No. 12-158

In The
Supreme Court of the United States

CAROL ANNE BOND,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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BRIEF OF THE YALE LAW SCHOOL CENTER FOR GLOBAL LEGAL CHALLENGES AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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Soc'y for the Propagation of the Gospel in Foreign Parts v. *New Haven*, 21 U.S. 464 (1823)..26

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United States v. *Pink*, 315 U.S. 203 (1942)...............14

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U.S. Steel Corp. v. *Multistate Tax Comm'n*, 434 U.S. 452 (1978)..6

Ware v. *Hylton*, 3 U.S. (3 Dall.) 199 (1796)..........25, 26

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Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, S. Treaty Doc. No. 100-20 33

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Treaty of Paris, U.S.-Gr. Brit., Sept. 3, 1783, 8 Stat. 80. 5

OTHER AUTHORITIES

Advisory Comm. on Int'l Law, *Memorandum Summarizing U.S. Views and Practice in Addressing Federalism Issues in Treaties*, U.S. Dep't of State (Nov. 8, 2002), http://www.state.gov/s/l/38637.htm 33

Akhil Reed Amar, *America's Constitution: A Biography* (2005) 5, 6

Anthony J. Bellia, Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. Chi. L. Rev. 445 (2011). 5

Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent,* 149 U. Pa. L. Rev. 399 (2000) 32

David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 Mich. L. Rev. 1075 (2000) 18

Alexander Hamilton, *The Defence No. XXXVI*, reprinted in 20 *The Papers of Alexander Hamilton* 3 (Harold C. Syrett ed., Univ. of Va. Press 2011) (1796) 18, 19

Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 Yale L.J. 140 (2009). 31, 33

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Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 Yale L.J. 1236 (2008) 29, 30, 31

Oona A. Hathaway & Scott Shapiro, *The Law of the World* (Apr. 23, 2013) (unpublished manuscript), available at http://www.law.yale.edu/documents/pdf/cglc/HathawayShapiro_LOW.pdf 7

Oona A. Hathaway, Spencer Amdur, Celia Choy, Samir Deger-Sen, John Paredes, Sally Pei & Haley Nix Proctor, *The Treaty Power: Its History, Scope, and Limits*, 98 Cornell L. Rev. 239 (2013) 4

Louis Henkin, *Foreign Affairs and the United States Constitution* (2d ed. 1996) 17

Duncan B. Hollis, *Executive Federalism: Forging New Federalist Constraints on the Treaty Power*, 79 S. Cal. L. Rev. 1327 (2006) 34

Julian G. Ku, *The Crucial Role of the States and Private International Law Treaties: A Model for Accommodating Globalization*, 73 Mo. L. Rev. 1063 (2008) 34

Letter from John Adams to John Jay (May 25, 1786), in 8 *The Works of John Adams* 394 (Charles Francis Adams ed. 1853) 5

Library of Cong., *THOMAS: Treaties*, http://thomas.loc.gov/home/treaties/treaties.html (last visited Aug. 14, 2013) 30

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8 Op. Att'y Gen. 411, 415 (1857) 15

Robert J. Reinstein, *Executive Power and the Law of Nations in the Washington Administration*, 46 U. Rich. L. Rev. 373 (2012) 6

Restatement (Third) of the Foreign Relations Law of the United States (1987)......................18, 27

The Debates in the Several State Conventions, on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia in 1787 (Jonathan Elliot ed., William S. Hein & Co. 2d ed. 1996) (1891)..11, 12, 13, 28

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The Federalist No. 44 (James Madison). 21

The Federalist No. 80 (Alexander Hamilton). 9

The Records of the Federal Convention of 1787 (Max Farrand ed. 1911) ....*passim*

U.S. Senate, *Treaties Approved by the Senate During the Current Congress*, http://www.senate.gov/pagelayout/legislative/one_item_and_teasers/trty_rtf.htm 30

Michael P. Van Alstine, *Federal Common Law in an Age of Treaties*, 89 Cornell L. Rev. 892 (2004)...27

Emmerich de Vattel, *The Law of Nations* (Joseph Chitty ed. and trans., T. & J.W. Johnson & Co. 1844) (1758).......................................7

INTEREST OF THE *AMICUS CURIAE*

The Yale Law School Center for Global Legal Challenges is an independent Center that promotes the understanding of international law, national security law, and foreign relations law. The Center seeks to close the divide between the legal academy and legal practice by connecting the legal academy to U.S. government actors responsible for addressing international legal challenges. In the process, the Center aims to promote greater understanding of legal issues of global importance – encouraging the legal academy to better grasp the real legal challenges faced by U.S. government actors and encouraging those same government actors to draw upon the expertise available within the legal academy. The Center files this brief to promote accurate interpretation of U.S. foreign relations law in this case.[1]

SUMMARY OF ARGUMENT

At the time of the Founding, the nation's survival hinged on its ability to fulfill its treaty obligations in the face of recalcitrant States. As Alexander Hamilton

[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* or its counsel made a monetary contribution to its preparation or submission. The parties' correspondence consenting to the filing of this brief has been filed with the Clerk's office. The views expressed in this brief are not necessarily those of the Yale Law School or Yale University.

observed, the Articles of Confederation left the "faith, the reputation, [and] the peace of the whole Union * * * at the mercy of the prejudices, the passions, and the interests of every member of which it is composed." *The Federalist No. 22* (Alexander Hamilton).

The Framers recognized that the exigencies of diplomacy demanded a robust, flexible treaty power. To achieve this aim, they delegated to the federal government an independent enumerated Article II Treaty Power, the scope of which is defined on its own terms and not by Article I. The Framers considered proposals to qualify the Treaty Power, but ultimately rejected them all. They also explicitly denied the States the power to make international agreements. Thus, in contrast to the legislative powers, which were carefully divided between Congress and the States, the Treaty Power was delegated in its entirety to the federal government, empowering the President and Senate to make treaties on any subject over which sovereign nations might validly negotiate.

The Framers knew that it was not enough to give the new federal government a robust treaty power. They also had to effectuate that power by giving the federal government the authority to implement and enforce the treaties it entered. They took three steps to ensure the Constitution did not repeat the Articles' mistakes.

First, the Supremacy Clause makes treaties the "supreme Law of the Land." U.S. Const. Art. VI, Cl. 2. Second, the judicial power extends to "all Cases * * * arising under * * * Treaties made, or which shall be made," thus requiring the courts to enforce treaty obligations. *Id.* Art. III, § 2. And, third, Congress has the 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." *Id.* Art. I, § 8, Cl. 18 (emphasis added).

The Framers intended these provisions to protect the United States from the dangerous failures to abide by treaty obligations that had plagued the country under the previous regime.

Recognizing that the Treaty Power was expansive, the Framers did not leave it unconstrained. They put in place significant structural checks – requiring that every treaty gain the support of the President *and* a two-thirds supermajority of the Senate. In doing so, they granted each State, no matter how small, significant power over the treaty-making process.

The Framers considered this the most effective way to safeguard the States against federal interference. History has vindicated their decision. The number of Article II treaties ratified each year has

remained consistently low since the Founding. And what treaties *are* ratified frequently include specific provisions meant to safeguard state prerogatives.

In sum, the structural checks embodied in the Treaty Clause have proven extremely effective in protecting federalism values. Judicial intervention for that purpose is unnecessary and ill-advised.[2]

ARGUMENT

I. AT THE CONSTITUTIONAL CONVENTION, THE FRAMERS SOUGHT TO REPAIR THE ARTICLES OF CONFEDERATION, WHICH HAD ALLOWED INDIVIDUAL STATES TO PLACE THE ENTIRE COUNTRY IN VIOLATION OF ITS TREATY OBLIGATIONS.

Under the Articles of Confederation, the federal government was unable to secure state compliance with treaty obligations. This placed the very existence of the new nation at risk. When they convened in Philadelphia, the Framers worked in the shadow of these threats. They were therefore determined to design a new treaty power that would not enable

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[2] This brief draws in significant part on Oona A. Hathaway, Spencer Amdur, Celia Choy, Samir Deger-Sen, John Paredes, Sally Pei & Haley Nix Proctor, *The Treaty Power: Its History, Scope, and Limits*, 98 Cornell L. Rev. 239 (2013).

individual States to place the security of the United States in jeopardy.

The 1783 Treaty of Paris had brought an end to the war with Great Britain. In the treaty, Great Britain acknowledged the United States to be free, sovereign, and independent. It relinquished all claims to the government and territorial rights of the United States and every part thereof. And it recognized the territorial boundaries between the United States and British North America. Both countries guaranteed that lawful contracted debts would be paid to creditors on both sides. Treaty of Paris, U.S.-Gr. Brit., Sept. 3, 1783, 8 Stat. 80.

Under the Articles of Confederation, however, the United States found it difficult to fulfill its end of the bargain. During the Revolutionary War, several States had passed laws preventing British creditors from collecting their debts. These state laws obstructed U.S. compliance with the 1783 Treaty. The national government was powerless to prevent the States' obstruction of treaty compliance. See Akhil Reed Amar, *America's Constitution: A Biography* 47 (2005); Anthony J. Bellia, Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. Chi. L. Rev. 445, 498-501 (2011).

In retaliation for the United States' failure to comply, Britain refused to evacuate strategically important forts in the northern frontier, effectively threatening renewal of hostilities. See *Letter from John Adams to John Jay* (May 25, 1786), in 8 *The*

Works of John Adams 394 (Charles Francis Adams ed. 1853) ("By the answer of Lord Carmarthen to the memorial of the 30th of November, congress will see that the detention of the posts is attempted to be justified by the laws of certain States impeding the course of law for the recovery of old debts * * *."). Violation of the Treaty of Paris by some States "put sister [S]tates at risk by giving Britain a pretext for further North American interventions." Amar, *supra*, at 47.

The threat of renewed conflict was not mere speculation. At the time of the Founding – as the Constitution's drafters well understood – violations of treaty obligations provided just cause for war under international law. The principle of treaty breach as *casus belli* was prominently highlighted by Emmerich de Vattel, "[t]he international jurist most widely cited in the first 50 years after the Revolution." *U.S. Steel Corp.* v. *Multistate Tax Comm'n*, 434 U.S. 452, 462 n.12 (1978).[3]

[3] The Framers knew Vattel so well that "[i]n 1775, Benjamin Franklin acknowledged receipt of three copies of a new edition, in French, of Vattel's Law of Nations and remarked that the book 'has been continually in the hands of the members of our Congress now sitting.'" *U.S. Steel Corp.*, 434 U.S. at 462 n.12 (quoting 2 Francis Wharton, *United States Revolutionary Diplomatic Correspondence* 64 (Washington, Gov't Printing Office 1889)). See also Robert J. Reinstein, *Executive Power and the Law of Nations in the Washington Administration*, 46 U. Rich. L. Rev. 373, 404-405 (2012) (describing the influence of Vattel on Hamilton and Jefferson).

Vattel recognized that "[t]he violation of a treaty is an act of injustice." 2 Emmerich de Vattel, *The Law of Nations* § 164 (Joseph Chitty ed. and trans., T. & J.W. Johnson & Co. 1844) (1758). "As the engagements of a treaty impose on the one hand a perfect obligation, they produce on the other a perfect right. The breach of a treaty is therefore a violation of the party with whom [a State has] contracted; and this is an act of injustice against him." *Ibid.* "The right of employing force, or making war, belongs to nations no farther than is necessary for their own defence, and for the maintenance of their rights," and "[w]hatever strikes at these [perfect] rights is an injury, and a just cause of war." 3 Vattel, *supra*, § 26.

Such wars were entirely commonplace for hundreds of years preceding the Constitutional Convention. Any treaty violation, no matter how trivial, gave a state "just cause" to go to war. See generally Oona A. Hathaway & Scott Shapiro, *The Law of the World* (Apr. 23, 2013) (unpublished manuscript), available at http://www.law.yale.edu/documents/pdf/cglc/HathawayShapiro_LOW.pdf (describing how international law long permitted States to resort to war in pursuit of "just causes," including even trivial treaty violations).

The Framers repeatedly referred to this principle while drafting and debating the Constitution. For example, John Jay observed that "[t]he number of wars which have happened or will happen in the world will always be found to be in proportion to the number and weight of the causes, whether REAL or PRETENDED, which PROVOKE or INVITE them."

The Federalist No. 3 (John Jay). He concluded that "[t]he JUST causes of war, for the most part, arise either from *violations of treaties* or from direct violence." *Ibid.* (emphasis added).

The Articles thus put the entire nation at risk by permitting individual States to cause breaches of the country's treaty obligations. As Alexander Hamilton explained,

> 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.

The Federalist No. 22 (Alexander Hamilton). "Is it possible," he asked rhetorically, "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, [and] their safety, on so precarious a foundation?" *Ibid.*

What the country needed was an *effective* federal treaty power: that is, the power both to make and to carry out treaty obligations. Without such a power, individual States would always be able to undermine the entire nation's foreign relations and, thereby, its security. As Hamilton put it, "[T]he peace of the WHOLE ought not to be left at the disposal of a

PART. The Union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it." *The Federalist No. 80* (Alexander Hamilton).

James Madison made the point even more forcefully at the Philadelphia Convention, asking of a proposal: "Will it prevent those violations of the law of nations & of Treaties which if not prevented must involve us in the calamities of foreign wars?" 1 *The Records of the Federal Convention of 1787*, at 316 (Max Farrand ed. 1911) [hereinafter *Records*]. He reminded the Convention's delegates that individual States had violated treaties before:

> The tendency of the States to these violations has been manifested in sundry instances. The files of Congs. contain complaints already, from almost every nation with which treaties have been formed. * * * A rupture with other powers is among the greatest of national calamities. It ought therefore to be effectually provided that no part of a nation shall have it in its power to bring them on the whole. The existing confederacy does (not) sufficiently provide against this evil.

Ibid.

When the Framers wrote the Treaty Clause, there is no doubt that they were focused on the relationship between the federal government and the States. They were determined to create a new treaty power that would prevent individual States from

violating treaties and thereby placing the security of the entire nation in jeopardy. They aimed, in short, to ensure that the United States would have the power to live up to its treaty commitments.

II. THE FRAMERS CREATED A ROBUST, FLEXIBLE, AND EXCLUSIVELY FEDERAL TREATY POWER.

A. The Framers Gave the Federal Government a Robust and Flexible Treaty Power, Which They Understood To Be an Enumerated Power Independent of Congress's Article I Authority.

The Treaty Clause creates an independent enumerated power. As such, the Treaty Power is not limited to the scope of the powers enumerated in Article I. This is simply a specific instance of a general principle: Enumerated powers in different parts of the Constitution do not restrict each other's scope. When Congress "by general Laws prescribe[s] the" manner of proof and effect of out-of-state judgments, U.S. Const. Art. IV, § 1, or when it makes "Rules and Regulations respecting the Territory or other Property belonging to the United States," *id.* Art. IV, § 3, Cl. 2, it is not constrained by the scope of the Commerce Clause or of other Article I powers. Like all independently enumerated powers, the Treaty Power must be examined on the basis of its own text, structure, and historical context.

The Framers recognized that the exigencies of international relations demanded a robust and flexible

treaty power capable of addressing issues traditionally governed by state law. This is reflected in the text of the Treaty Clause, which grants the Treaty Power to the federal government in its entirety without qualification. Article II of the Constitution simply gives the President the "Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." *Id.* Art. II, § 2, Cl. 2.

The structure of the Treaty Power reinforces the text. The power is placed in Article II, rather than Article I. Moreover, the power is subject to its own stringent *procedural* checks. Most notably, two-thirds of all Senators – the representatives of the States – must approve all treaties. See Part IV, *infra*.

These textual and structural choices did not arise by chance. The history of the Treaty Clause shows that the Framers specifically considered the concerns of those wary of an unqualified treaty power – concerns identical to the ones the Petitioner raises now. Indeed, the requirement that a treaty gain the support of two-thirds of the Senate was specifically offered and adopted as a substitute for the various subject-matter limitations critics unsuccessfully proffered. See, *e.g.*, 3 *The Debates in the Several State Conventions, on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia in 1787*, at 347-348, 357-359, 362-365, 500 (Jonathan Elliot ed., William S. Hein & Co. 2d ed. 1996) (1891) [hereinafter *Debates*].

Opponents of the Treaty Clause's text persistently objected to the absence of any limits on the subjects to which the Treaty Power could apply. At the Philadelphia Convention, future Supreme Court Justice James Wilson warned that "the Senate alone can make a Treaty, requiring all the Rice of S. Carolina to be sent to some one particular port." 2 *Records*, *supra*, at 393. George Mason worried that the Senate "could * * * sell the whole Country by means of Treaties," *id.* at 297, and – during the Virginia Convention – confirmed his understanding that, unless there was a substantive limit written into the Clause, treaties could be used to "dismember the empire." 3 *Debates*, *supra*, at 509. Indeed, he continued, "[t]he President and the Senate [could] make any treaty whatsoever." *Ibid.* And Patrick Henry railed against "the paramount power given them." *Id*. at 513.

The Framers nevertheless rebuffed proposals that would have qualified the Treaty Power. In so doing, they made clear that they did not want to limit the federal government's sovereign power to conduct foreign relations; instead, they wanted to give it the flexibility required to adapt to changing times. As Edmund Randolph noted at the Virginia Convention, "[t]he various contingencies which may form the object of treaties, are, in the nature of things, incapable of definition." *Id.* at 363. He acknowledged that the Treaty Power lacked any express substantive limits, but he concluded: "I defy the wisdom of [those opposed] * * * to show how [it] ought to be limited." *Id.* at 504.

But it was James Madison who put the nail in the coffin:

> I do not think it possible to enumerate all the cases in which such external regulations would be necessary. Would it be right to define all the cases in which Congress could exercise this authority? The definition might, and probably would, be defective. They might be restrained, by such a definition, from exercising the authority where it would be essential to the interest and safety of the community.

Id. at 514-515.[4]

In sum, the text, structure, and ratification history of the Treaty Clause rule out the possibility of any Article I limit – whether express or implied – on the Treaty Power.

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[4] Madison identified only one limit on the content of treaties: they could not "alienate any great, essential right." 3 *Debates*, *supra*, at 514. See also Part II.C, *infra* (detailing how explicit prohibitions found elsewhere in the Constitution limit the scope of the treaty power).

B. The Constitution Not Only Grants the Power To Make and Enforce Treaties to the Federal Government but Also Explicitly Denies That Power to the States.

This Court has repeatedly reaffirmed that federal authority must be paramount in our foreign relations. Indeed, the demands of state sovereignty are at their weakest when it comes to formulating and executing foreign policy. In *United States* v. *Pink*, the Court stated that

> there are limitations on the sovereignty of the States. No State can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the States; it is vested in the national government exclusively. It need not be so exercised as to conform to state laws or state policies whether they be expressed in constitutions, statutes, or judicial decrees. And the policies of the States become wholly irrelevant to judicial inquiry, when the United States, acting within its constitutional sphere, seeks enforcement of its foreign policy in the courts.

315 U.S. 203, 233-234 (1942). To reach this conclusion, the *Pink* Court relied on *United States* v. *Belmont*, which held that, "[i]n respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. * * * Within the field of its powers, whatever the United States rightfully undertakes, it

necessarily has warrant to consummate." 301 U.S. 324, 331-332 (1937).

The Constitution does not just vest the entire Treaty Power in the federal government. It also prohibits States from participation in foreign agreements not once but twice. U.S. Const. Art. I, § 10, Cl. 1 ("No State shall enter into any Treaty, Alliance, or Confederation * * *."); *id.* Art. I, § 10, Cl. 3 ("No State shall, without the Consent of Congress, * * * enter into any Agreement or Compact with another State, or with a foreign Power * * *.").

Citing these Clauses, this Court has repeatedly confirmed that the Treaty Power is exclusively federal. See *Belmont*, 301 U.S. at 330 ("Governmental power over internal affairs is distributed between the national government and the several States. Governmental power over external affairs is not distributed, but is vested exclusively in the national government."); *Barron* v. *Baltimore*, 32 U.S. (7 Pet.) 243, 249 (1833) ("A state is forbidden to enter into any treaty, alliance or confederation. If these compacts are with foreign nations, they interfere with the treaty-making power, which is conferred entirely on the general government * * *."). And because the Treaty Power is exclusively federal, the *entire* treaty power of the United States necessarily resides in the federal government. Indeed, this Court has long recognized that "[i]f the national government has not the power to do what is done by such treaties, it cannot be done at all." *Hauenstein* v. *Lynham*, 100 U.S. 438, 490 (1880). See 8 Op. Att'y Gen. 411, 415

(1857) ("[I]n the matter of foreign negotiation, the States have conferred the whole of their power, in other words, all the treaty-powers of sovereignty, on the United States. Thus, in the present case, if the power of negotiation be not in the United States, then it exists nowhere * * *.").

For these reasons, it is clear that the Constitution creates a unified treaty power and denies the States any ability to engage in foreign relations without the consent of Congress. The additional restrictions advanced by the Petitioner contradict the exclusively federal character of the Treaty Power in the text of the Constitution and in this Court's foreign affairs jurisprudence.

C. The Tenth Amendment Does Not Apply to the Treaty Power, Which Was "Delegated to the United States by the Constitution" and "Prohibited by It to the States."

The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited to it by the States, are reserved to the States respectively, or to the people." U.S. Const. Amend. X. But as explained in Sections II.A-B, *supra*, the Constitution both grants the Treaty Power to the federal government and denies it to the States. The Tenth Amendment's "reserv[ation]" therefore does not apply to the Treaty Power.

The Court has left this conclusion undisturbed in the ninety-three years since it concluded that, to challenge the validity of a treaty or its implementing legislation, "it is not enough to refer to the Tenth Amendment[.] * * * [B]y Article 2, Section 2 [of the Constitution], the power to make treaties is delegated expressly, and by Article 6 treaties made under the authority of the United States * * * are declared the supreme law of the land." *Missouri* v. *Holland*, 252 U.S. 416, 432 (1920). Nor could an "invisible radiation from the general terms of the Tenth Amendment" limit the United States' authority to regulate migratory-bird hunting. *Id.* at 434.

This Court "has consistently upheld the validity and supremacy of treaty provisions dealing with matters as local as the right to inherit land or to engage in local trade." Louis Henkin, *Foreign Affairs and the United States Constitution* 191 (2d ed. 1996); see, *e.g.*, *Nielsen* v. *Johnson*, 279 U.S. 47 (1929) (recognizing the validity of a treaty with Denmark and its supremacy over a contradictory state inheritance tax provision); *Jordan* v. *K. Tashiro*, 278 U.S. 123 (1928) (recognizing the validity of a treaty with Japan and its supremacy over a contradictory state business incorporation restriction); *Asakura* v. *Seattle*, 265 U.S. 332 (1924) (recognizing the validity of a treaty with Japan and its supremacy over a contradictory city business licensure ordinance); *Hauenstein*, 100 U.S. 483 (recognizing the validity of a treaty with Switzerland and its supremacy over a contradictory state law on land inheritance).

That the Treaty Power is delegated to the federal government does not leave it unchecked. In addition to the procedural checks detailed in Part IV, *infra*, a treaty may not "contravene any prohibitory words to be found in the Constitution." *Holland*, 252 U.S. at 433; see also Restatement (Third) of the Foreign Relations Law of the United States § 302 cmt. b & reporter's note 1 (1987); David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 Mich. L. Rev. 1075, 1083-1084 (2000).

Thus, it is hornbook law that the federal government may not employ a treaty to "authorize what the [C]onstitution forbids." *De Geofroy* v. *Riggs*, 133 U.S. 258, 267 (1890). It may not, for example, employ a treaty to grant a title of nobility or to pass an ex post facto law – or indeed, to carry out any of the prohibited actions listed in Article I, § 9. U.S. Const. Art. I, § 9. Nor may the federal government employ a treaty to cause a "change in the character of the government." *De Geofroy*, 133 U.S. at 267. It may not use a treaty, for example, to transfer the Constitutional powers of one branch of the federal government to another. See Alexander Hamilton, *The Defence No. XXXVI*, reprinted in 20 *The Papers of Alexander Hamilton* 3, 6-7 (Harold C. Syrett ed., Univ. of Va. Press 2011) (1796) (explaining that "[t]he only constitutional exception to the power of making Treaties is that it shall not change the constitution" because "a delegated authority cannot rightfully transcend the constituting act unless so expressly authorized by the constituting Power. A treaty for example cannot

transfer the legislative power to the Executive Department") (footnotes omitted).

The Tenth Amendment is nothing like these explicit Constitutional prohibitions. Indeed, the fact that a treaty may not contravene the Constitution, and may not cause a "change in the character of the government," *ibid.*, is fully consistent with *Holland*'s "careful[ ]" analysis holding that the Migratory Birds Treaty was "not inconsistent with any specific provision of the Constitution." *Reid* v. *Covert*, 354 U.S. 1, 18 (1957) (plurality opinion).

This is because a treaty that violates affirmative prohibitions found in the Constitution is not a valid treaty. (For example, a treaty provision that granted a title of nobility would be *an invalid treaty commitment*.) But "[t]o the extent that the United States can validly make treaties, the people and the States have delegated their power to the National Government[,] and the Tenth Amendment is no barrier." *Ibid.*

III. THE FRAMERS TOOK STEPS TO ENSURE THAT THE NEW TREATY POWER WOULD BE IMPLEMENTED AND ENFORCED, EVEN IN THE FACE OF STATE RESISTANCE.

The Framers recognized that it was not enough to give the new federal government a robust and flexible treaty power. It was also essential to give the federal government the authority to implement and enforce the treaties it entered. Recognizing this clear

Constitutional design, this Court has consistently upheld the federal government's power to enforce any treaty it ratifies.

A. The Framers Took Steps To Ensure the Federal Government Would Be Empowered To Enforce the Nation's Treaty Obligations.

The Framers recognized the threat to the nation's security posed by the Articles of Confederation's dangerous combination of a broad treaty-making authority with a weak power to enforce those same treaties. To ensure the new Constitution would not create this same danger, the Framers took three steps to ensure that the federal government would be empowered to enforce the nation's treaty obligations even on matters traditionally within the ambit of state authority.

First, the Framers made clear in the Supremacy Clause that

> 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.

U.S. Const. Art. VI, Cl. 2.

Writing in support of the Supremacy Clause, Madison pointed out the vital importance of securing

uniform compliance. He contended that, in the absence of the Supremacy Clause, "it might happen that a treaty * * * of great and equal importance to the States, would interfere with some and not with other [State] constitutions, and would consequentially be valid in some of the States at the same time that it would have no effect in others." *The Federalist No. 44* (James Madison). If that were to happen, "the world would have seen * * * the authority of the whole society every where subordinate to the authority of the parts; it would have seen a monster, in which the head was under the direction of the members." *Ibid.*

Second, the Framers vested judicial authority for the enforcement of treaties in the federal courts: "The judicial Power shall extend to all Cases * * * arising under * * * Treaties made, or which shall be made * * *." U.S. Const. Art. III, § 2. This provision specifically tasked the federal courts with ensuring robust compliance with international treaties.

In the *Federalist Papers*, John Jay explained why. Invoking the country's recent experience with the Treaty of Paris, he argued that

> under the national government, treaties * * * will always be expounded in one sense and executed in the same manner, – whereas, adjudications on the same points and questions, in thirteen States * * * will not always accord or be consistent * * *. The wisdom of the convention, in committing such questions to the jurisdiction and judgment of courts

> * * * [of] one national government, cannot be too much commended.

The Federalist No. 3 (John Jay). Thus would the security of the whole be protected from the intransigence of the part.

Third, the Framers endowed Congress with the 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." U.S. Const. Art. I, § 8, Cl. 18 (emphasis added). Those governmental powers include the federal Treaty Power. The textual link between the Necessary and Proper Clause and the Treaty Clause is clear: Article II 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." *Id.* Art. II, § 2, Cl. 2 (emphasis added).

Where, as here, the implementing legislation is manifestly designed to ensure compliance with a valid treaty obligation, "there can be no dispute about the validity of the statute under Article 1, Section 8, as a necessary and proper means to execute the powers of the Government." *Holland*, 252 U.S. at 432. That is because "[t]he power of Congress to make all laws necessary and proper * * * includes the power to enact such legislation as is appropriate to give efficacy to any stipulations which it is competent for the President by and with the advice and consent of the

Senate to insert in a treaty with a foreign power." *Neely* v. *Henkel*, 180 U.S. 109, 121 (1901).

Reading the Necessary and Proper Clause together with the Treaty Clause establishes that Congress may pass implementing statutes "plainly adapted to th[e] end" of ensuring U.S. compliance with its obligations under a valid treaty. *M'Culloch* v. *Maryland*, 17 U.S. 316, 421 (1819).

B. The Framers Meant To Give the Federal Government the Power To Enforce *All* Its Valid Treaty Commitments.

The Framers considered it essential that the federal government be able to live up to *all* its valid treaty commitments. Of course, they generally expected treaties to be self-executing.[5] They therefore never expressly discussed how best to implement and enforce non-self-executing treaties. But the Constitution's text, structure, and history all make clear that the Framers intended the federal government to have power to effectuate *all* its valid treaty commitments.

[5] This understanding is clear from the record of the debates at the Philadelphia Convention. One proposal would have allowed Congress "[t]o call forth the aid of the militia, in order to execute the laws of the Union [and] enforce treaties." 2 *Records*, *supra*, at 389 n.9. Gouverneur Morris moved to strike the phrase "enforce treaties," arguing it was "superfluous since treaties were to be 'laws.'" *Id.* at 389-390. His motion passed unanimously. *Id.* at 390. Morris later proposed that "no Treaty shall be binding on the U.S. which is not ratified by a law." *Id.* at 392. That proposal was rejected. *Id*. at 392-394.

First: Text. As discussed *supra* Section III.A., the Necessary and Proper Clause gives Congress the power to make all laws necessary for carrying into execution all other powers vested by the Constitution – the Treaty Power included. And the Treaty Power grants the President and the Senate the power to make all treaties on behalf of the United States, whether those treaties are self-executing or not.

Second: Structure. It would be strange indeed if the President and two-thirds of the Senate could accomplish by self-executing treaty what the President and two-thirds of the Senate *plus* both Houses of Congress and the President acting a second time could not. Petitioner is correct, of course, that the Senate may ratify a valid non-self executing treaty with the understanding that there will be no federal legislation to carry that treaty into effect. In such cases, however, the Senate is fully capable of making those intentions and expectations clear by modifying the United States' treaty obligations. See *infra* Section IV.C. It would not, moreover, vote to approve federal legislation contravening that intention.

Third: History. Non-self-executing treaties bind their signatories as a matter of international law just as strongly as their self-executing counterparts. It stands to reason, then, that the Framers would have viewed compliance with non-self-executing treaties as equally essential to the nation's security.

This analysis is fully consistent with the Court's decision in *Medellín* v. *Texas*, 552 U.S. 491 (2008),

which did not hold that treaties that *may* depend on state and local laws and authorities for compliance *must* rely only on such laws. Certainly, the Vienna Convention on Consular Relations relied on "state and local laws and authorities for compliance." Pet. Br. at 32. But this Court has never concluded that federal legislation to carry the Convention into effect would have been unconstitutional.

Quite the contrary: When this Court decided that the treaty commitments at issue were not self-executing, it made clear that Congress could have enacted legislation to effectuate those same international obligations. *Medellín*, 552 U.S. at 520. The Court explained, "Congress is up to implementing non-self executing treaties." *Id.* at 521. "Congress knows," the Court concluded, "how to accord domestic effect to international obligations when it desires such a result." *Id.* at 522. Congress simply had not done what was necessary. In the present case, however, Congress has.

C. This Court Has Consistently Upheld Treaty Obligations, Even in Areas of Traditional State Control.

The Framers' constitutional design was put to an early test in *Ware* v. *Hylton*, 3 U.S. (3 Dall.) 199 (1796). During the Revolutionary War, Virginia was among the States that enacted a statute allowing debtors who had borrowed money from British creditors to discharge the debt by paying it to the State.

After the war, a British creditor sued, arguing that the Treaty of Paris nullified Virginia's statute. This Court agreed. As Justice Chase explained, "A treaty cannot be the Supreme law of the land, that is of all the United States, if any act of a State Legislature can stand in its way." *Id.* at 236. Faced with precisely the same problem that had motivated the Constitutional Convention, the Court ensured the treaty's domestic effect, in the process superseding the law of Virginia. It did so, moreover, in an area of law that had traditionally been a matter of near exclusive state concern – property law.

The *Ware* opinion does not stand alone. Although this Court has recognized that rights of succession to property are generally matters of local law, *Clark* v. *Allen*, 331 U.S. 503, 517 (1947), it has upheld succession-related treaties despite conflicting state laws. See, *e.g.*, *Santovincenzo* v. *Egan*, 284 U.S. 30 (1931) (finding the Consular Convention of 1878 between the United States and Italy overruled New York law governing the assets of a native of Italy who died intestate in New York); *Soc'y for the Propagation of the Gospel in Foreign Parts* v. *New Haven*, 21 U.S. 464 (1823) (finding the Treaty of Paris and the Jay Treaty protected the real property of a British corporation against a confiscatory Vermont property law); *Orr* v. *Hodgson*, 17 U.S. 453, 462 (1819) (finding the Treaty of Paris protected the titles of British subjects from "forfeiture, by way of escheat for the defect of alienage," notwithstanding contrary Virginia law).

Other prominent examples of treaties relating to matters of traditional State concern include treaties that guarantee foreign citizens rights of inheritance and property ownership, such as treaties of amity, commerce, and navigation concluded in the early years of the Republic. See Michael P. Van Alstine, *Federal Common Law in an Age of Treaties*, 89 Cornell L. Rev. 892, 922 (2004) (describing a broad range of "[s]elf-executing treaties [that] now address such diverse fields as commercial law, criminal law, property law, tax law, civil procedure, administrative law, and family law"). Provisions in such treaties – "especially in matters ordinarily governed by State law" – have long been given effect by the courts without any implementing legislation. Restatement (Third) of the Foreign Relations of the United States, § 111 reporter's note 5 (1987).

The same is true for treaty provisions governing matters such as personal injury, *El Al Israel Airlines* v. *Tsui Yuan Tseng*, 525 U.S. 155 (1999) (finding that the Warsaw Convention precluded a damages action under New York tort law); intrastate trade and business regulation, *Asakura*, 265 U.S. 332 (finding that a 1911 treaty with Japan precluded operation of a Seattle ordinance prohibiting noncitizens from engaging in the pawnbroker business); and taxes, *Nielsen* v. *Johnson*, 279 U.S. 47 (1929) (finding that a treaty with Denmark required equal inheritance taxation of Danish and U.S. citizens, notwithstanding contrary Iowa law).

IV. THE TREATY POWER PROTECTS FEDERALISM THROUGH THE RATIFICATION PROCESS.

A. The Framers Established a Two-Thirds Consent Requirement in the Senate To Protect State Prerogatives.

This Court did not eliminate federalism as a check on the Treaty Power in *Holland*, because the Treaty Power contains its *own* robust federalism check. Treaty ratification requires both the consent of the President and a two-thirds supermajority vote in the Senate. U.S. Const. Art. II, § 2, Cl. 2. The Constitution thus grants the States, through their representatives in the Senate, the power to exercise control over treaty ratification.

By requiring that all treaties receive the advice and consent of the Senate, the Framers knew they were conferring gate-keeping authority to the States equally represented therein. In debates over the Treaty Clause, James Madison observed that "the Senate represented the States alone." 2 *Records*, *supra*, at 392. Alexander Hamilton reasoned that "the senators will constantly be attended with a reflection[ ] that their future existence is absolutely in the power of the States. Will not this form a powerful check?" 2 *Debates*, *supra*, at 304. And North Carolina Convention delegate William R. Davie argued that "small states would not consent to confederate without an equal voice in the formation of treaties." 4 *Debates*, *supra*, at 120.

To further empower each individual State, the Framers made advice and consent contingent upon a supermajority rule. The few other supermajority requirements in the Constitution are reserved to the most serious matters. *See* U.S. Const. Art. I, § 3, Cl. 6 (providing for impeachment of the President); *id.* Art. I, § 5, Cl. 2 (providing for expulsion of members from the Senate and House). The use of a supermajority requirement to constrain the treaty-making process thus reflects the Framers' belief that the most effective way to protect State prerogatives against infringement by treaties was through a strong structural check. See Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 Yale L.J. 1236, 1284-1285 (2008).

B. Throughout U.S. History, the Constitution's Structural Checks on the Treaty Ratification Process Have Proven Highly Effective in Protecting State Interests.

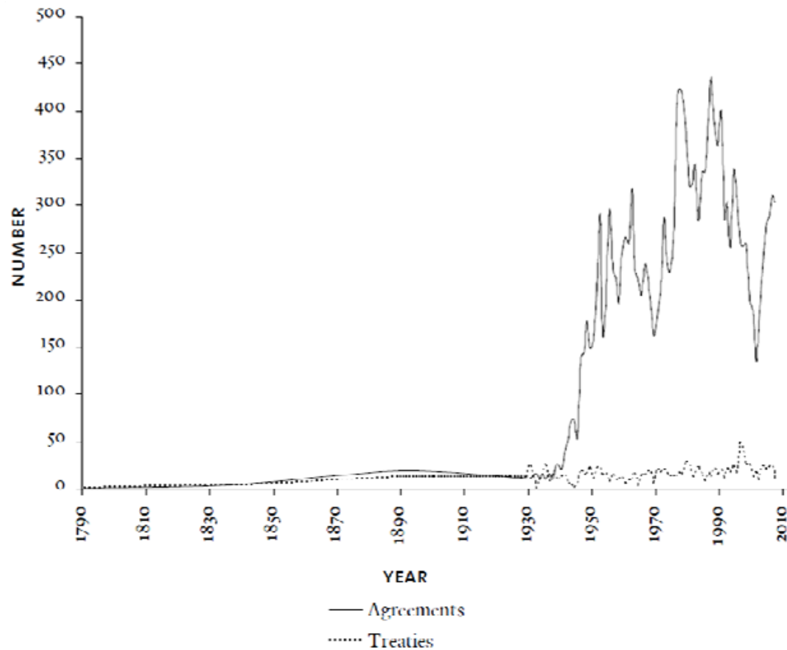
The effect of the extraordinary level of consensus demanded by the two-thirds requirement has been dramatic. Since the time of the Founding, Senate advice and consent has presented a notable and effective barrier to the ratification of Article II treaties implicating areas of traditional state concern – as evinced by the fact that, today, Article II treaties make up a small portion of the international agreements the United States concludes.

From 1980 to 2000, the United States entered into 375 treaties – just under twenty per year. *Id.* at 1258. During the last several years, the numbers have been even lower. The 112th Congress gave advice and consent to only two treaties. See Library of Cong., *THOMAS: Treaties*, http://thomas.loc.gov/home/treaties/treaties.html (last visited Aug. 14, 2013) (search "Treaties" for "advice and consent" in "All Congresses," selecting "All" for "Date Transmitted to Senate" and sorting results by "Latest action"). The current Congress has given advice and consent to none. See U.S. Senate, *Treaties Approved by the Senate During the Current Congress*, http://www.senate.gov/pagelayout/legislative/one_item_and_teasers/trty_rtf.htm (last visited Aug. 14, 2013).

As Figure 1 shows, today Article II treaties comprise a small proportion of the United States' international agreements. The number of international agreements concluded by other means has exploded, even as the number of Article II treaties has remained relatively constant since the Founding. Hathaway, 117 Yale L.J. at 1287. The vast majority of these are congressional-executive agreements. Such agreements are entered by the President authorized by both houses of Congress – usually through legislation giving the President authority to negotiate binding international agreements that preempt inconsistent state law. Unlike Article II treaties, these agreements are unconstrained by the supermajority requirement of the Article II treaty ratification process.

However, such agreements are limited to Congress's Article I authority. *Id.* at 1338-1348.

Figure 1. Executive Agreements and Treaties, 1790-2007[6]



These data demonstrate that, throughout American history, Article II's structural checks have allowed only those treaties with overwhelming political support – and therefore reflecting significant national and international interests of the United States – to survive the ratification process. Because the structural

[6] Figure 1 is reprinted from Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 Yale L.J. 140, 180 (2009).

checks embodied in the Treaty Clause effectively preclude the parade of horribles petitioner and amici have proffered, additional judicial constraints are neither necessary nor appropriate.

C. The Treaty Ratification Process Also Accommodates Federalism Values by Giving the Political Branches the Capacity To Modify Treaty Obligations and Temper Enforcement Strategies.

The structural checks in Article II also allow the political branches to modify the content of the United States' treaty obligations in light of federalism values. "Throughout U.S. history, the treatymakers have used their conditional consent powers to guard against undue intrusions on state prerogatives." Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent,* 149 U. Pa. L. Rev. 399, 409 (2000). These modifications may take various forms. Treatymakers may limit the substance of a treaty to accommodate States' interests, make treaties dependent upon state law, or limit U.S. treaty obligations to those matters within the federal government's jurisdiction. *Ibid.*

States' interests are protected by the Senate's ability to attach reservations, understandings, and declarations (RUDs) at the time of its consent. Federalism-specific RUDs are common, and generally distribute treaty implementation authority among federal, state, and local jurisdictions. Representative

language can be found in reservations the United States has asserted in several major treaties.[7]

Indeed, of the twenty-five international human rights treaties that the United Nations has identified as "core" treaties, the United States has signed twenty (80%), but the President has only submitted seventeen (68%) to the Senate. Hathaway et al., *supra*, at 311. The Senate gave its advice and consent to only twelve (48%), placing explicit federalism RUDs on four. *Ibid.* Of the eight core treaties that the United States has joined without federalism RUDs, six either involve international matters (such as armed conflict) unlikely to raise federalism issues or were ratified before the use of RUDs for this purpose became common. *Ibid.* The remaining two were specifically tailored to avoid any conflict with state interests. *Id.* at 312.

The United States further accommodates federalism values as a political matter by at times depending upon States in the first instance to implement treaties, particularly when the treaty involves a matter of traditional state concern. For example, the

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[7] See, *e.g.*, Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, S. Treaty Doc. No. 100-20; Charter of the Organization of American States, Apr. 30, 1948, 119 U.N.T.S. 54; see generally Advisory Comm. on Int'l Law, *Memorandum Summarizing U.S. Views and Practice in Addressing Federalism Issues in Treaties*, U.S. Dep't of State (Nov. 8, 2002), http://www.state.gov/s/l/38637.htm (listing more examples of federalism RUDs).

United States has relied on state law to fulfill its obligations under one of the two optional protocols to the Convention on the Rights of a Child. See Duncan B. Hollis, *Executive Federalism: Forging New Federalist Constraints on the Treaty Power*, 79 S. Cal. L. Rev. 1327, 1382-1383 (2006). It has also implemented the Convention on the Form of an International Will using an innovative combination of both federal and state implementing legislation. See Julian G. Ku, *The Crucial Role of the States and Private International Law Treaties: A Model for Accommodating Globalization*, 73 Mo. L. Rev. 1063, 1067 (2008). Such State-centered implementation has not been driven by the courts. It has, instead, been used by the political branches when they concluded that it offered the most appropriate means of effectively implementing and enforcing a treaty.

* * *

For more than two centuries, the Constitution has enabled the federal government to pursue the United States' foreign policy objectives effectively while accommodating State interests. The Constitution grants the federal government a robust, exclusive, and effective Treaty Power. That power is tempered by a set of embedded structural checks, chief among them the requirement that every Article II treaty earn the support of not only the President but also a two-thirds supermajority of the Senate. These constraints are so powerful that only a handful of Article II treaties have received the advice and consent of the Senate in recent years. In short, the

system has successfully protected federalism values while giving the federal government the flexibility it needs to effectively pursue the foreign policy interests of the United States. That delicate balance must not be disturbed now.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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