanying text.

269. *See* Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 249 (2005) ("[C]ourts can serve as agents of federalism. State and federal courts, as alternative centers of power, can cooperate and compete so as best to promote the goals of federalism.") (footnote omitted).

270. *See* Bulman-Pozen & Gerken, *supra* note 16, at 1287 ("When states challenge federal policies in areas where they are autonomous sovereigns, they are in roughly the same position as individual dissenters—outside the system—thus making it easy for federal officials to pursue a strategy of avoidance.").

271. *Cf. id.* ("[T]he less the effects of [a state's] policies are felt elsewhere, the easier it is for federal officials simply to ignore the challenge.").

As an example, consider that, as a direct result of the *Medellín* litigation, the United States exited the Optional Protocol (under which the United States recognized the ICJ's jurisdiction to resolve disputes under the Vienna Convention).[272] One can debate the normative value of this outcome, but the point remains that Texas's action brought to light an international tribunal's interpretation of the Vienna Convention as applied to U.S. law, and the notion that that interpretation might (though not in the *Medellín* case itself) have binding effect in the United States. And that, in turn, prompted the federal government to exit the treaty regime that purported to afford ICJ cases binding domestic effect. Presumably the United States did not agree with the ICJ's holding, and the ICJ's holding would not have emerged but for the steps taken by Texas.

Consider as well the possibility that the federal government welcomes the subversive effect of state-level marijuana legalization. The response of the federal government to state legalization has been acquiescence.[273] It is not a large step to infer from that acquiescence that the federal government indeed might welcome state legalization, hoping it might eventually generate support—both domestically and internationally—to modify the governing international treaty regime.

CONCLUSION

This Article has elucidated the notion of doubly uncooperative federalism in the context of treaty compliance. Doubly uncooperative federalism arises out of the substantial gap between the expectations of the doctrine of state responsibility and the reality of U.S. federalism. Examples of it already exist, and the likelihood is that it will only proliferate in the future. Doubly uncooperative federalism may render portions of treaties substantially unenforceable, reduce clarity over treaty breaches, and create an avenue for states to effect changes in the treaties, and the interpretation of treaties, to which the United States subscribes.

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272. *See supra* note 83 and accompanying text.

273. *See, e.g.*, Ryan J. Reilly & Ryan Grim, *Eric Holder Says DOJ Will Let Washington, Colorado Marijuana Laws Go Into Effect*, HUFFINGTON POST (Sept. 3, 2013), http://www.huffingtonpost.com/2013/08/29/eric-holder-marijuana-washington-colorado-doj_n_3837034.html.