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INTRODUCTION

Anna Ivey[†]

What a barnburner of a volume we are able to offer this season. We include some posts that are noteworthy not just for their analysis, but also for their timeliness: one on drones and the problem of setting precedent through the administration's "kill list" procedure; another on ethics, consent, and data privacy in the study of brain injuries (pro athletes among them); and a third on how upholding the health care mandate required a gestalt shift in order to avoid a tectonic shift. We'll chew on that one for a bit.

Also timely is a series of posts on a case – *Bond v. United States* – that the Supreme Court has agreed to hear not once, but twice (the second time on whether international treaties can authorize Congress to legislate on things that would otherwise be under the exclusive control of the states). In proposing to republish all 24 posts in the series, I feared that I would be testing the outer limit of our *Journal of Law* editor-in-chief's otherwise indefatigable patience, but he agreed that the Treaty Debate demonstrated the full potential of legal blogging at its finest: real-time parsing of important ideas and observations in a way that's much harder to do (at least in a span of two weeks) in a more traditional law review format. Now that cert has been granted for the second hearing, we hope law clerks are reading.[1] And it's always fun to read about a case in which Scalia

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[1] "Most law professors want their law review articles to influence courts . . . . Yet law clerks, I'm told, often read blogs." Eugene Volokh, *Scholarship, Blogging and Trade-Offs: On Discovering, Disseminating, and Doing* (April 2006). Berkman Center for Internet & Society – Bloggership: How Blogs are Transforming Legal Scholarship Conference Paper; UCLA School of Law Research Paper No. 06-17, at 6. Available at SSRN: http://ssrn.com/abstract=898172.

busts out a reference to Zimbabwe. Will the Supreme Court use *Bond* to limit *Missouri v. Holland*? We're staying tuned.

We also love this zeitgeist-y, post-apocalyptic hypo in the Treaty Debate:

> Imagine that the United States is defeated in a disastrous war, and the victorious country requires, as a term of a peace treaty, a concession that would violate the Bill of Rights. . . . Can the United States agree to the term and end the war?

If that isn't enough to pique the interest of the Walking Dead crowd, the Treaty Debate also serves as a reminder to law school applicants why the skills tested in the much-cursed logic puzzles and reading passages on the LSAT actually matter to legal thinking. Under the Constitution, how does the Treaty Power fit together with the Offenses Power and the Foreign Commerce Power and the Necessary and Proper Clause and the Supremacy Clause? Is there a "magical on-off switch" for Congress's powers? How does the use of the infinitive mood of a verb in a key sentence affect its meaning? And how LSAT-like does this look:

> [A]ssume that (1) X alone is within Congress's power; (2) Y alone is not; and (3) Y is necessary to carry X into execution. It may be that a single act of Congress X+Y is constitutional, because X+Y may fairly be described as a law regulating interstate commerce. It does not follow, however, that Y could ever be enacted alone, even after the enactment of X, because Y alone could never be described as a law regulating interstate commerce.

LSAT students, we invite you to go to town on this series and find inspiration. Words do matter, and logic does matter. This exercise isn't some whacky thought experiment; it's a real case pending before our highest court. (Or maybe not our highest court, depending on the validity of certain treaties. But I digress.) The skills you're practicing for the test are skills that actually matter for legal thinking and the interpretation of laws. Watch these marvelous gymnastics in action in the Treaty Debate.

Other posts jump out as us for their data. One we are including here on the *Fisher* case collects some eye-popping statistics that, we would argue, any honest discussion of affirmative action and diversity goals needs to acknowledge and weigh.

And finally, the last post – on litigation against law schools for allegedly deceptive practices – shows us that one brutal and succinct sentence can stop us in our tracks. For anyone who cares (or whose job it is to care) about the future of law students, legal education, and the profession, what do we make of this? "The students we welcome in our doors are being warned by state and federal judges that they cannot take at face value the employment information we supply." What does that mean for law schools, "which have always held themselves out as honorable institutions of learning and professionalism?" Word.

Are you inspired to celebrate more legal blog posts that can sometimes get buried in the avalanche of life on the internet? We welcome submissions from astute readers who know good legal blog posts when they see them. (Our parameters: (1) The blog post should be about law or laws; (2) it should be written by legally trained people for legally trained people or aspiring lawyers rather than for a general audience; and (3) it deserves to transcend the 15 nanoseconds of fame that blog posts typically enjoy.) Please send links you'd like to nominate to *post@annaivey.com*. //

JL

FROM: THE VOLOKH CONSPIRACY

THE SECRET "KILL LIST" AND THE PRESIDENT

Kenneth Anderson[†]

My corner of the national security law world is abuzz today reading the outstanding New York Times article by Jo Becker and Scott Shane, "Secret 'Kill List' Proves a Test of Obama's Principles and Will."[1] As Ben Wittes says at Lawfare,[2] it is a richly textured, detailed look at how the administration approaches targeted killing (whether with drones or human teams or in combination), and is the most detailed insider account of how the administration has gradually evolved a process for vetting targets. Opinio Juris' Deborah Pearlstein focuses in on a key passage[3] in the story, one that talks about the essentially casuistical evolution of targeting standards, case by case:

> It is the strangest of bureaucratic rituals: Every week or so, more than 100 members of the government's sprawling national security apparatus gather, by secure video teleconference, to pore over terrorist suspects' biographies and recommend to the president who should be the next to die.
>
> This secret "nominations" process is an invention of the Obama administration, a grim debating society that vets the

[†] Professor of Law, American University Washington College of Law, and Visiting Fellow, The Hoover Institution on War, Revolution and Peace, Stanford University. Original at www.volokh.com/2012/05/29/the-secret-kill-list-and-the-president/ (May 29, 2012; vis. Apr. 15, 2013). © 2012 Kenneth Anderson.

[1] www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?_r=3&hp&pagewanted=all&.

[2] www.lawfareblog.com/2012/05/the-new-york-times-on-obama-and-counterterrorism/.

[3] opiniojuris.org/2012/05/29/nyt-must-read-on-obama-counterterrorism-and-targeting/.

> PowerPoint slides bearing the names, aliases and life stories of suspected members of Al Qaeda's branch in Yemen or its allies in Somalia's Shabab militia. The video conferences are run by the Pentagon, which oversees strikes in those countries, and participants do not hesitate to call out a challenge, pressing for the evidence behind accusations of ties to Al Qaeda.
>
> "What's a Qaeda facilitator?" asked one participant, illustrating the spirit of the exchanges. "If I open a gate and you drive through it, am I a facilitator?" Given the contentious discussions, it can take five or six sessions for a name to be approved, and names go off the list if a suspect no longer appears to pose an imminent threat, the official said. A parallel, more cloistered selection process at the C.I.A. focuses largely on Pakistan, where that agency conducts strikes. The nominations go to the White House, where by his own insistence and guided by Mr. Brennan, Mr. Obama must approve any name. He signs off on every strike in Yemen and Somalia and also on the more complex and risky strikes in Pakistan – about a third of the total.

The article is important in several ways. First, it seems pretty clear that the administration cooperated in giving information to the reporters, because it wants to make clear that there is a process and a robust one for making targeting decisions. In this regard, this article fits with the series of national security speeches by senior officials and general counsels of national security departments of government – most of them are collected here, at Lawfare, in a list[4] that gets periodically updated. It is quite true that if one believes that targeted killing is simply extrajudicial execution as a matter of substance, or that it has to be approved by a judge, or that the process has to be judicial rather than that of the political branches or the executive acting in an armed conflict and/or national self defense, then none of this will impress you. But if you are most people in the United States, your reaction is much more likely to be, good, I'm glad they are killing the bad guys, and I'm glad they're thinking hard about who they're killing and why before they do it. Clearly the

[4] www.lawfareblog.com/2012/04/readings-the-national-security-law-speeches-of-the-obama-administration-general-counsels/.

administration wants to get across a message to the public that there is a serious process, even if the circumstances for making targeting decisions are novel.

That signal is aimed, presumably, at broad opinion-setting elites – liberal and conservative, but mostly liberal – whose visceral reactions to how the issue is framed (targeting in unconventional war or just remote execution?) matter over the long run to its institutional legitimacy. As Jack Goldsmith has pointed out in his new book, Power and Constraint, targeted killing and drone warfare are likely to be the next "detention and interrogation" ground of delegitimation in the broader argument over counterterrorism. The Obama administration is more aware than most administrations just how important it is to hold a certain legitimacy high ground, and that starts with its framing among opinion-elites.

Second, there is also likely a signal here to the judicial branch that this is not unconsidered or purely discretionary; far from it. More exactly, there is a signal that the judiciary would have no ability to do a better job, as an effectiveness question, quite apart from the Constitutional and other domestic legal questions. It is highly unlikely that the judicial branch, taken as a whole, has any appetite for getting involved in these questions – particularly on the front end, of signing off in advance on targeting, effectively death warrants, given the Constitutional and other domestic legal issues raised. Even in an indirect, informal way, this kind of article helps set the picture of a process with serious mechanisms for discussion and review; it helps establish the legitimacy of the process – and so also helps establish the legitimacy of the judiciary staying out of it.

Third, the administration wants to send a clear signal that the President considers and signs off on these personally, and that this is far from a perfunctory or unconsidered sign-off. I applaud the President for this level of personal review; I think it is right. This signal carries a certain ambiguity, however – one that I believe the administration needs to consider closely. The ambiguity lies in whether the President's personal, considered attention to each decision is understood and conveyed to the public as a matter of the burden of the institutional presidency – something that would be no less true

of a President Romney than a President Obama. In that case the implication is that President Obama is stepping up to the plate to establish a process not just for himself, but for his successors and for the institution of the presidency. And he does so in a way that both sets a precedent (in the sense of a certain burden) for the proper level of involvement of the president in targeted killing decisions. But, while setting a presidential burden, this also gives future presidents important institutional legitimacy, through the weight of precedent established by the acts of a prior president, and institutional stability – to targeted killing, specifically, but also by implication to the emerging paradigm of covert and small-scale self-defense actions against non-state terrorist actors which, in the future, may or may not have anything to do with Al Qaeda and might be addressed to wholly new threats.

The alternative is that President Obama is sending a signal that these actions are legitimate only because he is personally trusted to do the right thing on these decisions, just because he is Barack Obama. His constituencies trust him with this power in a way that they would not entrust to any other president, including those who come after. In other words, there is a question implicit in the New York Times description as to whether the President is conferring a purely personal legitimacy that disappears with this presidency, or whether he and his administration are creating a long term process, and conferring the weight of institutional legitimacy on it.

It is obvious from how I've framed the ambiguity that I believe that the administration has an obligation to create lasting institutional structures, processes, institutional settlement around these policies. It owes it to future presidencies; every current president is a fiduciary for later presidents. It also owes it to the ordinary officials and officers, civilian and military, who are deeply involved in carrying out killing and death under the administration's claims of law – it needs to do everything it can to ensure that things these people do in reliance on claims of lawfulness will be treated as such into the future. And in fact I believe this is what the senior leaders and lawyers who have issued speeches for the administration are seeking. But I think there is still room for the players involved to say clearly

that these processes are legitimate for the executive, this president and future presidents.

Finally, we might add, the article says that the decision to target Anwar Al-Aulaqi was, in the President's mind, an "easy one." //

/ /

FROM: THE FACULTY LOUNGE

ARE YOU READY FOR SOME . . . RESEARCH?

UNCERTAIN DIAGNOSES, RESEARCH DATA PRIVACY, & PREFERENCE HETEROGENEITY

Michelle N. Meyer[†]

As most readers are probably aware, the past few years have seen considerable media and clinical interest in chronic traumatic encephalopathy[1] (CTE), a progressive, neurodegenerative condition linked to, and thought to result from, concussions, blasts, and other forms of brain injury (including, importantly, repeated but milder sub-concussion-level injuries) that can lead to a variety of mood and cognitive disorders, including depression, suicidality, memory loss, dementia, confusion, and aggression. Once thought mostly to afflict only boxers, CTE has more recently been acknowledged to affect a potentially much larger population, including professional and amateur contact sports players and military personnel.

CTE is diagnosed by the deterioration of brain tissue and tell-tale patterns of accumulation of the protein tau inside the brain. Currently, CTE can be diagnosed only posthumously, by staining the brain tissue to reveal its concentrations and distributions of tau.[1]

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† Fellow, The Petrie-Flom Center for Health Law Policy, Biotechnology, and Bioethics, Harvard Law School. Original at www.thefacultylounge.org/2013/02/are-you-ready-for-some-research-uncertain-diagnoses-research-data-privacy-preference-heterogeneity.html (Feb. 3; vis. Apr. 15, 2013). The bracketed endnote calls in the text correspond to the endnotes on pages 108-09. © 2013 The Faculty Lounge and Bill of Health, February 3, 2013, by Michelle N. Meyer.

1 www.bu.edu/cste/about/what-is-cte/.

According to Wikipedia,[2] as of December of 2012, some thirty-three former NFL players have been found, posthumously, to have suffered from CTE. Non-professional football players are also at risk; in 2010, 17-year-old high school football player Nathan Styles became the youngest person to be posthumously diagnosed with CTE, followed closely by 21-year-old University of Pennsylvania junior lineman Owen Thomas. Hundreds of active and retired professional athletes have directed that their brains be donated to CTE research upon their deaths. More than one of these players died by their own hands, including Thomas, Atlanta Falcons safety Ray Easterling, Chicago Bears defensive back Dave Duerson, and, most recently, retired NFL linebacker Junior Seau. In February 2011, Duerson shot himself in the chest, shortly after he texted loved ones that he wanted his brain donated to CTE research. In May 2012, Seau, too, shot himself in the chest, but left no note. His family decided to donate his brain to CTE research in order "to help other individuals down the road."[3] Earlier this month, the pathology report revealed that Seau had indeed suffered from CTE. Many other athletes, both retired and active, have prospectively directed that their brains be donated to CTE research upon their death.[2] Some 4,000 former NFL players have reportedly joined numerous lawsuits against the NFL for failure to protect players from concussions. Seau's family, following similar action by Duerson's estate, recently filed a wrongful death suit[4] against both the NFL and the maker of Seau's helmet.

The fact that CTE cannot currently be diagnosed until after death makes predicting and managing symptoms and, hence, studying treatments for and preventions of CTE, extremely difficult. Earlier this month, retired NFL quarterback Bernie Kosar, who sustained numerous concussions during his twelve-year professional career – and was friends with both Duerson and Seau – revealed[5] both that

[2] en.wikipedia.org/wiki/Chronic_traumatic_encephalopathy.

[3] espn.go.com/nfl/story/_/id/7889467/junior-seau-family-allow-concussion-study-brain.

[4] usatoday30.usatoday.com/sports/!invesitgations%20and%20enterprise%20docs/seau_complaint_-_superior_court.pdf.

[5] espn.go.com/nfl/story/_/id/8833397/bernie-kosar-former-cleveland-browns-quarterback-finding-help-concussions.

he, too, has suffered from various debilitating symptoms consistent with CTE (but also, importantly, with any number of other conditions) and also that he believes that many of these symptoms have been alleviated by experimental (and proprietary) treatment provided by a Florida physician involving IV therapies and supplements designed to improve blood flow to the brain. If we could diagnose CTE in living individuals, then they could use that information to make decisions about how to live their lives going forward (e.g., early retirement from contact sports to prevent further damage), and researchers could learn more about who is most at risk for CTE and whether there are treatments, such as the one Kosar attests to, that might (or might not) prevent or ameliorate it.

Last week, UCLA researchers reported[6] that they may have discovered just such a method of in vivo diagnosis of CTE. In their very small study, five research participants – all retired NFL players – were recruited "through organizational contacts" "because of a history of cognitive or mood symptoms" consistent with mild cognitive impairment (MCI).[3] Participants were injected with a novel positron emission tomography (PET) imaging agent that, the investigators believe, uniquely binds to tau. All five participants revealed "significantly higher" concentrations of the agent compared to controls in several brain regions. If the agent really does bind to tau, and if the distributions of tau observed in these participants' PET scans really are consistent with the distributions of tau seen in the brains of those who have been posthumously-diagnosed CTE, then these participants may also have CTE.[4]

That is, of course, a lot of "ifs." The well-known pseudomymous neuroscience blogger Neurocritic[7] [5] recently asked me about the ethics of this study. He then followed up with his own posts laying out his concerns about both the ethics[8] and the science[9] of the study. Neurocritic has two primary concerns about the ethics. First, what are the ethics of telling a research participant that they may be

[6] deadspin.com/5978074/new-study-reveals-that-cte-may-be-detectable-in-living-patients.
[7] neurocritic.blogspot.com.
[8] neurocritic.blogspot.com/2013/01/the-ethics-of-public-diagnosis-using.html.
[9] neurocritic.blogspot.com/2013/01/is-cte-detectable-in-living-nfl-players.html.

showing signs of CTE based on preliminary findings that have not been replicated by other researchers, much less endorsed by any regulatory or professional bodies? Second, what are the ethics of publishing research results that very likely make participants identifiable? I'll take these questions in order.

UNCERTAIN DIAGNOSES & RISK-BENEFIT HETEROGENEITY

On his blog, Neurocritic asks[10]:

> "What are the ethics of telling [Wayne Clark,[11] the only one of the 5 participants who has experienced no symptoms except age-consistent memory impairment,] that he has 'signs of CTE' after a undergoing a scan that has not been validated to accurately diagnose CTE? It seems unethical to me. I imagine it would be quite surprising to be told you have this terrible disease that has devastated so many other former players, especially if your mood and cognitive function are essentially normal. . . . I could be wrong about all of this and maybe [their novel PET imaging agent] does provide a definitive diagnosis of CTE (the definition of which may need amending). But don't you want to be sure before breaking the news to one of your patients?"

One of the most contentious current debates in the law and ethics of genetics and neuroimaging research is whether to offer to return individual research results (IRRs) to participants. Often, IRRs are of uncertain analytical and/or clinical validity, and they may not be clinically actionable. Some worry that returning such IRRs will simply burden individuals with scary, but uncertain and relatively useless, data. Others, by sharp contrast, view an offer to return "their data" to research participants as akin to a human right. I've tried to stake out a middle, participant-centered ground[12] in this polarized debate.

[10] neurocritic.blogspot.com/2013/01/the-ethics-of-public-diagnosis-using.html.
[11] www.nfl.com/player/wayneclark/2511579/profile.
[12] papers.ssrn.com/sol3/papers.cfm?abstract_id=2106135.

On one hand, participants need to understand what they're getting into when they join a study like this. Information, once learned, cannot be unlearned (thus, the relatively new concept of the "right not to know"). Among other things, Wayne Clark and the other participants should have been told (by which I mean, throughout, meaningfully made to understand) why they were recruited – namely, that their history of head trauma, combined with their MCI symptoms, made researchers suspect that they may well have CTE. In 64-year-old Clark's case, it should have been made additionally clear to him that, although his only current symptom is age-appropriate memory loss, that investigators might come to suspect that this is a symptom of a neurodegenerative condition rather than normal aging. And all participants should have been told that they would effectively have no choice but to have their IRRs "returned" to them: a CTE study involving five retired NFL players, released shortly before the Super Bowl and amidst lots of media coverage about the future of contact sports was bound to go (and has gone) viral. Finally, they should have been told that virtually nothing can be concluded from a study of just five individuals with various additional design limitations. We can't know, of course, whether the informed consent process in this case was adequate. Readers of the study are told that "[i]nformed consent was obtained in accordance with UCLA Human Subjects Protection Committee procedures" – and also told that UCLA owns the patent to the method used in the study, and that some of the investigators are inventors who stand to collect royalties. We should have additional concerns about informed consent, given that the participants by definition all suffer from some level of MCI.

That said, it is not inherently unethical to give people uncertain information – even when the information is potentially devastating and even if it's not "clinically actionable." Extremely inconvenient though it often is, life is filled with uncertainties. Information rarely carries with it tags that read 0% or 100%. This is about as true in medical practice, by the way, as it is in biomedical research – in part because huge swaths of "standard practice" are not evidence-based, for a variety of reasons; in part because even a solid evidence base is

typically based on the effects of an intervention on narrowly selected research participants in highly controlled circumstances which may not generalize to individual patients in real life; and in part because medicine, even at its best, often remains probabilistic. So although most of us, most of the time, would prefer certainty to uncertainty, where certainty is out of reach, the question becomes whether it's better, relative to the status quo ante, to obtain (additional) probabilistic information or not.

The answer is that it depends. Learning probabilistic information (here I assume that the study isn't completely without probative value) about oneself can be risky. But it can also carry potential benefits. Just how risky and/or potentially beneficial it is – and whether this expected risk-benefit profile is "reasonable" (as IRBs must find) – depends on a variety of factors, most obvious among them the kind of information at issue, the degree of uncertainty, and – as I have been at pains to emphasize in my work – the individual's preferences and circumstances. Sometimes people who suffer from MCI are relieved to learn that they may have a diagnosis, and perhaps a culprit, and that their symptoms aren't mere figments of their imagination. Other participants, especially those who have lost friends to CTE, may feel so strongly that something needs to be done to advance our knowledge of CTE that they are willing to assume the risks of psychosocial discomfort and privacy invasions in order to contribute to that effort even in a small way.

Heterogeneity in stakeholder preferences implies a prima facie case against any one-size-fits-all law, policy, or ethical code governing risk-benefit trade-offs. (My forthcoming law review article on this "heterogeneity problem" in risk-benefit decision-making by central planners is here;[13] a tl;dr version of some of the take-home points is here.[14]) Sometimes, of course, one-size-fits-all is the best we can do in law and policy; but where we can improve upon it, especially with little or no cost, we should. The presence of heterogeneity tends to recommend private ordering, nudges, federalism,

[13] papers.ssrn.com/sol3/papers.cfm?abstract_id=2138624.

[14] www.forbes.com/sites/davidshaywitz/2013/01/24/personalized-regulation-more-than-just-personalized-medicine-and-urgently-required/.

and ex post regulation (rather than ex ante licensing). You'll find libertarians who are sympathetic to this line of argument, of course. But you'll also find welfare liberals like Cass Sunstein agreeing (in his Storrs Lecture, no less) that[15] "While some people invoke autonomy as an objection to paternalism, the strongest objections are welfarist in character. Official action may fail to respect heterogeneity . . . ." And so one answer to Neurocritic's query about "the ethics" of revealing this information is that there is no singular "ethics" of this situation, at least not in terms of substantive outcomes, as opposed to an appropriate process for allowing individualized decision-making.

(RE)IDENTIFIABILITY OF RESEARCH DATA & RISK-BENEFIT HETEROGENEITY

Neurocritic's second concern is about the privacy implications of participating in the CTE study. Of the five participants, two have spoken on the record to the media about the study – voluntarily, I'll assume. One hopes that they were told that, even if they are okay with the public learning about their results, they can't always control the way the public interprets those results. For instance, Wayne Clark's Wikipedia page[16] has already been updated to indicate, inaccurately, that "[a]fter his career, Clark was discovered to have chronic traumatic encephalopathy," citing to an article whose headline declares breathlessly: "Scans show CTE in living ex-players; could be breakthrough."[17] (See also "Researchers find CTE in living former NFL players,"[18] "Scientists discover 'holy grail' of concussion-linked CTE research,"[19] and "Holy Grail Breakthrough in CTE Brain Damage Research."[20]) Scientists have a responsibility to

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[15] papers.ssrn.com/sol3/papers.cfm?abstract_id=2182619.

[16] en.wikipedia.org/wiki/Wayne_Clark_(American_football).

[17] www.nflevolution.com/article/Scans-show-CTE-in-living-ex-players-could-be-breakthrough?ref=4026.

[18] www.cbssports.com/nfl/blog/eye-on-football/21599368/researchers-find-cte-in-living-former-nfl-players.

[19] www.ctvnews.ca/health/scientists-discover-holy-grail-of-concussion-linked-cte-research-1.1125840.

[20] www.theblend.ie/lifestyle-2/health-fitness/holy-grail-breakthrough-in-cte-brain-damag

carefully and accurately communicate all science, but especially sensitive or controversial science. They should go out of their way to avoid hype, and should affirmatively correct the record when necessary. When neuroscience is at issue, investigators should avoid brain porn[21] – pretty pictures of brain scans designed to look as dramatically different from the "control" brain scan as possible, and which exploit our tendency to believe that being able to point to something in the brain makes it more "real" than otherwise. In this case, in addition to plenty of pretty pictures of brain scan, the journal article contains plots of nice-looking correlations between concussions and tau, but these graphics are easily misinterpreted, since results from just five observations will be very sensitive to the influence of outliers.

What of the other three participants, who have not been identified? They may nevertheless be *identifiable*, given the information about them that has been published in the journal article and in the press (e.g., age, position played in the NFL, concussion history, MCI symptoms). One can't help but be reminded of another recent study, published in *Science*[22] just a week or so before the CTE study appeared. That paper reported that computer informatics and genetics researchers were able to re-identify five men who had participated in both the 1000 Genomes Project[23] – an international public-private consortium to sequence (as it turns out, 2500) genomes from "unidentified" people from about 25 world populations and place that sequence data, without phenotypic information, in an open online database – and a similar study of Mormon families in Utah, which did include some phenotypic information. Although this "DNA hacking" made a huge splash, the fact that de-identified genetic information can fairly easily be re-identified is not news; it's happened before to research samples (although, importantly, always by researchers simply attempting to show that it can be done, rather than by actors with nefarious motives). NIH, which funds both pub-

e-research/.

[21] neurocritic.blogspot.com/2012/12/the-mainstreaming-of-neurocriticism.html.

[22] www.sciencemag.org/content/339/6117/321.

[23] www.1000genomes.org.

lic genetic databases, responded, as it had following a similar incident in 2008,[24] by reducing the richness of the Utah dataset by eliminating the ages of participants to make re-identification more difficult. In this case, that was likely appropriate, since participants probably had consented to a different risk-benefit profile. But what to do going forward? Should participants be allowed to donate their data to open access science, knowing that ensuring anonymity is impossible? We can, of course, make research data available to only a limited circle of those with approved access, as is typically done. And we can render our datasets less and less rich, to reduce the risk of re-identification. But both privatizing and watering down data sets impede knowledge production.

A different – and neglected – approach is the one taken by the Personal Genome Project[25] (PGP), led by Harvard Medical School geneticist George Church.[26] The PGP posts on the Internet participants' whole genome sequences (WGS), along with as rich a phenotype dataset as participants are willing to provide. The first ten participants[6] (the PGP ultimately wants to recruit 100,000) identified themselves by name, occupation, and photo,[27] and provided medical and other personal data.[28] Since then, participants generally have not explicitly identified themselves by name, but they have agreed to make their DNA sequence and often huge amounts of personal information available to researchers and to the general public – *all with the express understanding and agreement that their anonymity cannot be guaranteed*. (Disclosure: I'm a PGP participant; indeed, my genome is being sequenced as I write.) Rather than making what are, it has for some time now been clear, fairly empty promises of de-identification, the PGP's "open consent"[29] model requires participants to be "information altruists."

It is, perhaps, the idiosyncratic person such as myself whose net preferences yield a willingness to give such "open consent." But the-

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[24] gwas.nih.gov/pdf/Data%20Sharing%20Policy%20Modifications.pdf.
[25] www.personalgenomes.org.
[26] www.hms.harvard.edu/dms/BBS/fac/church.php.
[27] www.personalgenomes.org/pgp10.html.
[28] my.personalgenomes.org/users.
[29] arep.med.harvard.edu/pdf/Lunshof08.pdf.

se people do exist, they may be more numerous than many believe, and they have perfectly rational (if difficult to quantify) reasons to want to sacrifice their informational privacy, including altruism, intellectual curiosity, novelty, and a desire to be part of something bigger than themselves. To help ensure that these really are participants' considered preferences, the PGP requires that prospective participants obtain a 100% score on a genetic test that includes questions about the limits of information privacy. Rather than Harvard's IRB or a state or federal regulator imposing a one-size-fits-all privacy rule, this approach accommodates both heterogeneous risk-benefit preferences and heterogeneity among individuals in their comprehension of the study's risks.

Were the five retired NFL players who participated in the CTE study knowing information altruists who gave open consent? I don't know, because I don't know what they were told and, of that, what they understood and appreciated. But I think they should have been allowed to be.

[Disclaimer: I am not involved in this,[30] and the views expressed here are entirely my own.]

Cross-posted at *Bill of Health*.

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[1] All neurodegenerative diseases can be diagnosed *definitively* only on autopsy. This is true, for instance, of Alzheimer's. You likely know at least one person who has been diagnosed with Alzheimer's while they were still living. That's because, after *much* research, a professional consensus has been reached about the clinical diagnostic features of, and objective biomarkers for, Alzheimer's which allow clinicians to make a differential diagnosis of "probable Alzheimer's" as opposed to some other form of dementia. Any in vivo diagnostic for CTE would likely have implications for the (probably much bigger) Alzheimer's diagnosis market.

[2] For a graphic description of this process, which suggests one reason why families often wrestle with the decision to permit their loved ones' bodies to be donated to science, especially when the deceased hasn't indicated his or her wishes, see a few paragraphs down in this article[31] about the brain donation of hockey player Derek Boogaard, who was found to have had CTE.

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[30] blogs.law.harvard.edu/billofhealth/2013/01/30/petrie-flom-center-to-work-with-nfl-players-association/.

[31] www.nytimes.com/2011/12/06/sports/hockey/derek-boogaard-a-brain-going-bad.html?pagewanted=1&hp.

[3] The investigators were led through "organization contacts" to 19 retirees known to have "MCI-like symptoms." Of these, 11 were lost to "non-response or disinterest" [sic], 2 to being too young, and 2 to "medical illness." This was not, then, a representative sample of professional football players, football players who have experienced concussions, or even football players who have experienced concussions and MCI-like symptoms. Moreover, investigators chose controls that were as similar as possible in relevant ways (e.g., age, BMI) to players but, of the 35 eligible controls, investigators chose 5 and averaged their PET scans, rather than averaging data from all 35 eligible controls – a potentially questionable decision to jettison statistical power.

[4] Neurocritic notes that tau deposits observed in the participants' PET scans may not, in fact, match observed patterns of tau in deceased individuals diagnosed with CTE.

[5] As profiled in this recent *New York Times* piece,[32] Neurocritic is one of a "gaggle of energetic and amusing, mostly anonymous, neuroscience bloggers – including Neurocritic, Neuroskeptic, Neurobonkers and Mind Hacks – [who] now regularly point out the lapses and folly contained in mainstream neuroscientific discourse." If I recall correctly, I first got on Neurocritic's radar back when Charlie Sheen was "winning." I took his side in a Twitter war over the professional ethics of diagnosing celebrities. At the time, various people (Dr. Drew, I'm looking at you) were rushing before the television cameras to make all manner of "diagnoses" of Sheen's mental health. No one who isn't (a) medically qualified, (b) treats or knows the individual well, and (c) has said individual's permission to discuss his diagnosis publicly has any business doing so. This is not a hard question. Neurocritic's interlocutor argued that since there's no shame in having mental health issues, there's nothing wrong without "outing" someone. There should indeed be no shame in having mental health issues, which should be seen as on par with physical disabilities. But that is not remotely the world in which we live. Elyn Saks's story is inspiring, and her willingness to share it[33] – after tenure, in the way she chooses – is wonderful. But that's her decision to make, not someone else's. So I agreed then, and still agree now, with Neurocritic about the importance of sound diagnoses, of patient privacy, and generally of avoiding imposing upon individuals even accurate diagnoses when they are unwanted. The rest of this post explains why I think the present situation is – at least potentially – entirely different.

[6] Small world alert: PGP-10 member James Sherley is none other than "Sherley" from Sherley v. Sebelius.[34] //

[32] www.nytimes.com/2012/11/25/opinion/sunday/neuroscience-under-attack.html?hp&_r=0.

[33] www.nytimes.com/2013/01/27/opinion/sunday/schizophrenic-not-stupid.html?_r=0.

[34] www.thefacultylounge.org/2012/08/finally-an-endfor-nowto-dickey-wicker-sticky-wickets-on-stem-cell-research-and-chevron-deference.html.

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DEBATE ON THE TREATY POWER

Nick Rosenkranz,[†] *Eugene Kontorovich,*[*]
Rick Pildes[‡] *& Ilya Somin*[°]

INTRODUCING GUEST-BLOGGER PROF. RICK PILDES OF NYU, TO DEBATE WHETHER A TREATY CAN INCREASE THE LEGISLATIVE POWER OF CONGRESS

Nick Rosenkranz

At the Federalist Society Faculty Convention in New Orleans last week, Prof. Rick Pildes of NYU[1] and I debated whether a treaty can increase the legislative power of Congress. (Video here.[2]) In a case called Missouri v. Holland[3] (1920), the Court, per Justice Holmes, seemed to say that the answer is yes. In an article in the Harvard Law Review, Executing the Treaty Power[4] (2005), and again in New Orleans, I argued that the correct answer is no.

The issue is of great theoretical importance, because, at least in my view, Missouri v. Holland[5] is in apparent tension with the doctrine of enumerated powers and the basic structural principle of limited federal legislative power. The issue is also of great and in-

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[†] Professor of Law, Georgetown University Law Center. Links to originals at www.volokh.com/2013/02/03/final-post-of-the-treaty-debate/ (Jan. 13-Feb. 3; vis. Apr. 15, 2013). © 2013 in relevant parts by Eugene Kontorovich, Richard H. Pildes, Nicholas Quinn Rosenkranz, and Ilya Somin.

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[1] its.law.nyu.edu/facultyprofiles/profile.cfm?personID=20200.

[2] www.fed-soc.org/publications/detail/resolved-congresss-enumerated-powers-cannot-be-increased-by-treaty-event-audiovideo.

[3] supreme.justia.com/cases/federal/us/252/416/case.html.

[4] papers.ssrn.com/sol3/papers.cfm?abstract_id=747724.

[5] supreme.justia.com/cases/federal/us/252/416/case.html.

creasing practical importance, as we enter into ever more international legal commitments, many of which implicate what would seem to be paradigmatic state and local matters, far from traditional international concerns.

The debate is also timely, because there is a certiorari petition currently pending at the Supreme Court, United States v. Bond,[6] which raises this exact issue. (I filed an amicus brief on behalf of the Cato Institute,[7] urging the Court to grant the petition.) Bond has been relisted six times, which is unusual – suggesting that at least some Justices are interested.

In our debate in New Orleans, Rick offered the best and most articulate defense of Missouri v. Holland[8] that I have ever heard. But neither of us landed a knockout punch in New Orleans, and so Rick suggested that we continue our debate here, with perhaps three or four posts each. On behalf of Eugene and the rest of the Conspirators, I am delighted to introduce Rick as a guest-blogger for this purpose.

TREATIES, THE LAW OF NATIONS, AND FOREIGN COMMERCE

Eugene Kontorovich

I'm delighted to see Rick Pildes will be guest-blogging,[9] and the exchange with Nick on the Treaty Power will be a treat.

I would invited them to consider an aspect of the question that has long interested me: What is the relationship between the Offenses Power, the Treaty Power, and the Foreign Commerce power? All three might overlap at their edges (assuming they are not entirely congruent), and the extent of the overlap would say a lot about the extent of the other powers. If for example, the Foreign Commerce power is even broader than the Interstate one, then the scope of the treaty power becomes even less important.

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[6] www.scotusblog.com/case-files/cases/bond-v-united-states-2/.

[7] sblog.s3.amazonaws.com/wp-content/uploads/2012/09/12-158-Cato-Amicus-Bond-cert-final-8-31-12.pdf.

[8] supreme.justia.com/cases/federal/us/252/416/case.html.

[9] www.volokh.com/2013/01/13/introducing-guest-blogger-prof-rick-pildes-of-nyu-to-debate-whether-a-treaty-can-increase-the-legislative-power-of-congress/.

Hamilton, as I've mentioned before saw the Treaty Power as in some ways ways being not coterminous with the Foreign Commerce power,[10] and my understanding of the Offenses Power has always been that it was distinct from the Treaty Power. An example of how such delimitations might matter would be whether the courts can consider, as they sometimes do, unratified treaties in determining the "Law of Nations."

UPDATED with minor edits.

DOES CONGRESS HAVE THE POWER TO ENFORCE TREATIES? PART I

Rick Pildes

I want to thank Eugene and Nick for graciously inviting me to guest blog here.

One of the longstanding conundrums in American constitutional history, theory, and doctrine is how the treaty power relates to Congress' Art. I enumerated powers. This question is also pending before the Supreme Court in *Bond v. United States*, in which the cert. petition challenges the constitutional power of Congress to enforce the international Chemical Weapons Convention, a treaty the United States entered into in 1993. The Court has already re-listed *Bond* an exceptional six times[11] for the Court's consideration at conference – a strong signal that at least some Justices consider these issues extremely serious ones.

The most momentous argument the Bond petition raises follows the novel solution to "the treaty problem" developed in a provocative article by Nick Rosenkranz, *Executing the Treaty Power*.[12] Distilled to a sentence, Nick's argument (which he will explain more fully in his own posts) is that a treaty cannot change the balance of federal-state power established in Art. I, which enumerates Congress' specific powers. More specifically, if Congress legislates to enforce a treaty,

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[10] www.volokh.com/2013/01/09/the-material-support-statute-a-neutrality-act-for-everyone/.

[11] www.scotusblog.com/2013/01/relist-and-hold-watch-34/.

[12] papers.ssrn.com/sol3/papers.cfm?abstract_id=747724.

Congress is limited to the powers it otherwise has in Art. I; the treaty itself does not permit Congress to enact legislation it would otherwise be constitutionally forbidden to enact. In a few posts, I'll suggest why I think Nick's analysis is ultimately unconvincing.

The treaty-power issue is part of the larger set of questions about how the outward looking aspects of the Constitution – its structure of powers for international relations, foreign affairs, war, and the like – relate to the Constitution's inward looking structure of powers over purely domestic matters. In starting to think about these issues, it's essential to understand that ensuring that the United States would be able to credibly make and faithfully honor international agreements was one of *the* central purposes driving the creation of the Constitution. This aim was not just one of many desirable goals the Constitution was designed to help achieve; it was one of the central animating causes that led to the calling of the Constitutional Convention, the abandonment of the Articles of Confederation, and the overall design and structure of the Constitution. See here[13] for a full history.

Today, it is easy to forget how fundamental it was to the Constitution's design that the U.S. be able to make and honor treaties. The most important treaty in U.S. history is still the Treaty of Peace with Great Britain in 1782, which ended the Revolutionary War. The inability of the U.S. to honor its obligations under the Treaty, and the resulting national-security threat to the U.S. from British retaliation for the inability of the U.S. to honor its Treaty commitments, was one of the major events behind the Constitution's creation.

The Treaty recognized the independence of the U.S. and our claim to expansive boundaries. On the British side, an essential demand was that the U.S. override state war-time confiscation laws that had eliminated or reduced pre-War debt obligations of American debtors to British creditors. In the Treaty, the U.S. agreed to do so to ensure these debts would be honored in full; as part of the pact, the British also agreed to withdraw from their forts in the northwest of the U.S. But all that Congress could do, under the Ar-

[13] papers.ssrn.com/sol3/papers.cfm?abstract_id=1669452.

ticles of Confederation, was to ask the states to honor these international commitments the U.S. had made, and Virginia (whose citizens owed the largest portion of these debts) refused to do so. In retaliation, the British refused to withdraw from their forts and held the security of the U.S. hostage.

Notice that the Treaty regulated property or contract claims – debts – that are ordinarily regulated under state law. In addition, this problem of states undermining the capacity of the U.S. to honor its treaty obligations and be a credible nation in world affairs, with consequences to both the security and economic prosperity of the country, was a general problem under the Articles (for a fuller history on the Treaty of Peace, see the magisterial article on the history of the treaty power: David Golove, *Treaty-Making and the Nation*[14]).

Numerous provisions reveal the extent to which the Constitution was designed to remedy this defect. Although treaties were made difficult to enter into, requiring 2/3 support in the Senate for ratification, the Constitution sought to ensure that the U.S. would have the capacity to honor valid treaties. Thus, the Constitution expressly makes treaties part of the "supreme law of the land;" the Art. III federal judicial power expressly extends to cases arising under treaties, to ensure their effective enforcement; the states are expressly denied power to enter into treaties; and the states are also denied power to enter into international compacts without congressional consent.

In addition, the Constitutional Convention explicitly debated but rejected the proposal to limit the subject matter of treaties into which the U.S. could enter, because of the view that the U.S. needed to have the power to decide over time the subject on which it would be desirable to enter into treaties to promote the interests of the U.S. Moreover, the Founding Era is overflowing with statements and positions that express the necessity and importance of the Constitution enabling the U.S. to honor its treaty commitments. As just one brief glimpse, here is what Federalist Papers #22 (by Hamilton) has to say:

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[14] papers.ssrn.com/sol3/papers.cfm?abstract_id=220269.

> The treaties of the United States, under the present Constitution [of the Confederation], are liable to the infractions of thirteen different legislatures, and as many different courts of final jurisdiction, acting under the authority of those legislatures. The faith, the reputation, the peace of the whole Union, are thus continually at the mercy of the prejudices, the passions, and the interests of every member of which it is composed. Is it possible that foreign nations can either respect or confide in such a government? Is it possible that the people of America will longer consent to trust their honor, their happiness, their safety, on so precarious a foundation.

This brief account of the historical problems and context against which the Constitution was crafted is necessary to set the stage for considering Nick's approach to the "treaty problem."

Yet pushing back against all this history and original understanding is the kind of intuition or anxiety that fuel's Nick's argument and related ones that have arisen throughout U.S. history: if no limit on the treaty power and related national powers exists, can't the national government subvert the federal/state balance of power that the Constitution also works so hard to establish? To make this concrete, let's assume Congress does not have the legislative power to abolish the death penalty in the states. If the U.S. then enters into a treaty on this subject, can Congress now legislate to abolish the death penalty? Or, to take the issue in *Bond* itself, if Congress would not otherwise have the power to regulate an individual's possession and use of toxic chemicals, can Congress gain this power as a means of implementing the Chemical Weapons Convention?

The issue takes on even more heightened stakes with the rise of human rights treaties the U.S. has signed in the post-WWII era. If Congress would not otherwise have the power to legislate in these areas, can it do so as a means of implementing these treaties? These questions illustrate the tension or puzzle or conundrum about the treaty power.

This post has gone on long enough in providing the historical perspective needed to assess Nick's argument. In subsequent posts, I will offer my reasons for not being persuaded by Nick's approach to the treaty power. I will then suggest some alternative approaches.

THE FRAMERS GAVE CONGRESS A ROBUST LIST OF POWERS; THEY DID NOT PROVIDE THAT THESE LEGISLATIVE POWERS CAN BE INCREASED BY TREATY

Nick Rosenkranz

Rick Pildes has posted useful historical background[15] for our debate about whether treaties can increase the legislative power of Congress.[16] I agree with almost everything that he has said. Under the Articles of Confederation, Congress lacked the power to enforce the Treaty of Peace with Great Britain in 1782, and that defect in the Articles was indeed part of the impetus for the Constitution.

This is helpful context, and it is certainly worth noting. I would just add a few sentences to, as it were, put this context in context. Under the Articles of Confederation, Congress lacked the power to do a great many important things – perhaps most importantly, it lacked the power to regulate interstate and international commerce. The inability to enforce the Treaty of Peace was a specific instantiation of this general impotence of Congress. And it is this general weakness that was the overriding impetus for the Constitution.

The Constitution remedied this general defect by giving Congress a robust array of legislative powers that were lacking in the Articles. This impressive list of powers seemed more than sufficient to meet the needs of the nation. Indeed, the primary concern of the antifederalists was that this list went far too far.

But in fact, the Constitution went even further. If at some future date, this list of powers, fearsome as it was, should, for whatever reason, prove insufficient, Article V provides a mechanism – really four distinct mechanisms – by which the Constitution could be amended and Congress's legislative power could be increased even further. These mechanisms of Article V have, in fact, been utilized seven times to increase Congress's legislative power.

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[15] www.volokh.com/2013/01/14/does-congress-have-the-power-to-enforce-treaties-part-i/.

[16] www.volokh.com/2013/01/13/introducing-guest-blogger-prof-rick-pildes-of-nyu-to-debate-whether-a-treaty-can-increase-the-legislative-power-of-congress/.

But the question on the table is whether – in addition to the enumerated powers, and in addition to the four elaborate and express Article V mechanisms for adding to that list – the Constitution also includes a fifth mechanism, unmentioned in the text, by which Congress's legislative power may be increased, simply by making a treaty.

Justice Scalia, at least, has his doubts:[17] "I don't think that powers that Congress does not have under the Constitution can be acquired by simply obtaining the agreement of the Senate, the President and Zimbabwe. I do not think a treaty can expand the powers of the Federal government." (oral argument, Golan v. Holder (2012)).

Stay tuned for Rick's argument that Justice Scalia is wrong.

DOES CONGRESS HAVE THE POWER TO ENFORCE TREATIES? PART II

Rick Pildes

As we move into the areas where Nick and I disagree about the treaty power, I want to avoid getting mired in the smaller constitutional issues we could debate and instead focus on four of the deepest and most general problems I see in Nick's approach. This post will address the first two. Nick's argument, remember, is that a treaty cannot generate any legislative power to implement the treaty that Congress otherwise would not have.

First, Nick's approach *accepts* that if the Senate and President choose to make a treaty self-executing, then that treaty can indeed displace the states' traditional legislative powers. Thus, under Nick's approach, a treaty to eliminate the death penalty that was self-executing would validly and constitutionally have the power to displace the states' traditional police-power authority to decide for themselves whether to adopt the death penalty – even if Congress would lack legislative power to do so absent the treaty. In other words, the Senate and the President can jointly ensure faithful compliance with a treaty obligation by making the treaty self-executing.

It is easy to overlook this fact in responding to Nick's "solution" to the treaty problem. But because Nick's approach would apply

[17] www.cato.org/blog/justice-scalia-reads-catos-amicus-briefs.

only if the President and Senate choose not to make a treaty self-executing, so that Congress must enact legislation to implement the treaty as domestic law, much of the rhetorical force behind Nick's argument, as well as the constitutional foundation for it, seems to me to dissipate.

On the rhetorical side, Nick invokes concerns such as the one he quotes Justice Scalia as expressing at a recent oral argument: can it be the case that if the President and Senate enter into a treaty with Zimbabwe, Congress now has legislative powers it would not otherwise have to enforce that treaty? But even under Nick's approach, the President and the Senate *can* displace the prior constitutional allocation of federal/state legislative authority as long as they make that treaty with Zimbabwe self-executing. Moreover, the meaning of a self-executing treaty is that it has immediate domestic legal effect; that means the federal courts would have the power (and obligation) to implement the treaty through interpretation. The only option taken off the table by Nick's approach is giving Congress the power to implement and interpret the treaty through legislation (it's unclear whether Justice Scalia endorses Nick's position or whether Justice Scalia would conclude, contrary to Nick, that a self-executing treaty can also not displace the legislative powers otherwise allocated to the states).

On the constitutional side, it is surely hard to understand as a structural or functional matter why the Framers would have intended – or why a sensible way of reading and reasoning about the Constitution would be – that the Senate and the President acting jointly can displace state law but the Senate and the President are constitutionally forbidden from deciding that the best means of implementing a treaty is to require the subsequent agreement of the House, Senate, and the President. After all, to make a self-executing treaty requires only the agreement of the President and 2/3 of the Senate. To give a non-self-executing treaty domestic legal effect requires that same level of agreement plus the later agreement of the House, the Senate, and the President to enact legislation. The latter process would seem more protective, not less, of both the states' legislative powers and the private interests that would be affected by the treaty.

Thus, it turns out that Nick's solution rests on a very thin foundation: while his approach is driven by (understandable) anxieties about whether a treaty can expand the powers of the federal government vis a vis the states, his solution enables the federal government to do exactly that. All the weighty concerns about the federal/state balance of power thus disappear if the Senate and President simply chose to make the treaty self-executing. But if they do not make that choice, then (and only then) is Congress as a whole denied the power to implement that treaty through the legislative process. In terms of constitutional structure or logic, that seems like such a peculiar outcome – and such a strange way of "solving" the "treaty problem," if there is a problem – that we would need, at the least, a compelling account of why the Constitution would have been designed and is best read this way, especially in light of the centrality to the Constitution's design of enabling the federal government to honor treaty obligations.

Second, Nick tries to generate support from his argument by providing various seeming puzzles that the *Missouri v. Holland* approach purportedly spawns:

Aren't Congress' powers supposed to be fixed and enumerated? How can Congress acquire new powers outside the enumerated powers simply because a treaty has been adopted? Does this mean there is some magical on-off switch for congressional powers, by which Congress gains new powers it would not otherwise have from the national government's exercise of the treaty power? In general, he argues, the valid exercise of one power the federal government has cannot create new national powers, can it? Under *Holland*, does this mean that if the United States revokes the treaty, the legislation implementing it then becomes invalid? But, Nick continues, legislation must be either valid or invalid when enacted. Nick offers a number of challenges of this sort that arise from the view that Congress can gain power to enforce a treaty that Congress would not otherwise have.

But none of these seeming puzzles are all that puzzling once we focus on the larger constitutional structure. The short answer to all of these kind of questions is that, yes, that is precisely the way the

Constitution works. To gain perspective on that, let's broaden the discussion away from the treaty power in isolation to consider other national powers – specifically, the war powers. There is no question that the existence of war gives birth to numerous kinds of powers the national government does not otherwise have – including the power to change the balance of federal/state powers.

The most obvious example – especially if you have recently seen the movie, *Lincoln* – is the Emancipation Proclamation. President Lincoln always took the view that the Constitution did not give the national government the power to abolish slavery where it existed. As a matter of the ordinary allocation of domestic, national legislative and presidential power, there was no power to abolish slavery. Yet over the course of the war, Lincoln came to the view that abolishing slavery in the states in rebellion would be an important and constitutionally legitimate means of facilitating the Union war effort – and that he had the power, even acting unilaterally, to abolish slavery in the states in rebellion.

Similarly, during the war Congress passed the Confiscation Acts. These laws authorized the uncompensated confiscation of property held by those in rebellion. Again, there was no question that absent the activation of the war powers, Congress would have (1) no power to regulate state property law and (2) no power to confiscate property without compensation (Art. I, by the way, gives Congress enumerated power to regulate "captures,".but there is no express textual power to confiscate enemy property). Yet as with President Lincoln's action, the activation of the war power gave Congress power to displace state law it would otherwise lack.

The U.S. can, of course, enter into a state of war through a formal congressional declaration of war. That legal act then triggers new national powers. Such a declaration is probably the most visible, direct analogue to the legal act of entering into a treaty. The U.S. can also, of course, legitimately enter into military conflict in some contexts without a formal declaration of war. But either way, war and related uses of military force trigger new national powers, for both Congress and the President. Among many other consequences, the entry into war or miltiary conflict gives the national

government powers to displace state authority in areas otherwise allocated to state legislative power under the Constitution.

Thus, all Nick's puzzles are really not that puzzling once we focus on the Constitution's larger structure at the intersection of international and domestic matter. Yes indeed, the exercise of one power the Constitution gives the national government can activate other national powers the federal government does not otherwise have. There is nothing mysterious or magical or surprising about that. And the treaty power is not unique in this way.

Similarly, Nick thinks there is a great puzzle in the fact that if a treaty is revoked, what do we do about a law enacted to implement the treaty that Congress would not otherwise have power to adopt? Does that law now become unconstitutional? Can that make sense?

Again, the war powers example clarifies why these questions are not as puzzling as Nick makes them seem. If Congress adopts a war measure that it can only enact as long as a war is going on, then yes, that measure becomes unconstitutional going forward once the war ends. Congress might have power to require or permit military detention of enemies, including those captured in the U.S., but once the war ends, any such legislation would no longer be constitutional. There is no deep mystery here and the same is true with the treaty power.

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I will make my final two points more briefly in the next post, then turn to other possible approaches to "the treaty problem."

THERE IS NO TEXTUAL FOUNDATION FOR THE CLAIM THAT TREATIES CAN INCREASE THE POWER OF CONGRESS

Nick Rosenkranz

Rick has offered several articulate criticisms[18] of the argument in my treaty article,[19] and I will respond to his specific criticisms in a subsequent post. For now, though, I would just point out that

[18] www.volokh.com/2013/01/16/does-congress-have-the-power-to-enforce-treaties-part-ii/.

[19] papers.ssrn.com/sol3/papers.cfm?abstract_id=747724.

these criticisms seem to put the cart before the horse. Rick has not yet offered any *textual* basis for his claim that treaties can increase the legislative power of Congress.

The constitutional enumeration of federal legislative powers, plus the Tenth Amendment, surely puts the burden of proof on anyone who is arguing in favor of a particular congressional power – let alone arguing for a mechanism, outside of Article V, by which legislative powers can be expanded without limit. I would have thought that Rick would begin by gesturing to a particular constitutional provision. Where in the Constitution is one to find such a mechanism?

The conventional view (bolstered by a celebrated bit of purported drafting history, which proved to be false; see Executing the Treaty Power[20] at 1912-18) is that this mechanism derives from a combination of the Necessary and Proper Clause and the Treaty Clause. (I believe that Rick acceded to this conventional view at our debate two weeks ago in New Orleans.[21]) The Necessary and Proper Clause provides: "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." The Treaty Power is certainly an "other Power[] vested by th[e] Constitution." The Treaty Clause provides that 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."

So the Treaty Power is, in fact, a referent of the Necessary and Proper Clause, and thus the conjunction of these two clauses is essential to an analysis of whether a treaty can increase the legislative power of Congress. Here, then, is the way that these two Clauses fit together as a matter of grammar:

> "The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the [President's] Power . . . to make Treaties. . . ."

[20] papers.ssrn.com/sol3/papers.cfm?abstract_id=747724.
[21] www.fed-soc.org/publications/detail/resolved-congresss-enumerated-powers-cannot-be-increased-by-treaty-event-audiovideo.

The question is the scope of that power. What is a "Law[] for carrying into Execution the . . . Power . . . *to make* Treaties"?

For purposes of this inquiry, the key term is the infinitive verb "to make." The power granted to Congress is emphatically not the power to carry into execution "the treaty power," let alone the power to carry into execution "all treaties." Rather, on the face of the text, Congress has power "To make all laws which shall be necessary and proper for carrying into Execution the . . . Power . . . *to make* treaties."

This power would certainly extend to laws appropriating money for the negotiation of treaties. And it would likewise embrace any other laws necessary and proper to ensure the wise use of the power to enter treaties. These might include, for example, appropriations for research into the economic or geopolitical wisdom of a particular treaty, or even provisions for espionage in service of the negotiation of a treaty. But on the plain constitutional text, such laws must have as their object the "Power . . . *to make* treaties." This is not the power to implement non-self-executing treaties already made.

The Supreme Court saw this textual point clearly when construing a statute with similar language. In *Patterson v. McLean Credit Union*, the statute at issue concerned the "right . . . to make . . . contracts." This provision is textually and conceptually parallel to the "Power . . . to make Treaties" both because of the key infinitive verb "to make" and because, as Chief Justice Marshall explained, non-self-executing treaties are, in fact, in the nature of contracts. This is what the Court said in *Patterson*:

> The right *to make* contracts does not extend, as a matter of either logic or semantics, to conduct . . . *after* the contract relation has been established, including breach of the terms of the contract . . . . Such *postformation* conduct does not involve the right *to make* a contract, but rather implicates *performance* of established contract obligations. . . .

Just so here. The "Power . . . to make Treaties" does not extend, as a matter of either logic or semantics, to the implementation of

treaties already made. See Executing the Treaty Power[22] at 1880-85. So there is no textual foundation for the claim that treaties can increase the legislative power of Congress.

THE SUPREME COURT CERT. GRANT IN BOND

Rick Pildes

To the surprise of many Supreme Court observers, the Court today granted cert. in the *Bond* case, which Nick and I have been debating on this blog. The grant was a surprise because the Court had re-listed *Bond* for discussion at conference seven or eight times; after that many re-listings, the most typical outcome is cert. denied, with at least one dissenting opinion. It's possible a majority of the Court had initially voted to deny cert. but the dissenting opinion was convincing enough it persuaded the Court it should not decide the issue without plenary consideration. It's also possible the Court was uncertain throughout about whether to grant cert. and was working through the several issues the case presents before concluding it was appropriate to hear on the merits.

In light of the grant, it's perhaps worthwhile to collect in one place the debate Nick and I have conducted so far. See here,[23] here,[24] here,[25] and here.[26] The biggest issue the case presents is whether *Missouri v. Holland* was rightly decided on the scope of Congress' power to legislate to enforce valid treaties, which is precisely the issue we have been debating. We will continue that debate over the coming days, now with the greater sense of urgency and interest the Court's grant generates.

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[22] papers.ssrn.com/sol3/papers.cfm?abstract_id=747724.

[23] www.volokh.com/2013/01/14/does-congress-have-the-power-to-enforce-treaties-part-i/.

[24] www.volokh.com/2013/01/16/the-framers-gave-congress-a-robust-list-of-powers-they-did-not-provide-that-these-legislative-powers-can-be-increased-by-treaty/.

[25] www.volokh.com/2013/01/16/does-congress-have-the-power-to-enforce-treaties-part-ii/.

[26] www.volokh.com/2013/01/16/there-is-no-textual-foundation-for-the-claim-that-treaties-can-increase-the-power-of-congress/.

BOND V. UNITED STATES AND THE TREATY POWER

Ilya Somin

As guest blogger Rick Pildes notes, the Supreme Court on Friday agreed to hear *Bond v. United States*,[27] an important case addressing the issue of whether international treaties can authorize Congress to legislate on issues that would otherwise be under the exclusive control of state governments.

This is one of the very rare cases that comes before the Supreme Court twice. I discussed the previous *Bond* ruling – an important federalism decision – here:[28]

> In *Bond v. United States*,[29] an otherwise unremarkable recent Supreme Court ruling, a unanimous Court emphasized a profoundly important point: that "[f]ederalism secures the freedom of the individual" as well as the prerogatives of state governments. In addition to setting boundaries "between different institutions of government for their own integrity," constitutional federalism also "secures to citizens the liberties that derive from the diffusion of sovereign power."

I covered some of the issues at stake in the present iteration of *Bond* in this post:[30]

> In my view, unconstrained federal power under the treaty clause isn't as dangerous as unconstrained federal power under the Commerce Clause or the Necessary and Proper Clause. A treaty only becomes law if ratified by a two-thirds supermajority of the Senate, which is a high hurdle to overcome, and in practice usually requires a broad national consensus. Nonetheless, . . . I think the power to make treaties is best understood as a power allowing the federal government to make commitments regarding the use of its other enumerated powers, not a power that allows the federal government to legislate on whatever subjects it wants, so long as the issue is covered by a treaty. Among other things, the latter would enable the federal

[27] www.scotusblog.com/2013/01/court-grants-four-cases-2/.
[28] www.libertylawsite.org/2011/12/28/bond-federalism-and-freedom/.
[29] www.supremecourt.gov/opinions/10pdf/09-1227.pdf.
[30] www.volokh.com/2012/09/01/federalism-bond-v-united-states-and-the-treaty-power/.

> government to circumvent limits on the scope of its [authority] by paying off a foreign power (e.g. – a weak client state dependent on US aid) to sign a treaty covering the subject.

The view outlined in my last post on this subject flows naturally from the conventional understanding of treaties as contracts between nations. As *Federalist 64*[31] puts it, "a treaty is only another name for a bargain." A person who makes a contract only has the right to make commitments with respect to decision-making authority that he already possesses. For example, I cannot sign a binding contract committing a third party to teach constitutional law at George Mason University, unless he has specifically authorized me to do so. Similarly, the federal government cannot sign an international contract (i.e. – a treaty) making commitments on issues outside the scope of its other powers. This presumption could have been overriden by a specific provision of the Constitution authorizing the president or Congress to sign and enforce treaties on subjects that are otherwise outside the scope of their power. But there is no such provision. The Necessary and Proper Clause does not give such authority to Congress for reasons outlined by co-blogger Nick Rosenkranz in his important article[32] on the subject.

One could argue that Article VI of the Constitution,[33] which makes treaties "the supreme law of the land" authorizes the making of treaties that go beyond the scope of structural limits on federal power. But Article VI only gives that status to "treaties made, or which shall be made, *under the authority of the United States*" (emphasis added). A treaty covering issues outside the scope of federal power goes beyond "the authority of the United States," and is therefore not part of the "supreme law of the land." Under the very broad modern interpretation of the Commerce and Necessary and Proper Clauses, the federal government has the authority to make and enforce treaties on a very wide range of issues – but not an infinite range.

I am not nearly as expert on the treaty power as Rick Pildes and co-blogger Nick Rosenkranz, and have not done much academic

[31] usgovinfo.about.com/library/fed/blfed64.htm.
[32] papers.ssrn.com/sol3/papers.cfm?abstract_id=747724.
[33] www.law.cornell.edu/constitution/articlevi.

work on the subject. So it's possible there's a key point I'm missing here. We shall see. In the meantime, interested readers should check out the the debate on this issue between Pildes and Rosenkranz, with links compiled here.[34]

TREATIES CAN CREATE DOMESTIC LAW OF THEIR OWN FORCE, BUT IT DOES NOT FOLLOW THAT TREATIES CAN INCREASE THE LEGISLATIVE POWER OF CONGRESS

Nick Rosenkranz

Yesterday, the Supreme Court granted certiorari in United States v. Bond,[35] which raises the question of whether a treaty can increase the legislative power of Congress. Guest Blogger Rick Pildes has already noted the cert grant here,[36] and Ilya Somin posted his thoughtful take on the case here.[37] I merely add that I am delighted that the Court has taken the case. *Missouri v. Holland* addressed this issue in one unreasoned sentence; I believe that it deserves a far more thorough treatment.[38]

As it happens, Rick and I are in the midst of debating this very issue. Rick set the stage with some historical background,[39] and I largely agreed with – but slightly re-characterized – his account.[40] Rick offered some structural or pragmatic reasons to believe that treaties can increase the legislative power of Congress.[41] I contended[42] that these arguments put the cart before the horse.

[34] www.volokh.com/2013/01/18/the-supreme-court-cert-grant-in-bond/.
[35] www.scotusblog.com/2013/01/court-grants-four-cases-2/.
[36] www.volokh.com/2013/01/18/the-supreme-court-cert-grant-in-bond/.
[37] www.volokh.com/2013/01/19/bond-v-united-states-and-the-treaty-power/.
[38] sblog.s3.amazonaws.com/wp-content/uploads/2012/09/12-158-Cato-Amicus-Bond-cert-final-8-31-12.pdf.
[39] www.volokh.com/2013/01/14/does-congress-have-the-power-to-enforce-treaties-part-i/.
[40] www.volokh.com/2013/01/16/the-framers-gave-congress-a-robust-list-of-powers-they-did-not-provide-that-these-legislative-powers-can-be-increased-by-treaty/.
[41] www.volokh.com/2013/01/16/does-congress-have-the-power-to-enforce-treaties-part-ii/.
[42] www.volokh.com/2013/01/16/there-is-no-textual-foundation-for-the-claim-that-treaties-can-increase-the-power-of-congress/.

The first question, I suggested, is whether there is any basis in constitutional *text* for this proposition. (And, in light of the Tenth Amendment and the enumeration of legislative power, the burden of proof surely lies with anyone claiming that Congress's legislative power can be expanded, virtually without limit, by treaty.) The conventional view is that the textual basis may be found in a combination of the Treaty Clause and the Necessary and Proper Clause. I have attempted to explain why this is not so.[43]

And the absence of textual support is unsurprising, because the proposition itself is in such deep tension with the basic structural axioms of the Constitution. The Constitution goes to great pains to limit and enumerate the powers of Congress. It emphasizes that the powers of Congress (unlike the powers of the President and the courts) are only those "herein granted." It creates an elaborate mechanism, really four mechanisms, for its own amendment, by which the legislative power can be – and repeatedly has been – augmented. And for good measure, it underscores 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."

Given all this, it is hard to imagine that the Constitution includes a fifth mechanism, unmentioned in the text, by which the legislative power of Congress can be increased, virtually without limit, by treaty. As Justice Scalia says: "I don't think that powers that Congress does not have under the Constitution can be acquired by simply obtaining the agreement of the Senate, the President and Zimbabwe. I do not think a treaty can expand the powers of the Federal government." (oral argument, Golan v. Holder (2012)).

Despite all this, Rick insists that that Justice Scalia is wrong, and that treaties can increase the legislative powers of Congress. He has advanced two arguments so far. In this post, I will address his first point, about self-executing treaties. I will address his second point in a subsequent post.

Rick points out that treaties generally can be self-executing; that

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[43] www.volokh.com/2013/01/16/there-is-no-textual-foundation-for-the-claim-that-treaties-can-increase-the-power-of-congress/.

treaties are supreme law of the land; and that self-executing treaties create domestic law of their own force, perhaps preempting state law in the process. (See the Treaty Clause + the Supremacy Clause.) If all that's so, he wonders, what's so bad about a non-self-executing treaty giving Congress new legislative power? Why should we object to the two-step displacement of state law (non-self-executing treaty followed by statute) if the one-step displacement (self-executing treaty) is permissible?

The short answer is that process and structure matter in constitutional law. In the canonical structural cases, like *INS v. Chadha* (legislative veto) and *Clinton v. New York* (line item veto), the losing argument generally takes this form: If the government could have achieved something similar by procedure X, then what's so bad about letting it use procedure Y? The winning side reminds us that functional equivalence does not suffice; there is no substitute for "a single, finely wrought and exhaustively considered procedure" required by the Constitution.

In any case, here we are not talking about functional equivalence. It is one thing for a treaty to create domestic law of its own force – a distinct, well-defined, section of federal law, whose preemptive force would be clear on its face, just like a federal statute. It is quite another matter for a treaty to create an entirely new font of legislative power (like the new fonts of power in various constitutional amendments) – power that Congress may use, at its discretion, to regulate entirely local matters forever after. Or at least until the President of the United States – or the President of, say, Zimbabwe – abrogates the treaty.

If this were permissible, the Constitution would create a doubly perverse incentive – an incentive to enter into new international entanglements precisely to enhance domestic legislative power. The Framers were very wary of foreign entanglements (see, e.g., Washington's Farewell Address). And they were deeply fearful of the legislature's tendency to "everywhere extend[] the sphere of its activity, and draw[] all power into its impetuous vortex," Federalist #48 (Madison). It is, therefore, implausible that they would have created a doubly perverse incentive by which treaty makers (the

President and Senate) could undertake new foreign entanglements – and thereby increase the power of lawmakers (the President, Senate, and House). This is not "ambition . . . made to counteract ambition," Federalist #51 (Madison); this is ambition handed the keys to power.

Happily, this is not what the Constitution requires.[44] It nowhere suggests that treaties can increase the legislative power of Congress.

SOMIN ON BOND

Nick Rosenkranz

Ilya Somin has a thoughtful post on U.S. v. Bond here.[45] I have only one quibble with what he has said. Ilya agrees with Justice Scalia and me that a treaty cannot increase the legislative power of Congress. But he reaches this conclusion in a slightly different way. The difference is actually an important window into this issue.

If the President signs a treaty promising that Congress will enact certain legislation, but Congress would ordinarily lack the power to enact that legislation, what happens? *Missouri v. Holland* seems to say that the treaty automatically gives Congress the legislative power at issue. Ilya and I both disagree.

Ilya would say that, under these circumstances, the treaty itself is void. He would say that the President has no power to make such a promise. In his view, the treaty power only empowers the President to make promises that the federal government knows it can keep.

In my view, the answer is different. I believe that the President *can* make such a promise, even though Congress lacks present power to keep it. Making such a promise is not generally advisable, to be sure, but it is permissible. To see why, consider that for every person, and every politician, and every government, the capacity to make promises exceeds the capacity to keep them. Many of our promises may turn on circumstances beyond our control, including the actions of third parties.

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[44] papers.ssrn.com/sol3/papers.cfm?abstract_id=747724.

[45] www.volokh.com/2013/01/19/bond-v-united-states-and-the-treaty-power/.

I might contract to build you a house on a particular tract of land by a particular date. Executing the contract might require circumstances, like good weather, that are not within my control. It might also require legal changes, like zoning waivers, that are also not within my control. This does not mean that we cannot make such promises. It merely means that we may fail to keep them.

Every non-self-executing treaty has this feature. Non-self-executing treaties promise that the United States will enact certain legislation. They promise, in other words, that we will utilize a particular constitutional mechanism, the mechanism of Article I, section 7, to achieve a particular outcome. But this mechanism requires the acquiescence of the House of Representatives – and the House has no role in the making of treaties. In every such case, there is the real possibility that the House will refuse to do what the President and Senate have promised, and then we will be in breach. Every time the President and Senate enter into a non-self-executing treaty, they are making a promise that they – and our treaty partners – cannot be certain that the United States will keep.

Now consider the case in which a treaty promises to enact legislation that Congress lacks the power to enact (either because such legislation would violate the Bill of Rights, see Reid v. Covert,[46] or because it would exceed the enumerated powers of Congress, see Executing the Treaty Power[47]). This is, in effect, a promise to use, not the legislative mechanism of Article I, section 7, but the amendment mechanism of Article V. The Article V mechanism, like the Article I, section 7, mechanism, requires the acquiescence of many political actors other than the President and Senate, and there is of course a great risk that these actors will refuse, putting the United States in breach. But this is, in principle, no different than the case above. Here too, the President and Senate are making a promise that turns on the actions of other political actors, a promise that they – and our treaty partners – cannot be certain that we will keep.

It will, of course, almost always be unwise to make such a promise. But perhaps not always. Imagine that the United States is de-

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[46] www.law.cornell.edu/supct/html/historics/USSC_CR_0354_0001_ZO.html.

[47] papers.ssrn.com/sol3/papers.cfm?abstract_id=747724.

feated in a disastrous war, and the victorious country requires, as a term of a peace treaty, a concession that would violate the Bill of Rights. It proposes, for example, to allow the United States to maintain some military bases abroad, but insists that any crimes committed by people there, including the spouses of soldiers, must be tried by military commission. Can the United States agree to the term and end the war?

Such a treaty cannot be self-executing; if it were, then making it would violate the Bill of Rights. And if such a treaty were non-self-executing, it would not empower Congress to pass legislation executing it. A treaty cannot itself violate the Bill of Rights, and nor can it empower Congress to violate the Bill of Rights. These are the holdings of Reid v. Covert,[48] and Rick, Ilya, and I all agree with them.

But does it follow that the President has no power to enter into such a treaty in the first place, even if it is non-self-executing? Ilya would say yes: If Congress has no power to execute such a treaty, then the President has no power to sign such a treaty, and if he does so, the treaty is void. But why? Would we really be obliged to fight to the last man rather than sign such a treaty?

This treaty, like all non-self-executing treaties, creates an international "legal" obligation. But this treaty, like all non-self-executing treaties, is not, of its own force, domestic law. It is hard to see how the subject matter of such a treaty exceeds the treaty power; a peace treaty is surely in the heartland of the treaty power. And since the treaty has no domestic legal effect, it's hard to see how the treaty itself violates the Bill of Rights.

This hypothetical treaty, like all non-self-executing treaties, purports to require the action of other political actors – actions that the President and Senate cannot really guarantee. Most non-self-executing treaties are (uncertain) promises to use Article I, section 7; this one is an (uncertain) promise to use Article V. But why should that matter? The Article V amendment process is as much a part of the Constitution as the Article I legislative power. If a treaty

[48] www.law.cornell.edu/supct/html/historics/USSC_CR_0354_0001_ZO.html.

can create an international commitment to exercise the latter, there is no reason in principle why it cannot create an international commitment to exercise the former.

I would say, contra Ilya (but perhaps consistent with Rick?), that the President has power to enter into such a treaty, even though Congress has no present power to execute the treaty. See Executing the Treaty Power[49] at 1920-27.

To reiterate, though, this is a mere intramural dispute. Ilya and I agree with Justice Scalia on the fundamental point: A treaty cannot increase the legislative power of Congress.

THE LEGAL STATUS OF TREATIES THAT REQUIRE VIOLATIONS OF THE CONSTITUTION

Ilya Somin

Co-blogger Nick Rosenkranz and I agree on most of the practically important issues regarding the constitutional status of treaties. But in his insightful recent post[50] responding to my most recent comment[51] on the subject, Nick does identify one theoretically interesting difference between us. He believes that treaties that require action that violates the Constitution are in some sense legally valid, whereas I do not:

> If the President signs a treaty promising that Congress will enact certain legislation, but Congress would ordinarily lack the power to enact that legislation, what happens? *Missouri v. Holland* seems to say that the treaty automatically gives Congress the legislative power at issue. Ilya and I both disagree.
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> Ilya would say that, under these circumstances, the treaty itself is void. He would say that the President has no power to make such a promise. In his view, the treaty power only empowers the President to make promises that the federal government knows it can keep.
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> In my view, the answer is different. I believe that the President *can* make such a promise, even though Congress lacks pre-

[49] papers.ssrn.com/sol3/papers.cfm?abstract_id=747724.
[50] www.volokh.com/2013/01/20/somin-on-bond/.
[51] www.volokh.com/2013/01/19/bond-v-united-states-and-the-treaty-power/.

> sent power to keep it. Making such a promise is not generally advisable, to be sure, but it is permissible. To see why, consider that for every person, and every politician, and every government, the capacity to make promises exceeds the capacity to keep them. Many of our promises may turn on circumstances beyond our control, including the actions of third parties.

To be clear, I don't doubt that the president can make that promise. I just deny that the promise has any legal validity of the kind that would be enjoyed by a treaty that only requires action within the constitutional limits of federal power. It has the same status as any other promise to do something we have no legal right to do. For example, if I sign a contract promising to force a third party blog for the Volokh Conspiracy, I certainly have the right to put my signature to the piece of paper. But it would create no binding legal obligation. The same goes for a treaty committing the federal government to do something it lacks the constitutional authority to do.

Nick correctly points out that we often have a right to contract to do things that we might not ultimately succeed in carrying out, such as promising to build a house within a time-frame that turns out to be impossible. But there is a difference between that kind of promise and a promise to do something that is actually outside the scope of the promisor's legal authority. It's the distinction between the contractor who promises to build a house on an unrealistic schedule, and one who promises to, say, commit murder for hire. Because the latter has no right to commit murder in the first place, his promise is legally void.

Nick argues that a presidential commitment to a treaty that requires action beyond the power of the federal government might be seen as a promise to use Article V of the Constitution to pass a constitutional amendment. If the treaty merely requires the president to take action to pass a constitutional amendment, that may be so. But most international agreements go beyond this, stating that the US is actually required to perform Action X, as opposed to merely requiring the president to use persuasion to try to enact a constitutional amendment.

There is a difference, moreover, between a treaty that would require a constitutional amendment to implement, and one that merely requires ordinary legislation. The latter is within the power of the federal government as a whole, even if not that of the president by himself. And the president is himself an official of the federal government. By contrast, a constitutional amendment requires the consent of a supermajority of states, which are not part of the federal government and have their own separate sovereign authority.

Nick worries that my approach might lead to disaster in some circumstances:

> Imagine that the United States is defeated in a disastrous war, and the victorious country requires, as a term of a peace treaty, a concession that would violate the Bill of Rights. It proposes, for example, to allow the United States to maintain some military bases abroad, but insists that any crimes committed by people there, including the spouses of soldiers, must be tried by military commission. Can the United States agree to the term and end the war?
>
> Such a treaty cannot be self-executing; if it were, then making it would violate the Bill of Rights. And if such a treaty were non-self-executing, it would not empower Congress to pass legislation executing it. A treaty cannot itself violate the Bill of Rights, and nor can it empower Congress to violate the Bill of Rights. These are the holdings of *Reid v. Covert*, and Rick [Pildes], Ilya, and I all agree with them.
>
> But does it follow that the President has no power to enter into such a treaty in the first place, even if it is non-self-executing? Ilya would say yes: If Congress has no power to execute such a treaty, then the President has no power to sign such a treaty, and if he does so, the treaty is void. But why? Would we really be obliged to fight to the last man rather than sign such a treaty?

In my view, such a treaty would indeed be legally void. To make it legal, we would have to pass a constitutional amendment. But notice that the practical situation is little different under Nick's view. In theory, he would say that the treaty is valid. But he also argues that it can't be enforced either through self-execution or

through congressional legislation. Presumably, the president cannot enforce it by executive order. Under Nick's theory, the treaty would have no real effect until there is a constitutional amendment. From the standpoint of a victorious power that wants to see results in the real world, there is little difference between my view and Nick's. In practice, both would require us to either pass a constitutional amendment quickly or violate the Constitution if we wanted to appease the enemy and end the fighting.

This is just one of many possible examples of how any constitutional limit on government power could potentially lead to disaster. Any such limit could turn into a suicide pact in some theoretically conceivable situation. But that does not mean that we should simply do away with constitutional restrictions on government. Unconstrained government power also poses grave risks. I wrote about the suicide pact dilemma in greater detail here.[52]

DOES CONGRESS HAVE THE POWER TO ENFORCE TREATIES: PART III

Rick Pildes

Recent posts (and comments) help clarify what is at stake in the debate about the treaty power and the *Bond* case. American constitutional doctrine since WW II, at least, is clear that a treaty cannot give Congress the power to violate the individual rights provisions of the Bill of Rights. That's the principle of *Reid v. Covert*. Nick and I agree about that. The only issue is whether a treaty can alter the balance of lawmaking power that would otherwise exist between the national and state governments, given the Constitution's grant of exclusive powers to the national government to make treaties and the effort to ensure that the U.S. would be able to comply with its treaty commitments.

In addition, Ilya and Nick actually disagree in profound ways that they do not yet acknowledge or recognize and that clarify my differences with Nick's position. While this sentence gets a little ahead of the supporting argument so far, my position is going to be that Con-

[52] www.volokh.com/posts/1190738598.shtml.

gress has legislative power to implement and enforce a valid treaty (as long as it doesn't violate the Bill of Rights, as noted above). I recognize that puts a lot of weight on the question what makes a treaty valid (or invalid), but I think that's precisely where the weight ought to be.

Ilya's example illustrates this point; he is concerned with Congress enter into a treaty pretextually – not for genuine reasons of foreign policy, international relations, and the like – but for the purpose of gaining legislative powers that would otherwise be in the hands of the states. But if we are worried about that concern (it's not clear we have a historical example of this actually having happened), the way to address it is to conclude that a pretextual treaty of this sort is not a valid exercise of the treaty power.

That is not, however, the position Nick argues. Nick argues that the national government *can* exercise powers it would not otherwise have vis a vis the states *as long as it does so through a self-executing treaty* – one that does not require further legislation to have binding domestic legal effect. Thus, all the parade of horribles that worry Ilya are not actually addressed by Nick's argument. As long as done through a self-executing treaty, the national government can do all the things that concern Ilya. The only barrier Nick's approach creates is to the national government adopting a non-self-executing treaty and then legislating to implement that treaty with powers otherwise left to the states.

I think that's a particularly peculiar way to resolve "the treaty problem." Put in other terms, Nick's approach derives a lot of its intuitive appeal, I think, from the instinct to think there must be some limit on the treaty power. But what's at stake here is the specific argument of what that limit actually is. My view is that if we are to look for such limits, the most appropriate place would be in determining what constitutes a valid treaty; if a treaty is valid, Congress then has the power to implement it. Nick's position is that there are no limits on the national government's powers when it makes a self-executing treaty, and those limits only arise when Congress legislates to implement a non-self-executing treaty. That's the burden of Nick's argument – to explain why sensible constitutional

designers would have given the national government power to enter into self-executing or non-self executing treaties, the power to override state legislative powers in the former context, but no such power in the latter context.

Perhaps that helps clarify, for Ilya and others, what's at stake here: it's what the best place to look for limits on the treaty power is, if there are any judicially-enforceable limits. Let me briefly now make the last two general points I promised in response to Nick's scholarship:

Third, Nick wants to put all the blame for the current structure of the law on Justice Holmes' opinion for the Court in *Missouri v. Holland*, which has just one sentence on the issue. That sentence states the view I am defending: if a treaty is valid, Congress has the power to implement it through appropriate legislation (subject to the Bill of Rights, as above). Critics of that view like to focus on this one sentence as a way of trying to delegitimate the position: it's just one sentence, unsupported by any analysis, in one case, that "establishes" this position. The implicit suggestion is that Holmes just invented this theory of the treaty power, that it did not exist before *Holland*, and that Holmes didn't even feel any obligation to offer the reasoning to support his creation of this "novel" position.

But that view is deeply misleading in terms of the larger arc of Americna constitutional history. That sentence in Holland merely reflects a position that had been close to universally accepted long before *Holland* and in the all the years since. In constitutional treatises throughout the 19th century, in political debates within Congress, in federal court decisions that touched on the issue, the view expressed in *Missouri v. Holland* had long been the essential position on this issue. Again, there were debates about what makes a treaty valid, but if valid, the overwhelming weight of authority and practice was that Congress had the power to implement the treaty through appropriate legislation.

That's the peculiarity of Nick's position: that self-executing treaties can displace state authority, but that non-self executing treaties cannot.

Fourth, we should return to the bigger picture that the historical context in my initial post describes. The burden of any approach

to the treaty issue, it seems to me, is to offer an account of how that approach provides adequate answers to the profound concerns that drove the Constitution's Framers in the first place – the concern to ensure the capacity of the national government to honor valid treaty obligations and to avoid the failed state of affairs under the Articles that followed from making treaty compliance hostage to the politics and policies of the states. Following on my first post, let's call this the "Treaty of Peace" problem. As far as I can tell, Nick's answer seems to be either, let the Senate and the President make the treaty self-executing; rely on the states to enforce the treaty; or get a constitutional amendment to enable Congress to enforce the treaty. But these latter two are not the answer to the treaty problem – they are a statement of the problem to which the Constitution was supposed to provide a solution. And thus the burden of Nick's argument, it seems to me, remains explaining why a sensible way of working with the constitutional design is to conclude that self-executing treaties can displace state power but non-self-executing ones cannot.

REASONS TO WORRY ABOUT OVERREACHING ON THE TREATY POWER

Ilya Somin

In his most recent thoughtful post[53] on the treaty power, guest blogger Rick Pildes describes my position as follows:

> Ilya . . . is concerned with Congress enter[ing] into a treaty pretextually – not for genuine reasons of foreign policy, international relations, and the like – but for the purpose of gaining legislative powers that would otherwise be in the hands of the states. But if we are worried about that concern (it's not clear we have a historical example of this actually having happened), the way to address it is to conclude that a pretextual treaty of this sort is not a valid exercise of the treaty power.

In actuality, however, Congress' and the President's motives in entering into a treaty are just one part of what I worry about. "Gen-

[53] www.volokh.com/2013/01/21/does-congress-have-the-power-to-enforce-treaties-part-iii/.

uine reasons of foreign policy" and "gaining legislative powers that would otherwise be in the hands of the states" are not mutually exclusive categories. Congress or the president might genuinely believe that a treaty creates foreign policy benefits for the US, while also seeking to expand federal power relative to the states. Even if their motives are completely benevolent and they have no conscious desire to make a power-grab, they could still end up violating the Constitution in ways that cause more harm than good and set a bad precedent for the future. This may only be a modest-size problem so long as federal power under the Commerce and Necessary and Proper Clauses is interpreted extraordinarily broadly. But, in my view, that interpretation is over-broad and needs to be pared back.[54] When and if that happens, the treaty power will become a more tempting back door for circumventing constitutional limits on federal power. Even in the status quo, various scholars and activists have proposed the treaty power as a tool for getting around limits on congressional Commerce Clause authority imposed by decisions such as *Lopez*, *Morrison*, and *NFIB v. Sebelius*.[55]

As I noted in previous posts,[56] an unconstrained treaty power is less dangerous than unlimited congressional power under the Commerce and Necessary and Proper Clauses, because treaty ratification requires a two-thirds majority in the Senate. But that doesn't mean we have no reason for concern at all. A temporary supermajority could still validate a dangerous expansion of federal power that would give Congress overbroad authority that persists long after that supermajority disappears. It could do so either deliberately or because treaty supporters simply fail to foresee the danger.

Rick says that Nick Rosenkranz and I differ on the key question of whether Congress and the President could establish a self-executing treaty that went beyond the limits that otherwise constrain federal power. I am not convinced that Nick's position really does imply that such a treaty is legally binding and can be enforced by the courts. But if it does, Nick and I do indeed disagree on this point.

[54] papers.ssrn.com/sol3/papers.cfm?abstract_id=916965.
[55] www.scotusblog.com/2012/06/a-taxing-but-potentially-hopeful-decision.
[56] www.volokh.com/2013/01/19/bond-v-united-states-and-the-treaty-power/.

As discussed in an earlier post,[57] Article VI of the Constitution only makes treaties the "supreme law of the land" if they "made . . .under the authority of the United States." The reference to "the United States" here means the federal government. The full passage states 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; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." "Laws of the United States" are contrasted with "Laws of any State" and made supreme over them. "Laws of the United States" is clearly a reference to federal law as distinct from state law. In the same way, "Authority of the United States" refers to federal government authority as distinct from state authority. A treaty requiring action outside the scope of federal power goes beyond "the authority of the United States" and therefore isn't part of the "supreme Law of the Land."

EXCEPT THE BILL OF RIGHTS: THE SELECTIVE-STRONG TREATY POSITION

Eugene Kontorovich

Generally, the entire Constitution is seen as having equal weight; there are not tiers of authority (unlike in the constitution's of many other nations, which make certain provisions suspendable). Thus I have always been puzzled by the dominant view, well-articulated by Prof. Pildes,[58] which manages to account for Missouri v. Holland and Reid v. Covert by saying that treaties can expand legislative powers but not infringe the Bill of Rights.

I do not see a strong basis to exempt *just* the Bill of Rights from the the general rule of treaties, whatever that rule may be, for several reasons. Mostly, I see no way to neatly sever the Bill of Rights from the rest of the Constitution.

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[57] www.volokh.com/2013/01/19/bond-v-united-states-and-the-treaty-power/.

[58] www.volokh.com/2013/01/21/does-congress-have-the-power-to-enforce-treaties-part-iii/.

1) There is no other area, to my knowledge, where one can override enumerated powers but not the Bill of Rights. If anything, the latter are at least waivable by individuals, while the former are not.

2) The 10th Amendment, reflecting the principle of Federalism, is of course part of the Bill of Rights. So the position must be "the Bill of Rights, except the last bit," which seems even more selective.

3) Could a treaty override Bill of Rights protections against action by the states? If not, this means treaties can override everything except Amends. I-VII, (maybe XI, see below), and XIV, D.P. Clause. That sounds even more selective.

4) Individual rights protections are contained elsewhere besides the Amends. I-VIII. Take the jury trial provision of Art. III: can treaties override that? (It is not a hypothetical question, as this would be the effect of signing the Rome Statute of the International Criminal Court.[59]) What about the President's pardon power? We can imagine the creation of mixed courts for treaty crimes, with convicts made unpardonable.

5) Now lets turn back to amendments: why stop at the first eight? What about a treaty changing voting rights? Abrogating state sovereign immunity? (See Carlos Vasquez's 2000 article arguing against abrogation.)

6) Another challenge for the theory is whether treaties can just the doctrine of enumerated powers, or all structural constitutional limits, including separation of powers. Many of the questions about the scope of the Treaty Power were previewed during the debate in the early 19th century over the constitutionality of joining international courts for the trial of the slave trade, about which I have written at length in *The Constitutionality of International Courts: The Forgotten Precedent of Slave Trade Tribunals*.[60] In those debates, Quincy Adams and others argued successfully that treaties could not vest judicial power in a court independent of the "Supreme" court. Note that this also means that the treaty could not expand Congress's power to create "inferior" tribunals by authorizing parallel or co-equal tribunals. This is a limitation on Congress's Art. I powers.

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[59] www.law.northwestern.edu/lawreview/v106/n4/1675/LR106n4Kontorovich.pdf.

[60] papers.ssrn.com/sol3/papers.cfm?abstract_id=1340645.

7) I understand the notion that when we deal with the outside world, our internal arrangements do not matter. But the question of legislative power is not about dealing with the outside world, but enforcing that deal domestically. If the idea is that the fulfillment of our external promises cannot be hostage to our particular federal arrangements, why should it be hostage to our particular domestic rights?

8) The "not the Bill of Rights" view may be based on the notion that individual rights are special. But limited government and federalism is designed in part as a protection for individual rights.

THE CONVENTIONAL WISDOM BEFORE MISSOURI V. HOLLAND: WAS IT "CLOSE TO UNIVERSALLY ACCEPTED" THAT A TREATY COULD INCREASE THE LEGISLATIVE POWERS OF CONGRESS?

Nick Rosenkranz

I have criticized[61] *Missouri v. Holland* for concluding – in one unreasoned sentence – that a treaty can increase the legislative power of Congress. But Rick insists that, by 1920, only one sentence was necessary. He writes:[62] "That sentence in *Holland* merely reflects a position that had been close to universally accepted long before *Holland* and in the all the years since. In constitutional treatises throughout the 19th century, in political debates within Congress, in federal court decisions that touched on the issue, the view expressed in *Missouri v. Holland* had long been the essential position on this issue."

This is a bold claim to make without citation. I'm afraid that it is incorrect on each point.

First, treatises. Just five years before *Missouri v. Holland*, a leading treatise on the treaty power was written by Henry St. George Tucker – law professor, dean, congressman, ABA president. Tucker considered the precise claim at issue here: "that when a treaty may need legislation to carry it into effect, has embraced a subject which Congress cannot legislate upon, because not granted the power un-

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[61] papers.ssrn.com/sol3/papers.cfm?abstract_id=747724.
[62] www.volokh.com/2013/01/21/does-congress-have-the-power-to-enforce-treaties-part-iii/.

der the Constitution, that the treaty power may come to its own assistance and grant such right to Congress, though the Constitution, the creator of both, has denied it." The treatise emphatically rejected this proposition, and for just the right reason: "[s]uch interpretation would clothe Congress with powers beyond the limits of the Constitution, with no limitations except the uncontrolled greed or ambition of an unlimited power." Henry St. George Tucker, Limitations on the Treaty-Making Power, s 113, at 129-30 (1915).

Second, congressional debates. The most important such debate about the treaty power was the one surrounding the Louisiana Purchase. The debate is too involved to recreate here, and a wide variety of positions were expressed, but suffice it to say that there was no consensus that a treaty could increase the legislative power of Congress. One of the most clear-eyed Senators powerfully expressed the contrary view, apparently concluding: (1) the treaty itself was constitutional because non-self-executing; (2) Congress's power to execute the treaty must be found among the list of Congress's powers; the power does not instantly and automatically arise from the treaty and/or the Necessary and Proper Clause; (3) if Congress lacks the present power to execute the treaty, it does not follow that the treaty is void; it follows, rather, that the treaty calls for a constitutional amendment. See Executing the Treaty Power[63] at 1926-27.

Third, Supreme Court cases: In 1836, the Court said this: "The Government of the United States . . . is one of limited powers. It can exercise authority over no subjects, except those which have been delegated to it. Congress cannot, by legislation, enlarge the federal jurisdiction, *nor can it be enlarged under the treaty-making power*." Mayor of New Orleans v. United States, 35 U.S. (10 Pet.) 662, 736 (1836) (emphasis added).

Fourth, for good measure, here is a caustic editorial on just this point in the New York Tribune (Dec 8, 1879): "it will be a new discovery in constitutional law," the Tribune sneered, "that the President and Senate can, by making a treaty, enlarge the power of Congress to legislate affecting internal affairs."

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[63] papers.ssrn.com/sol3/papers.cfm?abstract_id=747724.

So, it was hardly "universally accepted," before *Missouri v. Holland*, that a treaty could increase the legislative power of Congress; if anything, the conventional wisdom seemed to lean the other way. In any event, as of 1920, the issue certainly deserved far more than one unreasoned sentence in *Missouri v. Holland*.

Happily, the stare decisis force of an opinion turns, in part, on the quality of its reasoning – and it diminishes substantially if the opinion provides no reasoning whatsoever. This is why it is such good news that the Court is now poised to give this important question the analysis it deserves.[64]

DOES CONGRESS HAVE THE POWER TO ENFORCE TREATIES: PART IV

Rick Pildes

Apologies for the delay, the flu bug set me back enough to cancel class and to be unable to re-engage this important dialogue sooner. I hope a couple more posts will be enough to leave this discussion in the hands of readers for their own judgment.

To re-state my understanding of the Constitution's design: Treaties were to be hard to enter into (hence the 2/3 Senate ratification requirement), but easier to enforce than under the Articles of Confederation, where compliance depended on the willingness of state legislatures. If a treaty is a valid treaty, Congress' power to implement the treaty is not constrained by any "reserved" legislative powers of the states; the Constitution ensures that the legislative powers to implement treaties lie with the national government. This is a structural inference from the treaty-making power in Art. II and also a result of the necessary and proper (NP) clause. There are limits on what treaties can do, but those limits are to be found in various other provisions of the Constitution (Eugene is correct[65] that those limits are likely not exhausted just by the Bill of Rights) and in the requirement that treaties must be valid exercises of the treaty power.

[64] www.scotusblog.com/case-files/cases/bond-v-united-states-2/.

[65] www.volokh.com/2013/01/21/except-the-bill-of-rights-the-selective-strong-treaty-position/.

The Constitution was specifically designed to overcome "The Treaty of Peace" problem: peace treaties often require a nation to honor the claims of foreign creditors, eg, and Congress was giving the power to override state contract/debt laws in order to enforce the terms under which the Revolutionary War was ended. So far, I don't think any of the responses from Nick, Ilya, and Eugene have yet explained how their views would enable Congress successfully to enforce the Treaty of Peace. In my view, it's a serious strike against any interpretation of the Constitution if it cannot explain how the Constitution solves one of the fundamental problems to which the Constitution was specifically designed to be a solution.

Nick's approach is particularly odd to me because it generates the conclusion that the national government can trump state legislative powers if it makes a treaty self-executing, but not if the treaty requires domestic legislation to be implemented. Nick gets to this view, in part, by claiming that Congress' exercise of one enumerated power cannot give Congress additional legislative powers it does not have already. I want to say more about that claim of Nick's, in addition to my earlier argument that the national government's war powers have always stood against Nick's view.

Nearly *every* exercise of power by Congress under the NP clause also seems to be inconsistent with Nick's claim, unless I misunderstand that claim. Congress traditionally had no power to regulate intrastate railroad rates, for example, but if it regulates interstate rates through its commerce clause powers, then it can regulate intrastate rates as a necessary means of making the interstate regulatory regime effective. Or, Congress has no enumerated power to create national corporations or to create a Bank of the United States; yet once Congress is create currency, paying soldiers and sailors, purchasing property, and the like, it has the power to charter the Bank as a means of making effective the exercise of these other powers.

Here is Nick's apparent answer to this problem, from his article at n.91:

> Similarly, cases like Houston, East & West Texas Railway Co. v. United States (Shreveport Rate Cases), 234 U.S. 342

> (1914),[66] are not to the contrary. That case upheld an order of the Interstate Commerce Commission regulating intrastate railroad rates, because the order was necessary to maintain its regime of interstate rates. But to say that Congress can regulate intrastate railroad rates only when and because it is also regulating interstate railroad rates is not quite the same as saying that regulating interstate railroad rates expands the power of Congress to reach intrastate rates. The case is probably best read to hold that a single act of Congress (the Interstate Commerce Act of 1887) regulating both interstate and intrastate rates is necessary and proper to carry into execution the power to regulate interstate commerce. It does not follow, however, that an act of Congress regulating only intrastate rates would be constitutional – even if there were already another act of Congress on the books regulating interstate rates.
>
> In other words, assume that (1) X alone is within Congress's power; (2) Y alone is not; and (3) Y is necessary to carry X into execution. It may be that a single act of Congress X + Y is constitutional, because X + Y may fairly be described as a law regulating interstate commerce. It does not follow, however, that Y could ever be enacted alone, even after the enactment of X, because Y alone could never be described as a law regulating interstate commerce. Evaluation of the Article I power to enact a statute may rightly depend on the content of the whole statute, but probably should not depend on the existence of other statutes already enacted. The question in each case should be whether any given statute – all of it, in itself – may be said to be an exercise of an enumerated power (citations omitted).

Thus, Nick's view is that it would be unconstitutional for Congress to regulate intrastate commerce in a statute passed *after* Congress had regulated interstate commerce, but constitutional if Congress regulates both interstate and intrastate commerce at the same time in one statute. Needless to say, no Supreme Court case has come close to endorsing that position, as far as I know, and I will let readers decide how persuasive they find it. In addition, laws like the

[66] www.lexisnexis.com/lnacui2api/mungo/lexseestat.do?bct=A&risb=21_T16542632158&homeCsi=7339&A=0.43466653649654263&urlEnc=ISO-8859-1&&citeString=234%20U.S.%20342&countryCode=USA&_md5=00000000000000000000000000000000.

one creating the Bank of the US – and many laws enacted under the NP clause – are *not* enacted at the same moment as exercises of the enumerated powers to which those later laws are necessary and proper. The Bank of the US law was a freestanding law enacted after the national government was engaged in other activities to which the Bank was viewed as necessary. But Nick is driven to his claim about how congressional powers purportedly work by his view that self-executing treaties can displace state legislative power (the equivalent to a comprehensive federal law that regulates both interstate and intrastate commerce in one moment) but not non-self executing treaties.

On the historical record, Nick takes issue with my statement that long before *Missouri v. Holland* it was "close to universally accepted" that Congress' power to enforce treaties was not limited by any "reserved" legislative powers of the state. Ironically, one of the strongest pieces of evidence I can offer (in a blog post) for that statement is: Nick's own article. Before making that statement, I re-read Nick's articles with a specific eye out for every piece of historical evidence it offers to support Nick's view, since I assume Nick would have marshaled all the supportive evidence. Yet I was surprised how thin that evidence turns out to be; Nick reprises virtually all of it his short blog post.[67]

This evidence consists of (1) one newspaper article from 1879; (2) the position of one Senator, Wilson Cary Nicholas of Virginia, during debates over the Louisiana Purchase – but from my recollection of those debates, this statement was isolated and it was not an issue that anyone else engaged, agreed with, or took issue with it, because it stood askew to any of the issues actually being debated. But leaving that aside, if one Senator once made such a statement, that's not much of a basis for concluding that there has long been a significant understanding, even if a minority position, within the political branches, of the anti-*Missouri v. Holland* view; (3) a statement in one Supreme Court case in 1836 (Nick's post says "cases," but he cites

[67] www.volokh.com/2013/01/22/the-conventional-wisdom-before-missouri-v-holland-was-it-close-to-universally-accepted-that-a-treaty-could-increase-the-legislative-powers-of-congress/.

only this one majority opinion) and in St. George Tucker's treatise on the treaty power. Yet neither this Court case nor the treatise, as I understand them, supports Nick's particular view: neither takes the view that self-executing treaties can override state legislative power but non-self-executing ones cannot. These two statements, on their face (I haven't gone back to the sources to read them in context), support a different view, closer to Ilya's, which is that no kind of treaty can expand the legislative powers of Congress. And they remain two statements, in one treatise and one 1836 Court decision.

Having read Nick's article, I said the *Missouri v. Holland* view had been "close to universally accepted" throughout U.S. constitutional history – not universally accepted. I know enough constitutional history to know that there is always at least a few bits of support that one can find for most views on almost any difficult issue in constitutional history. But based on the evidence offered so far, I remain surprised by how little evidence there appears to be for Nick's view throughout American constitutional history. For the evidence on the other side, showing how central it was to the Constitution's design and structure that the U.S. be able to honor its treaty commitments and for the historical understanding of the treaty power, see the articles referred to in my earlier posts by Dan Hulsebosch[68] and David Golove.[69] I stand willing to be corrected on that point and now that the Supreme Court will be hearing the *Bond* case, perhaps we will learn much more about what the full historical record shows on these issues.

THE CONSTITUTION AND THE ENFORCEMENT OF PEACE TREATIES

Ilya Somin

In previous posts, I have argued that the Constitution does not give the federal government the power to make binding treaties on issues that are otherwise outside the scope of federal power (see

[68] papers.ssrn.com/sol3/papers.cfm?abstract_id=1669452.
[69] papers.ssrn.com/sol3/papers.cfm?abstract_id=220269.

here,[70] here,[71] and here[72]). In his latest contribution to our debate,[73] guest blogger Rick Pildes argues that this position would make it impossible for Congress to enforce peace treaties:

> The Constitution was specifically designed to overcome "The Treaty of Peace" problem: peace treaties often require a nation to honor the claims of foreign creditors, eg, and Congress was giving the power to override state contract/debt laws in order to enforce the terms under which the Revolutionary War was ended. So far, I don't think any of the responses from Nick, Ilya, and Eugene have yet explained how their views would enable Congress successfully to enforce the Treaty of Peace. In my view, it's a serious strike against any interpretation of the Constitution if it cannot explain how the Constitution solves one of the fundamental problems to which the Constitution was specifically designed to be a solution.

I don't think this is a difficult problem for my view at all. Article I of the Constitution gives Congress the power to "regulate Commerce with foreign Nations." Borrowing money from foreign creditors is clearly "commerce with foreign nations" even under a relatively narrow definition of commerce. Therefore, enforcing this kind of term is perfectly consistent with my argument, as are other treaty terms regulating international commercial transactions. Obviously, my approach does bar *some* conceivable peace treaty terms. But the same is true of Rick Pildes' own view, since he argues that treaties that require violations of the Bill of Rights are unconstitutional.[74] Under that approach, for example, we could not enforce a treaty requiring the United States to punish public criticism of the enemy state's government, or one requiring bench trials rather than jury trials for Americans accused of committing crimes against citizens of that state.

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[70] www.volokh.com/2013/01/21/reasons-to-worry-about-overreaching-on-the-treaty-power/.

[71] www.volokh.com/2013/01/19/bond-v-united-states-and-the-treaty-power/.

[72] www.volokh.com/2013/01/20/the-validity-of-treaties-that-violate-the-constitution/.

[73] www.volokh.com/2013/01/27/does-congress-have-the-power-to-enforce-treaties-part-iv/.

[74] www.volokh.com/2013/01/21/does-congress-have-the-power-to-enforce-treaties-part-iii/.

As I discussed here,[75] any limits of any kind on the treaty power might sometimes bar a treaty that many believe it is in our interests to sign. But that in no way proves that the treaty power is either unlimited or constrained only by the Bill of Rights. Co-blogger Eugene Kontorovich highlights the arbitrariness of the latter view in this post.[76]

UPDATE: Duke law professor Curtis Bradley, a leading academic expert on the treaty power, comments on our debate at the Lawfare blog.[77] Here's a brief excerpt:

> In arguing for a treaty power unconstrained by federalism, Rick emphasizes that the Founders wanted the United States to be able to comply with its treaty commitments. That is certainly true, but I don't see how it advances his argument. After all, a desire that the United States comply with its obligations is not the same as a desire for an unlimited ability to create obligations. Rick's point might be that in international affairs there will at times be situations in which the United States needs to be able to trade away important constitutional values. But if that is his point, then he has no basis for insisting, as he does, that the treaty power is subject to individual rights limitations. After all, there might be national affairs interests that could call for a restriction of rights. One might respond, of course, that part of the reason for having constitutional protections is to disallow the government from making such tradeoffs, but then the same point could be made about the constitutional value of federalism.

I agree with most of the points Bradley makes in his post. As they say, read the whole thing.

PEACE TREATIES & THE WAR POWER

Eugene Kontorovich

Ilya's response[78] to Rick,[79] that the Peace Treaty with Britain's domestically applicable provisions could have been implemented

[75] www.volokh.com/2013/01/20/the-validity-of-treaties-that-violate-the-constitution/.
[76] www.volokh.com/2013/01/21/except-the-bill-of-rights-the-selective-strong-treaty-position/.
[77] www.lawfareblog.com/2013/01/bond-v-united-states-and-the-treaty-power-debate/.
[78] www.volokh.com/2013/01/27/the-constitution-and-the-enforcement-of-peace-treaties/.
[79] www.volokh.com/2013/01/27/does-congress-have-the-power-to-enforce-treaties-part-iv/.

through the foreign commerce power, seems right to me. But there may be another power that would have justified such legislation.

Peace is the flip side of war. Thus Congress's power to decide on war also presumably includes the power to make peace, as Madison noted in the 1790s. Just as war does not need to be formally declared, peace can be established without a treaty. There may be international law advantages to a treaty, but peace could be created simply through a the cessation of hostilities, an executive agreement (such as an armistice), and so forth. Thus legislation dealing with the loose ends of a war would be independently justified, to some extent, by the War Power, as the Supreme Court recognized in Woods & Cloyd v. Miller.

Indeed, aside from the treaty with Britain, the Treaty Power would be an incomplete basis for legislating "peace conditions," as it would potentially be difficult to exercise in cases of *debilitatio*, the collapse or disintegration of the enemy government.

The Constitution gives the Federal government numerous express powers for directly regulating transborder phenomenon, including war and foreign commerce. The difficulty with the potentially broad uses of the Treaty power today is that they deal with purely internal phenomenon, which are only of general "concern" to foreign countries.

MISSOURI V. HOLLAND: THE INTELLECTUAL HISTORY THAT PRECEDED THE HOLDING

Nick Rosenkranz

Our treaty debate now seems to have several threads running at once. To make things a bit clearer, I plan to separate a few threads out into separate posts. In this post, I hope at least one thread can be put to rest: the intellectual history thread.

I have criticized[80] Justice Holmes for concluding – in one unreasoned sentence – that treaties can increase the legislative power of Congress. But Rick insists that, by 1920, only one sentence was

[80] papers.ssrn.com/sol3/papers.cfm?abstract_id=747724.

necessary. He writes[81]: "That sentence in *Holland* merely reflects a position that had been close to universally accepted long before Holland and in the all the years since. In constitutional treatises throughout the 19th century, in political debates within Congress, in federal court decisions that touched on the issue, the view expressed in *Missouri v. Holland* had long been the essential position on this issue."

This is simply not so, as I demonstrated in my last post[82] – citing a leading treatise, the most important congressional debate, a U.S. Supreme Court opinion, and, for good measure, an editorial in a prominent New York newspaper (which purports to express the general consensus of the time).

Rick seems to have two responses[83] to this contrary evidence. First, he says it tends to support Ilya's position,[84] not mine. Second, it's still not enough; Rick would like to see more. These are, I think, unpersuasive responses.

On the first point, it is not so; take a look at the sources[85] and decide for yourself. But even if Rick were right about this, that would be of no help to him. Again, Ilya and I agree[86] (with Justice Scalia) on the fundamental point that a treaty cannot increase the legislative power of Congress. All the sources cited clearly support that general point. They are all flatly inconsistent with Rick's claim that a treaty can increase the legislative power of Congress.

On the second point, about weight of authority, surely I have met my burden. Rick said his position was "close to universally accepted" before 1920, while citing no authority. I cited one powerful

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[81] www.volokh.com/2013/01/21/does-congress-have-the-power-to-enforce-treaties-part-iii/.

[82] www.volokh.com/2013/01/22/the-conventional-wisdom-before-missouri-v-holland-was-it-close-to-universally-accepted-that-a-treaty-could-increase-the-legislative-powers-of-congress/.

[83] www.volokh.com/2013/01/27/does-congress-have-the-power-to-enforce-treaties-part-iv/.

[84] www.volokh.com/2013/01/27/the-constitution-and-the-enforcement-of-peace-treaties/.

[85] www.volokh.com/2013/01/22/the-conventional-wisdom-before-missouri-v-holland-was-it-close-to-universally-accepted-that-a-treaty-could-increase-the-legislative-powers-of-congress/.

[86] www.volokh.com/2013/01/20/the-validity-of-treaties-that-violate-the-constitution/.

counterexample in each of the three categories that Rick suggested (treatise, congressional debate, supreme court case), plus an editorial for good measure. In response, Rick again offers zero citations – other than the *ipse dixit* in *Missouri v. Holland* itself – for the proposition that a treaty can increase the power of Congress.

Rick says only this: "For the evidence on the other side, showing how central it was to the Constitution's design and structure that the U.S. be able to honor its treaty commitments and for the historical understanding of the treaty power, see the articles referred to in my earlier posts by Dan Hulsebosch and David Golove." But we all agree[87] about this general historical claim. What Rick needs is evidence of the claim at issue (which is, as Curt Bradley explains, a non sequitur[88]): the claim that a treaty can increase the legislative power of Congress. As to that, Rick again offers no authority whatsoever. Neither, by the way, does David Golove. See Executing the Treaty Power[89] at 1888-89.

Moreover, Rick surely bears a much greater burden than I do here. After all, he is trying to assert that his position was so well established in 1920 as to require *no reasoning whatsoever* in *Missouri v. Holland*. I need to show only that *some* respectable arguments were in the air on the other side. Surely a leading treatise, published just five years before, squarely in the opposite camp – let alone a Supreme Court case and all the rest – suffices to prove that point.

I would think we could agree – as the current Supreme Court apparently agrees[90] – that the question merits at least some analysis. Happily, an opinion with no reasoning whatsoever has very little *stare decisis* force. If nothing else, we should celebrate that the Court is poised,[91] at last, to give the question the *de novo* analysis it deserves.

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[87] www.volokh.com/2013/01/16/the-framers-gave-congress-a-robust-list-of-powers-they-did-not-provide-that-these-legislative-powers-can-be-increased-by-treaty/.

[88] www.lawfareblog.com/2013/01/bond-v-united-states-and-the-treaty-power-debate/.

[89] papers.ssrn.com/sol3/papers.cfm?abstract_id=747724.

[90] www.scotusblog.com/case-files/cases/bond-v-united-states-2/.

[91] www.scotusblog.com/case-files/cases/bond-v-united-states-2/.

THERE IS NO BASIS IN CONSTITUTIONAL TEXT FOR THE CLAIM THAT A TREATY CAN INCREASE THE LEGISLATIVE POWERS OF CONGRESS

Nick Rosenkranz

Guest-blogger Rick Pildes has now written five long and eloquent posts[92] defending the proposition that a treaty can increase the legislative power of Congress. But I must say that I am struck by how little of his argument has anything to do with the Constitution as written. Rick's five posts – like the five pages of Justice Holmes's opinion in *Missouri v. Holland* – never so much as quote the relevant clauses of the Constitution. As I wrote[93] two weeks ago:

> The constitutional enumeration of federal legislative powers, plus the Tenth Amendment, surely puts the burden of proof on anyone who is arguing in favor of a particular congressional power – let alone arguing for a mechanism, outside of Article V, by which legislative powers can be expanded without limit. I would have thought that Rick would begin by gesturing to a particular constitutional provision. Where in the Constitution is one to find such a mechanism?

At last, in Rick's fifth post, he has given his answer. He writes that this alleged mechanism is "a structural inference from the treaty-making power in Art. II and also a result of the necessary and proper (NP) clause." That's it. That is the sum total of the textual argument.

The Court has made it clear that this won't do. One cannot simply gesture toward what the Court calls "the last, best hope of those who defend *ultra vires* congressional action, the Necessary and Proper Clause." *Printz v. United States*. One cannot simply assert that potentially limitless legislative power is "a result of" NP.

Scholars have tried this approach before, without really looking at the text, for a quite specific reason. For years, this position was bolstered by a celebrated bit of purported constitutional drafting

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[92] www.volokh.com/author/rickpildes/.

[93] www.volokh.com/2013/01/16/there-is-no-textual-foundation-for-the-claim-that-treaties-can-increase-the-power-of-congress/.

history – drafting history so powerful that it seemed to obviate the need to parse the actual text. For years it was said that an early draft of the Necessary and Proper Clause actually included the words "to enforce treaties," but that these words had been struck from the Clause as superfluous.

I have shown that this purported drafting history was simply false. See Executing the Treaty Power[94] at 1912-18. As it turns out, no draft of the Necessary and Proper Clause ever included those words.

If nothing else, one would have thought that this revelation would send the defenders of *Missouri v. Holland* back to the text of the Constitution, to see what it actually says. When one reads it closely,[95] one can see that it neither says nor implies that a treaty can increase the power of Congress. *Holland*'s defenders have not yet offered a counterargument grounded in constitutional text.

Again, Justice Scalia has said: "I don't think that powers that Congress does not have under the Constitution can be acquired by simply obtaining the agreement of the Senate, the President and Zimbabwe. I do not think a treaty can expand the powers of the Federal government." (oral argument, Golan v. Holder (2012)). To persuade Justice Scalia and his colleagues that he is wrong this time around,[96] it will surely be necessary to point to some specific words in the Constitution.

MISSOURI V. HOLLAND VS. REID V. COVERT

Nick Rosenkranz

My thanks to Rick Pildes and to our commenters for pushing me to reframe the precise issue at stake in Bond[97] and my precise position about it. I think we now have a better understanding of where we part ways.

Here is the question: If a non-self-executing treaty promises that Congress will do something that it otherwise lacks power to do,

[94] papers.ssrn.com/sol3/papers.cfm?abstract_id=747724.

[95] www.volokh.com/2013/01/16/there-is-no-textual-foundation-for-the-claim-that-treaties-can-increase-the-power-of-congress/.

[96] www.scotusblog.com/case-files/cases/bond-v-united-states-2/.

[97] www.scotusblog.com/case-files/cases/bond-v-united-states-2/.

what happens? Can the President (with the consent of the Senate), just by making such a promise, thus empower Congress to do that thing, even if Congress lacked the power to do so the day before? Does the treaty increase the legislative power of Congress?

Now, Rick and I agree about the general importance of complying with treaties. And we agree[98] that our pre-constitutional history of non-compliance was an important impetus for the Constitution. And yet – despite this important history that Rick keeps emphasizing – *we also agree that the answer is generally no*.

If the treaty promises that Congress will abridge the freedom of speech, despite the First Amendment, then Rick and I (and the Supreme Court) agree that the answer is no. Congress lacked that power yesterday, and the treaty cannot confer it. See *Reid v. Covert*.

If the treaty promises that Congress will suspend the writ of habeas corpus in peacetime, despite Article I, section 9, then Rick and I agree that the answer is no. Congress lacked that power yesterday, and the treaty cannot confer it.

If the treaty promises that Congress will commandeer state officials, despite *Printz*, then Rick and I agree that the answer is no. Congress lacked that power yesterday, and the treaty cannot confer it.

Now, what if the treaty promises that Congress will regulate INTRAstate commerce? What if, for example, it promises that Congress will regulate possession of guns near schools? In my view, the answer is the same. Congress lacked that power yesterday, see *U.S. v. Lopez*. And the treaty cannot confer it. See Executing the Treaty Power.[99]

But this is where Rick and I part ways. This last case, Rick says, is an exception to the rule. In this case, Rick argues that even though Congress lacked the power to regulate INTRAstate commerce before the treaty, now it has the power. Rick argues, in other words, that in these circumstances, the treaty increases the legislative power of Congress.

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[98] www.volokh.com/2013/01/16/the-framers-gave-congress-a-robust-list-of-powers-they-did-not-provide-that-these-legislative-powers-can-be-increased-by-treaty/.

[99] papers.ssrn.com/sol3/papers.cfm?abstract_id=747724.

Eugene Kontorovich[100] and Josh Blackman[101] and I[102] have explained why this last case should not be an exception to the general rule. Rick has not yet explained why it should.

THE LIMITS ON THE TREATY POWER

Rick Pildes

Hopefully, I will be able to leave the treaty power issue alone for a while after this post, but let me finish elaborating my views in the context of also responding to the series of posts from Nick and others since my last posting.

1. My principal argument has been directed against the *specific* limit on the treaty power that Nick argues follows from the Constitution's text. As I said in my initial post, I believe there might well be some constitutionally derived limits on the treaty power, but that Nick's particular argument as to what those limits are is not convincing. Curtis Bradley[103] expressly agrees with me on that. As I read him, Ilya appears to as well, but I'm not sure he has fully worked out his view yet. But I don't think anyone in this exchange has endorsed the specific view that is unique to Nick: that self-executing treaties can override federalism constraints, but that non-self executing treaties, followed by implementing legislation, cannot.

It was Nick's particular theory that I was primarily debating, not the full *Missouri v. Holland* set of issues. At times, the discussion has run the former and the latter together, but to clarify what's at stake, we need to be careful to keep Nick's theory separate from other theories on how the treaty power might be constitutionally bounded. If there are limits, we need a different account than Nick's of what they might be.

2. Further on Nick's particular theory: Nick's theory has the same *Reid v. Covert* "problem" that my approach has, though nothing

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[100] www.volokh.com/2013/01/21/except-the-bill-of-rights-the-selective-strong-treaty-position/.

[101] joshblackman.com/blog/2013/01/07/could-a-treaty-give-congress-the-power-to-enact-a-law-that-violates-constitutionally-protected-liberties/.

[102] papers.ssrn.com/sol3/papers.cfm?abstract_id=747724.

[103] www.lawfareblog.com/2013/01/bond-v-united-states-and-the-treaty-power-debate/.

in Nick's recent post on that issue recognizes that. A longstanding question in this area has been if treaties cannot override individual rights provisions in the Constitution, why should they be able to override federalism-based constitutional provisions/doctrines (leave aside for now whether it's actually right to conceptualize Congress as "overriding" any authority the Constitution otherwise grants states when Congress is enforcing treaties).

That's a genuinely serious question, but it's every bit as much a question for Nick as for me. Nick's view is that self-executing treaties can override federalism constraints – but of course, Nick does not believe self-executing treaties can override individual rights provisions of the Constitution. So he, too, must give an account of why federalism constraints are treated differently than individual rights constraints when it comes to the scope of the national government's power to adopt and enforce treaties.

3. The same point is true about the debate on the historical evidence that Nick and I were having – though here I am guilty of not expressing my point clearly enough. I still do not see virtually *any* historical evidence Nick can offer to support the *specific* understanding of the Constitution that he is advancing. That is, I do not see any of the sources taking the view that the national government can expand the legislative power it otherwise has via self-executing treaties but not via non-self executing treaties.

However, it is definitely true that throughout U.S. history, particularly before the Civil War, one can find many statements from political figures that treaties cannot expand the legislative power of Congress. That is what Nick's sources say and one could find many similar statements. Some of my earlier posts inadvertently blurred this distinction, so I want to be clear that the anti-*Holland* view has been expressed throughout U.S history, especially by Southerners before the Civil War. My reading of the record was that this was always a minority view, but at the point we start debating majority v. minority views, I recognize we are getting into more complex historical terrain. It is Nick's particular view that has virtually no historical support of which I'm aware.

4. Putting Nick's theory to the side, what are the more plausible

places to look, in my view, for limits on the treaty power (in addition to the widely recognized *Reid v. Covert*, individual rights limitations)? On this issue, I agree with a good deal of what Curtis Bradley has to say, at least in theory. I also think any limitations have to apply the same way to self-executing and non-self-executing treaties; I don't see any constitutional basis for distinguishing the two. Turning then to those potential limits, I see three such possible limitations, at least in theory:

(1) Any legislation that purports to rest solely on Congress' powers to implement treaties must actually be appropriately tied to the purposes, principles, and text of the treaty being implemented. Federalism values, as well as other constitutional values, can influence judicial judgments of whether such legislation is closely enough tied to the treaty itself. I suspect this might be the most important limitation, in practice, because it is the one it is easiest to imagine courts enforcing.

Indeed, in the *Bond* case itself, I share the intuition that there is something that seems odd, at least initially, in the notion that if the federal government would not otherwise have the power to criminalize a person's use of toxic chemicals to attack another person, that such legislation is justified as an appropriate means of enforcing the Chemical Weapons Convention. I have not studied the text of the Convention, the federal statute, or the facts enough to have a final judgment on that question, which is why I can only say that initially, the link between this application of the statute and the Convention seems thin. I would hope the Court would give serious attention to that question.

(2) In addition, any treaty has to be a valid exercise of the treaty power, as I have said throughout. What makes a treaty valid or invalid? In principle, I would say something like a treaty must be an actual means of gaining the cooperation of other countries in ways that advance legitimate national policy goals of the national government. More historically, this idea is reflected in the notion that treaties can deal with those subjects that are "appropriate objects of negotiation and agreement among states." Thus, if international cooperation is not helpful in achieving legitimate aims of the national government,

the national government does not have the power to enter into a treaty on that subject.

I realize this formulation – or any one I can envision to replace it – will necessarily be vague. It might also be that any limitation of this sort cannot be made judicially administrable and therefore should not be enforced by courts. But a principle like this seems to me the right one, and I think an idea of this sort underlies Curtis's analysis as well.

(3) This final limit is already contained within principle (2), I think, but just to be clear about it, let me also repeat, as I have said in earlier posts, that the national government cannot validly enter into a treaty solely for the purpose of gaining additional domestic legislative powers. Pretextual treaties of this sort would not be valid exercises of the treaty power; such a treaty would not be a means of gaining the cooperation of other nations in ways that advance the legitimate national interests of the national government.

Although critics of the treaty power often like to raise these kind of examples, I want to reiterate that I am not sure there is strong evidence of the U.S. ever having entered into a treaty for this reason – even in the eras in which the Constitution was understood to limit the domestic powers of the national government much more greatly than since the New Deal. So this fear might be the kind of abstract fear that could be raised about any powers the national government has, but real-world political constraints might make it highly unlikely such fears would ever come to fruition.

5. The Tenth Amendment question is not, in fact, whether treaties can "override" federalism constraints. The question is how the Constitution reconciles the national government's treaty powers with the lawmaking powers states otherwise have. I think the answer is reflected in the three principles I've outlined above: the Constitution does not permit the national government to displace state legislative authority except through a valid treaty and implementing legislation that is appropriate, according to some version of the three constraints above. But if a treaty and legislation meet these criteria, then this is an area the Constitution makes one of federal power (states might have some concurrent power, of course, de-

pending on how the treaty is written).

6. I don't think my critics can escape so easily from the Treaty of Peace and similar examples at the time of the Constitution's formation and early decades of operation. As Curtis notes, many of these treaties – including the Treaty of Peace – deal not just with debtor/creditor relations, but with the ability of aliens to hold land and pass it on through inheritance in the states. At common law, aliens did not have all of these rights, though states by legislation could grant them. But the national government through treaties often guaranteed these rights and those guarantees trumped state property laws. Some critics want to "save" the validity of these treaties (because they recognize the power of the notion that surely the national government must have the capacity to make and enforce these kinds of treaties, which serve such obvious national interests) by arguing that Congress could have regulated state property laws through some enumerated power, such as the power over foreign commerce.

But I think these views are anachronistic. As far as my understanding goes, neither constitutional doctrine nor political figures debating these treaties thought that the national government could regulate state property laws merely because an alien was involved. It was only through these treaties (which were self-executing) that the national government had the power to adopt substantive property rules of this sort. In other words, these treaties were all exercises of the *Missouri v. Holland* power. I think Curtis agrees with this, though I am not completely certain, in which case he agrees that valid treaties do give the national government the power to "override" state laws. The real question, then, is what makes a treaty valid. I agree that that should be the central question.

MORE ON FEDERALISM AND THE LIMITS OF THE TREATY POWER

Ilya Somin

We are, I thinking, nearing the end of the ongoing debate over federalism and the treaty power between guest-blogger Rick Pildes, Nick Rosenkranz, Eugene Kontorovich, and myself. My own

view[104] remains unchanged: the treaty power does not allow the federal government to make treaties that go beyond the scope of the authority granted to Congress and the president elsewhere in the Constitution. A treaty that makes commitments that go further than that is legally null and void, and cannot be enforced by the president, Congress, or the federal courts. I developed that view in greater detail here,[105] here,[106] and here.[107]

In this post, I wish to comment briefly on three issues raised in Rick Pildes' most recent contribution[108] to the discussion: his theory that the treaty power is limited to "actual means of gaining the cooperation of other countries in ways that advance legitimate national policy goals of the national government"; the question of whether my approach would deligitimizee the 1783 peace treaty with Britain that the Founding Fathers hoped the Constitution would enable us to enforce; and the possible differences between my view and Nick Rosenkranz's.

I. Rick Pildes' Theory of the Limits of the Treaty Power.

In his most recent post, Rick articulates his theory of the limits of the treaty power more clearly than before:

> Any legislation that purports to rest solely on Congress' powers to implement treaties must actually be appropriately tied to the purposes, principles, and text of the treaty being implemented. Federalism values, as well as other constitutional values, can influence judicial judgments of whether such legislation is closely enough tied to the treaty itself. I suspect this might be the most important limitation, in practice, because it is the one it is easiest to imagine courts enforcing . . . .
>
> In addition, any treaty has to be a valid exercise of the treaty power, as I have said throughout. What makes a treaty valid or

[104] www.volokh.com/2013/01/19/bond-v-united-states-and-the-treaty-power/.
[105] www.volokh.com/2013/01/20/the-validity-of-treaties-that-violate-the-constitution/.
[106] www.volokh.com/2013/01/21/reasons-to-worry-about-overreaching-on-the-treaty-power/.
[107] www.volokh.com/2013/01/27/the-constitution-and-the-enforcement-of-peace-treaties/.
[108] www.volokh.com/2013/02/02/the-limits-on-the-treaty-power/.

> invalid? In principle, I would say something like a treaty must be an actual means of gaining the cooperation of other countries in ways that advance legitimate national policy goals of the national government. More historically, this idea is reflected in the notion that treaties can deal with those subjects that are "appropriate objects of negotiation and agreement among states." Thus, if international cooperation is not helpful in achieving legitimate aims of the national government, the national government does not have the power to enter into a treaty on that subject.

The problems with this formulation run far deeper than the fact that it is – as Rick admits – extremely "vague" and difficult for courts to administer. Virtually any power could potentially become a policy tool useful as "an actual means of gaining the cooperation of other countries in ways that advance legitimate national policy goals of the national government." With respect to almost any treaty that it might conceivably sign, the federal government can point to some concession extracted from foreign powers that serves a "legitimate national policy goal." Even a treaty that, for example, overrides *United States v. Lopez* by criminalizing possession of guns in school zones, could be defended on the grounds that it will improve the public image of the United States among anti-gun Europeans. Good public relations is surely a legitimate objective of foreign policy.

Similarly, various Muslim nations have demanded that the United States censor speech offensive to their religious sensibilities. If the US signed a treaty with Saudi Arabia agreeing to ban anti-Muslim "hate speech" in exchange for discounted oil or military basing rights, that would clearly be an example of securing the Saudis' "cooperation" for for the purpose of "advancing legitimate national policy goals." Rick might argue that treaties that violate the Bill of Rights are unconstitutional even if they do promote legitimate policy goals. But, as Eugene Kontorovich points out,[109] it is difficult to see why treaties that violate the Bill of Rights should be treated any differently in Rick's framework than treaties that violate other con-

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[109] www.volokh.com/2013/01/21/except-the-bill-of-rights-the-selective-strong-treaty-position/.

stitutional rights or the Constitution's structural constraints on the scope of federal power.

II. The Constitutionality of the 1783 Peace Treaty with Britain.

In both his most recent post and previously, Rick argues that my approach would invalidate the 1783 peace treaty with Britain, which ended the Revolutionary War. Earlier, I pointed out[110] that the treaty's provisions protecting the rights of British creditors who lent money to Americans could easily be justified under the Congress' power to regulate international commerce. Rick now responds that the provisions protecting the property rights of British citizens. in America (mostly Americans who remained loyal to Britain during the War) could not be so justified. I am not so sure. The relevant provision of the treaty[111] merely requires that "Congress shall earnestly *recommend* it to the Legislatures of the respective States to provide for the Restitution of all Estates, Rights, and Properties, which have been confiscated belonging to real British Subjects" (*emphasis added). Making an "earnest recommendation" is very different from actually forcing the states to do anything. Like the Confederation Congress, the one established by the Constitution can make an earnest recommendation on anything it wants without exceeding the limits of its authority. Indeed, Article I of the Constitution requires Congress to "keep a Journal of its proceedings" and that journal can presumably include any recommendations – earnest or otherwise – that Congress might care to make.

Moreover, Article VI of the Constitution[112] explicitly validates treaties signed by the United States before the Constitution went into effect: "All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation." The 1783 treaty with Britain is obviously an "engagement . . entered into before the adoption of this Constitution." Indeed, it was by far

[110] www.volokh.com/2013/01/27/the-constitution-and-the-enforcement-of-peace-treaties/.
[111] www.ourdocuments.gov/doc.php?flash=true&doc=6&page=transcript.
[112] www.law.cornell.edu/constitution/articlevi.

the most important such engagement. Why would the framers and ratifiers of the Constitution want to validate the 1783 treaty if it contained provisions that would not have been permissible in a treaty contracted under the Constitution? Possibly because the termination of America's relationship with the mother country necessarily involved a wide range of issues unlikely to recur in future treaties. In particular, the 1783 treaty had to address the rights of numerous "Britons" who were actually Americans who had lived in the colonies all their lives, but now were threatened with dispossession or persecution by state governments due to their Loyalist sympathies.

III. Rosenkranz v. Somin?

In several posts, Rick makes the interesting suggestion that there is a fundamental difference between my position on the treaty power and that of Nick Rosenkranz. According to Rick,[113] Rosenkranz's view is that Congress cannot enact legislation to enforce treaties that go beyond the scope of federal authority, but such treaties can still be enforced by the federal courts, if they are designed to be "self-enforcing."

My interpretation[114] of Nick's theory is that he believes such treaties are legally valid in theory, but cannot actually be enforced by any agency of the federal government unless and until we enact a constitutional amendment permitting such enforcement. As Nick himself put it,[115] such treaties are merely "a promise to use . . . the amendment mechanism of Article V." If my interpretation of Rosenkranz is correct, we have an interesting theoretical disagreement, but one with little practical importance. I explained why in this post.[116] If Rick Pildes' reading of Rosenkranz turns out to be accurate, then Nick and I disagree more profoundly. In my view, courts cannot enforce treaties that go beyond the scope of federal power because Article VI of the Constitution only gives treaties the

[113] www.volokh.com/2013/01/21/does-congress-have-the-power-to-enforce-treaties-part-iii/.

[114] www.volokh.com/2013/01/20/the-validity-of-treaties-that-violate-the-constitution/.

[115] www.volokh.com/2013/01/20/somin-on-bond/.

[116] www.volokh.com/2013/01/20/the-validity-of-treaties-that-violate-the-constitution/.

status of law if they are "made . . . under the authority of the United States." A treaty that purports to exercise power the federal government does not have is necessarily outside the range of that authority. Hopefully, Nick himself will reveal his original intent and explain which interpretation of his view is correct.

FINAL POST OF THE TREATY DEBATE

Nick Rosenkranz

This will be my final post of the debate with guest-blogger Rick Pildes about whether a treaty can increase the legislative power of Congress. In this post, I will just make some brief concluding remarks.

1 Rick has been at pains to suggest a fundamental disagreement between Ilya and me. This is tactically clever – opening up a second front. And Ilya and I do have an interesting theoretical disagreement.[117] But on the fundamental point – the point on which Rick and I agreed to debate, the point on which I wrote[118] in the Harvard Law Review, the point on which the Court has granted certiorari[119] – Ilya and I are in perfect agreement with Henry St. George Tucker's leading treatise, with Senator Wilson Cary Nicholas during the Louisiana Purchase debate, with the Supreme Court in Mayor of New Orleans v. United States,[120] and with Justice Scalia at oral argument last term: *a treaty cannot increase the legislative power of Congress*.

2 In my last post,[121] I pointed out that *Missouri v. Holland* is in deep tension with *Reid v. Covert*, and that it is Rick's burden to explain why a treaty *cannot* empower Congress to violate the Bill of Rights (or Article I, section 9, or certain structural limits like the anti-commandeering principle) but *can* empower Congress to exceed its enumerated powers. Rick's most recent post[122] acknowl-

[117] www.volokh.com/2013/01/20/somin-on-bond/.

[118] papers.ssrn.com/sol3/papers.cfm?abstract_id=747724.

[119] www.scotusblog.com/case-files/cases/bond-v-united-states-2/.

[120] www.volokh.com/2013/01/22/the-conventional-wisdom-before-missouri-v-holland-was-it-close-to-universally-accepted-that-a-treaty-could-increase-the-legislative-powers-of-congress/.

[121] www.volokh.com/2013/01/30/missouri-v-holland-vs-reid-v-covert/.

[122] www.volokh.com/2013/02/02/the-limits-on-the-treaty-power/.

edges that his approach has this "*Reid v. Covert* 'problem'" and that it is "a genuinely serious question." But he makes no attempt to answer it. Instead, Rick resorts to jujitsu. This is "every bit as much a question for Nick," he insists, and leaves it at that.

But *Reid v. Covert* does not pose a problem for me. The treaty power is a power given to the President in Article II, and forbidden to the states in Article I, section 10; thus it is not a reserved power of the states under the Tenth Amendment. If a treaty is self-executing, then it creates domestic law of its own force, per the Supremacy Clause, and that law must be consistent with all restrictions on the content of domestic law – the Bill of Rights, etc. However, it need not necessarily be on the same subjects enumerated in Article I, section 8 – a section that, by its terms, enumerates the *lawmaking* powers of *Congress*, not the *treatymaking* powers of the *President*. About all this, Rick and I actually agree (though he scarcely lets on that we do).

If, however, a treaty purports to promise that *Congress* will make domestic law in our usual way, via Article I, section 7, (as in *Missouri v. Holland* and *Bond v. United States*), then all the usual restrictions apply to any such acts of Congress. Congress must act via biacameralism and presentment (even if the treaty says that it need not); Congress cannot violate the Bill of Rights (even if the treaty says that it must), see *Reid v. Covert*; Congress cannot suspend habeas in peacetime (even if the treaty says that it can); Congress cannot commandeer state officials (even if the treaty says that it can); – and *Congress cannot exceed its enumerated powers (even if the treaty says that it must)*, see Executing the Treaty Power.[123]

It is only this very last bit, about enumerated powers, on which Rick disagrees – his one exception to the rule. This is the "Reid v. Covert 'problem' that [his] approach has." It is a problem that he has acknowledged but made no attempt to solve.

3 Finally, I am obliged to point out that Rick has never offered a textual argument for his position, though I twice challenged him to do so (here[124] and here[125]). In his six long posts, he never so much as

[123] papers.ssrn.com/sol3/papers.cfm?abstract_id=747724.
[124] www.volokh.com/2013/01/16/there-is-no-textual-foundation-for-the-claim-that-trea

quoted the relevant constitutional clauses. Again, before 2005, defenders of *Holland* never needed a textual argument, because they relied on an ostensibly dispositive bit of drafting history. But now that this purported history has been debunked, see Executing the Treaty Power[126] at 1912-18, the defenders of *Missouri v. Holland* will surely need to return to the constitutional text, to see what it actually says. On careful reading,[127] it does not entail that a treaty can increase the legislative power of Congress.

In conclusion, let me offer my heartfelt thanks to Rick Pildes for conducting such a spirited debate on these pages. Rick signed on for a one-on-one debate, but I'm afraid that my excellent and irrepressible co-conspirators, Ilya Somin and Eugene Kontorovich, made it something more like three-on-one. Rick never complained, and he argued eloquently. I say again: he is the most worthy adversary that I have encountered on this topic. Thank you for your excellent posts, Rick.

Here, in chronological order, are links to all of our prior posts in this series.

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ties-can-increase-the-power-of-congress/.

[125] www.volokh.com/2013/01/29/there-is-no-basis-in-constitutional-text-for-the-claim-that-a-treaty-can-increase-the-legislative-powers-of-congress/.

[126] papers.ssrn.com/sol3/papers.cfm?abstract_id=747724.

[127] www.volokh.com/2013/01/16/there-is-no-textual-foundation-for-the-claim-that-trea ties-can-increase-the-power-of-congress/.

[128] www.volokh.com/2013/01/13/introducing-guest-blogger-prof-rick-pildes-of-nyu-to-debate-whether-a-treaty-can-increase-the-legislative-power-of-congress/.

[129] www.volokh.com/2013/01/13/treaties-offenses-and-foreign-commerce/.

[130] www.volokh.com/2013/01/14/does-congress-have-the-power-to-enforce-treaties-par t-i/.

[131] www.volokh.com/2013/01/16/the-framers-gave-congress-a-robust-list-of-powers-th ey-did-not-provide-that-these-legislative-powers-can-be-increased-by-treaty/.

[132] www.volokh.com/2013/01/16/does-congress-have-the-power-to-enforce-treaties-par t-ii/.

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[133] www.volokh.com/2013/01/16/there-is-no-textual-foundation-for-the-claim-that-treaties-can-increase-the-power-of-congress/.
[134] www.volokh.com/2013/01/18/the-supreme-court-cert-grant-in-bond/.
[135] www.volokh.com/2013/01/19/bond-v-united-states-and-the-treaty-power/.
[136] www.volokh.com/2013/01/19/treaties-can-create-domestic-law-of-their-own-force-but-it-does-not-follow-that-treaties-can-increase-the-legislative-power-of-congress/.
[137] www.volokh.com/2013/01/20/somin-on-bond/.
[138] www.volokh.com/2013/01/20/the-validity-of-treaties-that-violate-the-constitution/.
[139] www.volokh.com/2013/01/21/does-congress-have-the-power-to-enforce-treaties-part-iii/.
[140] www.volokh.com/2013/01/21/reasons-to-worry-about-overreaching-on-the-treaty-power/.
[141] www.volokh.com/2013/01/21/except-the-bill-of-rights-the-selective-strong-treaty-position/.
[142] www.volokh.com/2013/01/22/the-conventional-wisdom-before-missouri-v-holland-was-it-close-to-universally-accepted-that-a-treaty-could-increase-the-legislative-powers-of-congress/.
[143] www.volokh.com/2013/01/27/does-congress-have-the-power-to-enforce-treaties-part-iv/.
[144] www.volokh.com/2013/01/27/the-constitution-and-the-enforcement-of-peace-treaties/.
[145] www.volokh.com/2013/01/27/peace-treaties-the-war-power/.
[146] www.volokh.com/2013/01/28/missouri-v-holland-the-intellectual-history-that-preceded-the-holding/.
[147] www.volokh.com/2013/01/29/there-is-no-basis-in-constitutional-text-for-the-claim-that-a-treaty-can-increase-the-legislative-powers-of-congress/.

2/2 Pildes[149]
2/3 Somin[150]

I will return to this topic when the briefing begins in Bond v. United States.[151] //

[148] www.volokh.com/2013/01/30/missouri-v-holland-vs-reid-v-covert/.
[149] www.volokh.com/2013/02/02/the-limits-on-the-treaty-power/.
[150] www.volokh.com/2013/02/03/more-on-federalism-and-the-limits-of-the-treaty-power/.
[151] www.scotusblog.com/case-files/cases/bond-v-united-states-2/.

THE DECISION TO UPHOLD THE MANDATE AS TAX REPRESENTS A GESTALT SHIFT IN CONSTITUTIONAL LAW

Lawrence Solum†

The Supreme Court upheld the individual mandate today on a 5-4 vote. The decisive opinion by Justice Roberts reasons that the mandate was not authorized by commerce clause, but instead upheld the mandate as a tax. Justice Roberts wrote:

> Our precedent demonstrates that Congress had the power to impose the exaction in Section 5000A under the taxing power, and that Section 5000A need not be read to do more than impose a tax. This is sufficient to sustain it.

Individuals are not required to purchase insurance; instead they have the option to pay a tax instead. On the medicaid, issue Justice Roberts's opinion indicates that the Congress cannot encourage (or coerce) states to participate in the expansion of medicaid by conditioning their receipt of existing medicaid funds on their participation.

Had the Court struck down the mandate, it would have clearly represented a tectonic shift in American constitutional law. In the extraordinarily unlikely event that there had been a majority opinion authored by one of the four justices fromt he left wing of the Court,

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† John Carroll Research Professor of Law, Georgetown University Law Center. Original at lsolum.typepad.com/legaltheory/2012/06/the-decision-to-uphold-the-mandate-as-a-gestalt-shift-in-constitutional-law.html (June 28, 2012; vis. Apr. 15, 2013). © 2012 Lawrence Solum.

the decision would have cemented (at least for a time) the most common academic understanding of Congress's power under Article One of the Constitution. *Roughly, that understanding is that Congress has plenary legislative power, limited only by the carve outs created by the Supreme Court's decisions in Lopez and Morrison.*

This understanding shouldn't be confused with a rule of constitutional law; rather it is a *gestalt*, a holistic picture of Article One power. Constitutional doctrine is much more complex and also more contestable. The constitutional doctrine is the set of rules that can be found in the Court's opinions and that are required in order to provide a coherent set of norms that cohere with those opinions. In a complex area like Congressional power under Article One, constitutional doctrine is never fully settled because the set of legal materials that must be reflected in the doctrine is large (hundreds of Supreme Court opinions) and therefore neither fully consistent nor complete. The gestalt is simple picture that represents the core ideas that explain the shape of the doctrine.

The gestalt is shaped by all of the relevant legal materials--the constitutional text, the decisions of the Supreme Court, the practices of the political branches (especially Congresss), and even the decisiosn of the lower federal courts. But the gestalt that represents our understanding of Congress's Article One power is mostly a product of a key set of political and judicial decisions associated with the New Deal. The political decisions were made by the President and Congress is the form legislation that massively expanded the power of the national government. The judicial decisions consisted of a series of opinions that ratified this expansion of power – mostly under the Commerce Clause and the Necessary and Proper Clause of the Constitution. The most important decisions are familiar to almost every judge, lawyer, and law student in the United States: they include *Jones and Laughlin Steel*, *Darby*, and *Wickard v. Filburne*. The last decision in this trio is particular important as a symbol of the expansion of federal power, because it upheld Congress's power to regulate the "home consumption" wheat – that use of wheat by a farmer that he grew and consumed on his own farm. We now know that the Supreme Court agonized in its decision of this case. Alt-

hough the justices considered writing an opinion that explicitly endorsed a rule that stated that no Congressional exercise of power pursuant to the Commerce and Necessary and Proper Clauses would every be struck down, it ultimately decided to articulate a principle that allowed Congress to regulate intrastate activity that produced a substantial cumulative effect on interstate commerce.

Although the Supreme Court has never explicitly endorsed a rule that gives Congress plenary and unlimited power under Article One, the whole pattern of Supreme Court decisions could be seen as implicitly endorsing such a rule. Between 1937 when the Court decided *Jones and Laughlin Steel*, and 1995, when the Court struck down the Gun Free School Zones Act in *United States v. Lopez*, the Court did decide a single case in which it held that Congress had exceeded its Article One powers under the Commerce and Necessary and Commerce Clauses. *Lopez* was read by many commentators as a mere blip or symbolic gesture, and many theorized that the problem in *Lopez* was that Congress had failed to make a record that established a basis for the conclusion that guns near schools could rationally be believed to have a sustantial effect on interestate commerce. That reading of *Lopez* was rejected by the Supreme Court in *United States v. Morrison*, in which the Supreme Court struck down provisions of the Violence Against Women Act, despite extensive hearings and explicit findings that connected violence against women with harmful effects on interstate commerce.

Lopez and *Morrison* were part of what is sometimes called "the New Federalism," a series of Supreme Court opinions on various topics (especially the 10th and 11th Amendments) that limited federal power. Reconciling the New Federalism cases with the New Deal gestalt was a central preoccupation of constitutional scholarship in the 1990s. Many interpretations were possible, but the prevailing view was preserved the basic idea that Congress power was *almost* unlimited, subject only to a series of carve outs. A central metaphor expressed this idea as an ocean of federal power dotted by a few isolated islands of state sovereignty. This metaphor preserved as much of the gestalt view of the New Deal cases as possible. *Lopez* and *Morrison* were limited to cases in which Congress enacted laws

that were targeted soley at noneconomic activity; Congress unlimited authority to regulate any activity that was economic in nature. This revised version of the gestalt was reinforced by the Supreme Court's decision in *Gonzales v. Raich*, which upheld the application of the Controlled Substances Act to possession of marijuana that was home grown for medical use and which never crossed state lines. Some commentators believed that *Raich* represented a return to the principle that Congress had plenary and unlimited legislative powers, but the Court itself did not overrule *Lopez* and *Morrison* or express disapproval of those decisions.

That brings us to the litigation over the Affordable Care Act. Most of the academic community was committed to some version of the prevailing gestalt view of federal power. Some believed in unlimited and plenary congressional power. Others believed that the power was virtually unlimited, subject to a minor exception (details varied) for *Lopez* and *Morrison*. If you were committed to the gestalt as your mental picture of the constitutional doctrine, then the challenge to the individual mandate was radically implausible and might even be characterized as frivolous.

Nonetheless, the lawsuits against the individual mandate did not meet with unanimous rejection by the federal courts. Instead, a number of federal judges decided that the individual mandate was unconstitutional. The key moment was the decision of the 11th Circuit to strike down the mandate: that decision meant that the United States Supreme Court would hear the constitutional questions, although there was always the possibility that the Court might be able to duck the merits. At this stage of the game, the prevailing view was that the Court would almost certainly uphold the mandate if it reached the merits. Many commentators predicted an 8-1 decision, with Justice Thomas dissenting on originalist grounds. From the point of view of the prevailing gestalt, Thomas was simply an outlier, because he did not accept the New Deal Settlement and instead endorsed a pre-New-Deal vision of real and substantial limits on Congress's enumerated powers.

But confidence in the gestalt was shaken by the decision of the court to grant six hours of argument over three days in the Health

Care Cases. This was very unusual, and it seemed inconsistent with the notion that eight justices viewed the individual mandate question as easy. Confidence was further shaken by the oral argument in which it seemed clear that four members of the Court (Roberts, Scalia, Kennedy, and Alito) took the challenge very seriously. Since Thomas's vote against the mandate was taken for granted, that meant that there was a serious chance that the ACA would be struck down as beyond Congress's power under the Commerce and Necessary and Proper Clauses.

How could this be explained? If you continued to believe in the consensus academic gestalt concerning the Congress's power, then the alternative explanation was that the Court was disregarding the law and deciding the case on purely political grounds.

But there is an alternative explanation. There is an alternative gestalt concerning the New Deal Settlement. For many years, some legal scholars had advanced an alternative reading of the key cases uphold New Deal legislation. On this alternative reading, the New Deal decisions were seen as representing the high water mark of federal power. Although the New Deal represented a massive expansion of the role of the federal government, it actually left a huge amount of legislative power to the states. On the alternative gestalt, the power of the federal government is limited to the enumerated powers in Section Eight of Article One, plus the New Deal additions. These are huge, but not plenary and unlimited.

Today, it became clear that four of the Supreme Court's nine justices reject the academic consensus. As Justice Kennedy states in his dissent joined by Scalia, Thomas, and Alito:

> "In our view, the entire Act before us is invalid in its entirety."

The alternative gestalt is no longer an outlier, a theory endorsed by a few eccentric professors and one odd justice of the Supreme Court. And because Justice Roberts believes that the mandate is not a valid exercise of the commerce clause (but is valid if interpreted as a tax), he has left open the possibility that there is a fifth justice who endorses the alternative gestalt.

We are only minutes into a long process of digesting the Health Care Decision. But in my opinion, one thing is clear. Things are now "up for grabs" in a way that no one anticipated when the saga of the constitutional challenge to the Affordable Care Act began.

Update: A similar if more strident note is sounded here.[1] //

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[1] www.slate.com/articles/news_and_politics/scocca/2012/06/roberts_health_care_opinion_commerce_clause_the_real_reason_the_chief_justice_upheld_obamacare_.html.

ASIAN-AMERICANS, AFFIRMATIVE ACTION, AND *FISHER V. TEXAS*

Ilya Somin†

The Chronicle of Higher Education[1] reports that several Asian-American groups have filed an amicus brief opposing the University of Texas' affirmative action program, which is being challenged in *Fisher v. Texas*, an important affirmative action case before the Supreme Court:

> A brief filed Tuesday with the U.S. Supreme Court seeks to shake up the legal and political calculus of a case that could determine the constitutionality of programs in which colleges consider the race or ethnicity of applicants. In the brief, four Asian-American organizations call on the justices to bar all race-conscious admissions decisions, arguing that race-neutral policies are the only way for Asian-American applicants to get a fair shake.
>
> Much of the discussion of the case has focused on policies that help black and Latino applicants. And the suit that has reached the U.S. Supreme Court was filed on behalf of a white woman, Abigail Fisher, who was rejected by the University of Texas at Austin.
>
> But the new brief, along with one recently filed on behalf of Fisher, say that the policy at Texas and similar policies else-

† Professor of Law, George Mason University School of Law. Original at www.volokh.com/2012/05/31/asian-americans-affirmative-action-and-fisher-v-texas/ (May 31, 2012; vis. Apr. 15, 2013). © 2012 Ilya Somin.

[1] www.insidehighered.com/news/2012/05/30/asian-american-group-urges-supreme-court-bar-race-conscious-admissions#.T8YUi5xx1Q0.email.

> where hurt Asian-American applicants, not just white applicants. This view runs counter to the opinion of many Asian-American groups that have consistently backed affirmative action programs such as those in place at Texas . . . .
>
> The brief filed Tuesday on behalf of Asian-American groups Tuesday focused less on the Texas admissions policy than on the consideration of race generally in college admissions. "Admission to the nation's top universities and colleges is a zero-sum proposition. As aspiring applicants capable of graduating from these institutions outnumber available seats, the utilization of race as a 'plus factor' for some inexorably applies race as a 'minus factor' against those on the other side of the equation. Particularly hard-hit are Asian-American students, who demonstrate academic excellence at disproportionately high rates but often find the value of their work discounted on account of either their race, or nebulous criteria alluding to it," says the brief . . .
>
> The brief focuses heavily on research studies such as the work that produced the 2009 book, *No Longer Separate, Not Yet Equal: Race and Class in Elite College Admission and Campus Life* (Princeton University Press) . . . .
>
> The book suggested that private institutions essentially admit black students with SAT scores 310 points below those of comparable white students. And the book argued that Asian-American applicants need SAT scores 140 points higher than those of white students to stand the same chances of admission. The brief also quotes from accounts of guidance counselors and others (including this account in Inside Higher Ed) talking about widely held beliefs in high schools with many Asian-American students that they must have higher academic credentials than all others to gain admission to elite institutions . . .

The impact of Texas' affirmative action policy on Asian-American applicants raises serious questions about what the purpose of affirmative action actually is. As I have pointed out previously,[2] if the goal is compensatory justice for groups that have been victimized by government discrimination, Asian-Americans have a strong

[2] www.volokh.com/2009/10/17/asian-american-applicants-and-competing-rationales-for-affirmative-action-in-higher-education/.

case for being included in the program, and certainly should not be victimized by it. If, as the University of Texas argues, the purpose is ensuring that each group has a "critical mass" large enough to promote educationally beneficial "diversity," then it is hard to understand why the Texas policy extends affirmative preferences to Hispanics, but not Asians, even though the former have a much larger absolute presence at the school:

> The brief filed on behalf of [plaintiff Abigail] Fisher does focus on Texas policies — and specifically their impact on Asian-American applicants. Texas has stated that it considers black and Latino students "under-represented" at the university, based in part on their proportions in the state population. And the Fisher brief considers that illegal.
>
> "UT's differing treatment of Asian Americans and other minorities based on each group's proportion of Texas's population illustrates why demographic balancing is constitutionally illegitimate . . . . UT gives no admissions preference to Asian Americans even though 'the gross number of Hispanic students attending UT exceeds the gross number of Asian-American students attending UT.' This differing treatment of racial minorities based solely on demographics provides clear evidence that UT's conception of critical mass is not tethered to the 'educational benefits of a diverse student body.' UT has not (and indeed cannot) offer any coherent explanation for why fewer Asian Americans than Hispanics are needed to achieve the educational benefits of diversity."

As I explain here,[3] there is also no diversity-based reason to prefer Hispanics to a wide range of other groups that have lesser representation at UT, or to consider Asian-Americans as a single undifferentiated mass for diversity purposes:

> "Asians" are not a monolithic group. Japanese, Chinese, Indians, Filipinos, Vietnamese, and Cambodians all have very different cultures. Indeed, immigrants from one part of India or China often have different cultures and speak different lan-

[3] www.volokh.com/2009/10/17/asian-american-applicants-and-competing-rationales-for-affirmative-action-in-higher-education/.

> guages from those hailing from other parts of the same nation. Treating them all as an undifferentiated mass of "Asian-Americans" is a bit like saying that Norwegians, Italians, and Bulgarians are basically the same because they are "Europeans." If diversity is really the goal, university administrators should do away with the artificial "Asian-American" category altogether and start considering each group separately. They should do the same for the many groups usually lumped together as "white" or "Hispanic." A university that already has a critical mass of native-born-WASPS might well not have a critical mass of Utah Mormons or Eastern European immigrants.

The glaring inconsistencies in Texas' affirmative action policy and others like it suggest that many universities are either operating an ethnic spoils system,[4] trying to run a compensatory justice program under the guise of promoting diversity (while ignoring Chinese and Japanese-Americans' powerful claims for compensation) in order to avoid running afoul of Supreme Court precedent, or some of both.

To avoid misunderstanding, I should reiterate that I have some sympathy for the compensatory justice rationale for affirmative action,[5] and do not believe that such policies are categorically unconstitutional. I also have significant reservations[6] about the *Fisher* case in particular. My general position is the exact opposite of current Supreme Court precedent,[7] which holds that racial preferences can be used to promote "diversity" but not compensatory justice for minority groups that have been the victims of massive "societal" discrimination.

That said, many current affirmative action policies are a travesty from the standpoint of either compensatory justice *or* promoting diversity. The University of Texas policy is no exception.

UPDATE: Some have suggested to me that UT's policy may also

[4] www.volokh.com/2012/05/28/elizabeth-warren-and-fisher-v-university-of-texas/.

[5] www.volokh.com/2011/03/02/preferences-for-white-males-and-the-diversity-rationale-for-affirmative-action/.

[6] www.volokh.com/2012/02/29/why-fisher-v-texas-might-turn-out-to-be-a-pyrrhic-victory-for-opponents-of-racial-preferences/.

[7] www.law.cornell.edu/supct/html/02-241.ZS.html.

be motivated by a belief that GPA and test score admissions standards are more "culturally biased" against blacks and Hispanics than against Asians. To my knowledge, the University has not asserted any such justification for its policy of including blacks and Hispanics, but not Asian-Americans in its affirmative action program. In any event, it would be surprising if administrators really believed that the tests are more culturally biased against native-born blacks and Hispanics – including those from middle class backgrounds – than against recent Asian immigrants who come from very different cultures, and in some cases only recently became fluent in English. //

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FROM: BALKINIZATION

LAW SCHOOLS SUFFER LOSS IN LAWSUITS

Brian Tamanaha†

Of the dozen-plus misrepresentation lawsuits filed against law schools by their former students, in recent months three have been dismissed (several have survived motions to dismiss and are in discovery). The core basis for the dismissal is the same in all three: prospective students cannot *reasonably rely* upon employment data posted by law schools.

Judge Schweitzer dismissing the suit against New York Law School:

> plaintiffs could not have reasonably relied upon NYLS's alleged misrepresentations, as alleged in their fraud and negligent misrepresentation claims, because they had ample information from additional sources [*] and thus the opportunity to discover the then-existing employment prospects at each stage of their legal education through the exercise of reasonable due diligence.

Judge Cohen dismissing the suit against DePaul Law School:

> Plaintiffs allege that it was reasonable to rely on the Employment Information without making any independent investigation of their own because DePaul is a law school and prospective students should be able to rely on information presented by

† William Gardiner Hammond Professor of Law; Israel Treiman Faculty Fellow, Washington University School of Law. Original at balkin.blogspot.com/2012/09/law-schools-suffer-deep-loss-in-lawsuits.html (Sept. 19, 2012; vis. Apr. 15, 2013). The bracketed endnote calls in the text corresponds to the endnote on page 186. © 2012 Brian Tamanaha.

> a law school. Plaintiffs, however, offer no authority standing for the proposition that prospective students or enrolled students may close their eyes to publicly available information [*] on employment opportunities for lawyers and rely solely on data provided by the educational institution in deciding to enroll at, or stay enrolled at, the institution.

Judge Quist dismissing the suit against Cooley Law School:

> The bottom line is that the statistics provided by Cooley *and other law schools* in a format required by the ABA were so vague and incomplete as to be meaningless and could not reasonably be relied upon. But, as put in the phrase we lawyers learn early in law school – *caveat emptor*.

These three law schools, and others facing similar suits, undoubtedly count these decisions as victories. But I cannot shake the sense that they mark a deep wound to the standing of law schools. The students we welcome in our doors are being warned by state and federal judges that they cannot take at face value the employment information we supply. For law schools, which have always held themselves out as honorable institutions of learning and professionalism, this is crushing.

[* Judges Schweitzer and Cohen both assert that there was ample available public information on the true employment prospects. This is not correct. When writing my book on law schools, I discovered that it was nearly impossible to find comprehensive employment data on individual law schools. A sophisticated and suspicious prospective student would have been able to figure out that the employment numbers posted by many law schools are incomplete and untrustworthy, but they would not have been able to find out the actual employment numbers. It was only after the lawsuits were filed that more detailed information became available.] //