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

BRIEF FOR *AMICI CURIAE* PROFESSORS OF INTERNATIONAL LAW AND LEGAL HISTORY IN SUPPORT OF RESPONDENT

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INTEREST OF THE AMICI CURIAE

Amici curiae are professors of international law and legal history interested in sharing their knowledge of the treaty power in American constitutional history with this Court.[1]

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[1] Pursuant to Rule 37.6, counsel for amici states that no counsel for a party authored this brief in whole or in part, and that no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. The parties have filed letters of consent for amicus briefs with the Court.

SUMMARY OF ARGUMENT

The United States was able to become a global superpower because of the Framers' wise decision to allow the federal government to exercise national control in foreign affairs. Throughout our history, this power has been judiciously managed by our elected officials. As this brief shows, the Framers recognized and intended that treaties could operate in areas that would otherwise be left to the states, and treaties have impacted domains of state authority in various ways throughout U.S. history. Although Carol Bond's case could be decided on relatively narrow grounds, Petitioner and her *amici* invite this Court to overrule more than two centuries' worth of precedent and dramatically curtail the U.S. government's ability to credibly commit to and enforce international treaties. Instead, this Court should adhere to longstanding precedent and avoid crafting any new constitutional rules that might have unforeseen and harmful effects on foreign affairs and America's standing in the world.

ARGUMENT

I. The Framers Gave The Treaty Power To The Federal Government To Protect The Nation's Unity, Sovereignty, And Security In Foreign Affairs.

Under the Articles of Confederation, the federal government's inability to compel state compliance with treaty obligations vexed the young nation's ability to conduct foreign affairs and helped spur the calling of the Constitutional Convention in 1787. At that time, James Madison noted with concern that "not a year has passed without instances" of treaty

violations by "some one or other of the States." James Madison, *Vices of the Political System of the United States*, *April 1787*, *available at* http://founders.archives.gov/documents/Madison/01-09-02-0187; *see also* 1 *The Records of the Federal Convention of 1787*, at 164 (Max Farrand ed., 1911) (statement of James Madison) ("Experience had evinced a constant tendency in the States . . . to violate national Treaties."). As Alexander Hamilton explained, with "treaties of the United States . . . liable to the infractions of thirteen different legislatures, and as many different courts of final jurisdiction," 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 each state, leaving the nation on so "precarious a foundation" that other nations could not trust or respect it. *The Federalist No. 22*, at 131 (Alexander Hamilton) (Gary Wills ed., 1982). *See generally* David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 Mich. L. Rev. 1075, 1100-48 (2000) (describing founding era discussion of treaty power) [hereinafter Golove, *Treaty-Making*]; Martin S. Flaherty, *History Right? Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land*," 99 Colum. L. Rev. 2095, 2125 (1999).

The text of the new Constitution thus unambiguously delegated the full sovereign power to make treaties to the national government in Article II, U.S. Const. art II, § 2, cl. 2, while expressly denying states any power to make or to negate treaties. U.S. Const. art I, § 10, cl. 1 ("No state shall

enter into any Treaty, Alliance, or Confederation . . . ."); U.S. Const. art. VI, cl. 2 ("[A]ll 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."); *see also The Federalist No. 42*, at 253 (James Madison) (Gary Wills ed., 1982) ("If we are to be one nation in any respect, it clearly ought to be in respect to other nations."). When the Framers split the atom of sovereignty, they awarded the full sovereign power to make treaties to the federal government and not the states, rendering the Tenth Amendment inapplicable by its own terms. U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

That is not to say the treaty power is entirely unlimited. As this Court has long held, the Bill of Rights constrains the treaty power. *See Reid v. Covert*, 354 U.S. 1, 16-19 (1957). Similarly, a treaty could not be used to violate other prohibitory language in the Constitution, for example by purporting to appropriate funds from the federal treasury in contravention of the normal Article I requirements. *See* U.S. Const. art. I, § 9 ("No money shall be drawn from the treasury, but in consequence of appropriations made by law.").

Nor is the basic architecture of our federal system abandoned in the treaty context. First and foremost, the Framers chose to protect federalism by requiring the consent of two-thirds of the Senate. *See* 2 *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 507 (Jonathan Elliot ed., 2d ed. 1996) (1836) [hereinafter *Elliot's Debates*] (statements of James Wilson at Pennsylvania ratifying convention) ("[I]n the making of treaties, the states are mediately represented, and the people immediately represented; two of the constituent parts of government must concur in making them. Neither the president nor the Senate, solely, can complete a treaty; they are checks upon each other, and are so balanced, as to produce security to the people."). This was a considered choice, made in the context of concerns over potential treaties that threatened state interests of the most sensitive nature, but also in the face of consensus that subject matter limits on the treaty power were unwise. *See* Golove, *Treaty-Making*, *supra*, at 1133-49. Whatever skepticism might be warranted about the political safeguards of federalism in the statutory context, the Framers self-consciously chose to rely on an extraordinary supermajority requirement in the treaty context. This steep hurdle has significantly constrained the federal government from entering into treaties that would negatively affect the balance of our federal system. *See* David Sloss, *International Agreements and the Political Safeguards of Federalism*, 55 Stan. L. Rev. 1963, 1984-88 (2003).

Other constraints serve to protect federalism as well. Although Guarantee Clause claims have been found non-justiciable in other contexts, a treaty that denied states a republican form of government would likely be invalid under that clause. U.S. Const. art. IV, § 4. And while this Court has never directly

addressed the issue, it is possible that the anti-commandeering principle might come into play in an appropriate case. *See New York v. United States*, 505 U.S. 144 (1992).

It is equally clear, however, that the Framers did not curtail the treaty power in the particular ways that Petitioner and some of her *amici* suggest, namely by limiting the domestic effect of treaties to topics within Congress's other Article I powers or by carving off some vague substantive areas of regulation for exclusive state control. To the contrary, the Framers of the Constitution abandoned the confusing substantive caveats to the federal treaty power that existed under the Articles of Confederation, substituting a plenary delegation of authority to the President "to make Treaties" with the concurrence of the Senate. U.S. Const. art II, § 2, cl. 2. This textual conveyance of plenary national authority (accompanied by the explicit prohibition of such power to the states) is unambiguous and was not an accidental or unconsidered choice. *See* 3 *Elliot's Debates*, *supra*, at 363 (statement of Gov. Randolph at Virginia ratifying convention) ("The various contingencies which may form the object of treaties, are, in the nature of things, incapable of definition. The government ought to have power to provide for every contingency."); *see also id.* at 509 (statement of George Mason at same) (noting with some concern that "[t]he President and Senate can make any treaty whatsoever" and proposing substantive limitations on the scope of the treaty power, which were not incorporated); Golove, *Treaty-Making*, *supra*, at 1089-1100, 1134 (noting that founding materials reveal the "shared supposition

that the [treaty] power was general and would extend as far as was customary under international practice"); Michael D. Ramsey, Missouri v. Holland *and Historical Textualism*, 70 Mo. L. Rev. 969, 1006 (2008) (concluding that Constitution's original meaning did not include subject matter limitations on treaty power).

II. From The Early Republic, Treaties Have Regulated Matters That Would Otherwise Be Within The Exclusive Legislative Power Of The States.

Extensive historical practice belies the argument that treaties cannot be implemented domestically unless they fall within one of Congress's other enumerated powers, or that there is some "invisible radiation" from the Tenth Amendment that categorically precludes federal enforcement of treaties addressing subjects within traditional state police powers. Petitioner and her *amici* suggest that modern treaties (especially international human rights treaties) intrude into state regulatory domains in a way that treaties in the past did not. But from the earliest days of the Nation, this Court and the lower courts have consistently enforced treaties in sensitive areas that otherwise would have fallen within the reserved powers of the states. This was so even during time periods when the federal government was otherwise understood to have very limited legislative authority over domains of traditional state police power. Indeed, objections to federal treaty authority grounded in states' rights quite similar to those in the present case arose at various points in the nation's history, but they were

soundly and repeatedly rejected in favor of a broad and flexible national power.

A. Treaties In The Founding Period And Beyond Routinely Preempted State Contract And Property Law.

1. The Treaty Of Peace Between The United States And Great Britain In 1783 Validly Preempted State Debt Confiscation Statutes That Otherwise Fell Within The Exclusive Legislative Competence Of The States.

One of the first serious foreign policy questions the United States encountered was the treatment of debts owed by Americans to British creditors. The 1783 peace treaty between the United States and Britain overruled state laws concerning property and contract by requiring the repayment of debts to British creditors notwithstanding state confiscation laws. Definitive Treaty of Peace, U.S.-Gr. Brit., art. IV, Sept. 3, 1783, 80 Stat. 80. In response, opponents of the treaty insisted that it unconstitutionally interfered with the states' internal police powers. *See* Golove, *Treaty-Making*, *supra*, at 1124-25. These arguments encouraged state noncompliance with the treaty, which, in turn, dramatically undermined the diplomatic position of the new nation and, as noted, helped provoke the adoption of a new Constitution that would remedy this defect.

When cases pursuant to the peace treaty came before the courts under the new Constitution, the treaty was consistently enforced over contrary state laws. In the seminal case *Ware v. Hylton*, 3 U.S. (3

Dall.) 199 (1796), for example, a British creditor sued American debtors to recover a debt incurred before the war. *Id.* at 199-201. The defendants argued that their debts had been discharged by a 1777 Virginia statute, but this Court held that the treaty preempted the otherwise valid state law. *Id.* at 237 (opinion of Chase, J.)

Significantly, the Court indicated that the state confiscation statute governed matters that would have been within the exclusive legislative competence of Virginia at the time it was enacted. For example, Justice Chase (in the first of the *seriatim* opinions expressing the Court's judgment) acknowledged that Virginia had authority to pass the confiscation statute in the first place, stating that "I am of opinion that the exclusive right of confiscating during the war, all and every species of British property, within the territorial limits of Virginia, resided only in the Legislature of that commonwealth." *Id.* at 222; *see also id.* at 266 (Iredell, J., dissenting on other grounds) (agreeing that prior to the treaty, the continental "Congress could have passed no act on this subject, but if it had wished for an act, must have recommended to the State Legislatures to pass it"). But the Court rejected the argument that the federal Congress lacked the "power to make a treaty, that could operate to annul a legislative act of any of the states, and to destroy rights acquired by, or vested in individuals, in virtue of such acts." *Id.* at 235 (opinion of Chase, J.). Whatever doubts might have existed under the Articles of Confederation, the new Constitution made clear that "[i]t is the declared will of the people of the United States that every treaty made, by the authority of the United States,

shall be superior to the Constitution and laws of any individual State; and their will alone is to decide." *Id.* at 237.

The opinions rejected as contrary to the constitutional scheme the contention that state legislatures alone could remedy any inconsistency between the treaty and state law, for "[i]f a law of a State, contrary to a treaty, is not void, but voidable only by a repeal, or nullification by a State Legislature, this certain consequence follows, that the will of a small part of the United States may controul or defeat the will of the whole." *Id.*; *id.* at 281 (opinion of Wilson, J.) ("The treaty is sufficient to remove every impediment founded on the law of Virginia."); *id.* at 284 (opinion of Cushing, J.) (similar).

Even before *Ware*, lower courts under the authority of the Supremacy Clause had been enforcing the peace treaty obligations. *See, e.g.*, *Hamilton v. Eaton*, 11 F. Cas. 336, 338, 340 (C.C.D. N.C. 1792) (enforcing treaty obligation to repay debts despite North Carolina state law). Later cases continued to enforce the treaty over inconsistent state laws. *See, e.g.*, *Higginson v. Mein*, 8 U.S. (4 Cranch) 415, 419 (1808) ("If, then, [Georgia's] act of confiscation, independent of the treaty, would be construed to destroy the claim of the mortgagee, the treaty reinstates the lien in its full force . . . ."); *Hopkirk v. Bell*, 7 U.S. (3 Cranch) 454, 458 (1806) (denying enforcement of Virginia statute of limitations because it was inconsistent with treaty).

2. Treaties Governing Land Ownership Were Adopted And Enforced Over States' Rights Objections From The Founding Era Forward.

Another major area of controversy in the early Republic (and in later years) concerned ownership of real property, something ordinarily at the core of states' police powers. *See* Golove, *supra*, at 1106-15. In 1794, simmering tensions between Great Britain and the United States led President Washington, in the hopes of avoiding a war, to dispatch Chief Justice Jay to negotiate a new treaty. The terms of the resulting treaty provoked extensive controversy.

One focus of initial debate was a provision providing British subjects with the right to sell, devise, and inherit real property. *See* Treaty of Amity, Commerce, and Navigation (Jay Treaty), U.S.-Gr. Brit., art. 9, Nov. 19, 1794, 8 Stat. 116. Opponents of the Jay Treaty argued that this provision would result in massive redistribution of land to British owners, would interfere with states' rights to govern real property within their territories, and would therefore exceed the treaty power. *See* Golove, *Treaty-Making*, *supra*, at 1157-78; *id.* at 1158 (quoting Virginia Senator Henry Tazewell's argument against ratification on the grounds that "the rights of the individual States are by the 9th article of the treaty, unconstitutionally invaded"); Cato [Robert Livingston], *Observations on Mr. Jay's Treaty, No. XVI*, *reprinted in* 3 *The American Remembrancer; or an Impartial Collection of Essays, Resolves, Speeches &c., Relative or Having an Affinity to the Treaty with Great Britain* 63 (Mathew Carey ed., 1795) (arguing that Article 9 "appears to

infringe the constitutional independence of the respective states" because "[t]his is an act of sovereignty which is confined to the state legislatures, and which they have not ceded to congress, about which, therefore, I am led to doubt the right of the president and senate to treat"); Decius [Brockholst Livingston], *Reflections on Mr. Jay's Treaty, No. II*, *reprinted in* 2 *The American Remembrancer* 125 (arguing that Article 9 "infringes the rights of the different States").

These states' rights objections were decisively rejected in both the political and judicial realms. In response to George Washington's request for analysis of the Jay Treaty, Alexander Hamilton refuted the states' rights objections, noting that restricting treaties on the grounds that they invaded the legislative domain of the states "would totally subvert the power of making Treaties" for "[t]here can hardly be made a Treaty which does not make some alteration in the existing laws and which does not, as to its objects, controul the legislative authority – and from the nature of our constitution this must apply to the State laws and legislatures as well as to those of the Union." Golove, *Treaty-Making*, *supra*, at 1160 (quoting Alexander Hamilton, *Remarks on the Treaty of Amity Commerce and Navigation Lately Made Between the United States and Great Britain* (July 9-11, 1795), *in* 18 *The Papers of Alexander Hamilton* 428 (Harold C. Syrett ed., 1973)) [hereinafter *Hamilton Papers*]. Later, in published essays defending the Jay Treaty, Hamilton asserted that "[i]t was impossible for words more comprehensive to be used than those which grant the power to make treaties . . . . [W]hatever is a proper subject of

compact between Nation & Nation may be embraced by a Treaty." Alexander Hamilton, *The Defence No. XXXVI* (Jan. 2, 1796), *reprinted in* 20 *Hamilton Papers*, at 6. The language of the Supremacy Clause, Hamilton explained, laid to rest any "room for question whether a Treaty of the Union could embrace objects the internal regulation of which belonged to the separate authorities of the States." Hamilton, *The Defence No. XXXVII* (Jan. 6, 1796), *reprinted in* 20 *Hamilton Papers*, at 16.

These views carried the day, reflecting the considered view of the Founding generation on the scope of the Treaty Clause. The Senate provided its consent to the Jay Treaty; Washington ratified it; when the House adopted implementing legislation, the floor debates contained no mention of any lingering constitutional objections to Article 9 on states' rights grounds (though opponents voiced other strenuous policy objections). *See* Golove, *Treaty-Making*, *supra*, at 1176.

Thereafter, this Court – which was fully aware of the preceding debates and some members of which had previously opposed the Jay Treaty – consistently upheld the controversial provisions permitting alien land ownership. The issue most prominently came to this Court in *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603 (1812), which concerned Lord Fairfax's vast properties in Virginia. *Id.* at 604. While Lord Fairfax had taken Virginia citizenship and retained it after the Revolution, when he died in 1781 his heir, Denny Fairfax, was a British subject. *Id.* at 607. This led to years of controversy, state legislation purporting to reallocate the lands, the sale of some of the property to (oddly enough) Chief

Justice John Marshall, and protracted litigation. The parties' arguments implicated both Article 9 of the Jay Treaty and Article VI of the earlier 1783 peace treaty, which had provided that "there shall be no future Confiscations made" of British subjects' property.

In the Virginia Court of Appeals, Judge Spencer Roane advanced the states' rights position, holding that Article VI of the Treaty of Peace should be read narrowly so as not to affect the ordinary common law rules against devising property to aliens. To read it otherwise, he reasoned, would "invade a right of the several states, entirely of an internal and municipal nature" and that was "emphatically, beyond the power of congress" at least under the Articles of Confederation. *Hunter v. Fairfax's Devisee*, 15 Va. 218 (1810), app. at 620. At most, Judge Roane asserted, these types of treaty provisions constituted a recommendation that state legislatures change their laws. *Id.* Roane thought the Jay Treaty inapplicable because it had not yet been ratified when the case began, and he suggested that its terms had no bearing on the proper interpretation of the 1783 treaty because the federal government had broader powers under the new Constitution. *Id.* at 611, 625. In other words, even a judge working hard to assert a states' rights position in the case recognized the breadth of the federal government's powers under the Constitution. *See also* Golove, *Treaty-Making*, *supra*, at 1199.

This Court reversed in an opinion by Justice Story. *Fairfax's Devisee*, 11 U.S. (7 Cranch) at 628. The Court held that Article 9 of the Jay Treaty "completely protects and confirms the title of Denny

Fairfax." *Id.* at 627. On remand, the Virginia Court of Appeals defiantly refused to enforce the judgment and held that this Court had lacked appellate jurisdiction over its decisions. This Court reversed yet again in its landmark decision of *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 323, 362 (1816).

Subsequent decisions of this Court continued to enforce treaty provisions governing alien land ownership, negating any possible states' rights limitation on the treaty power based on categories that would ordinarily fall within the states' police powers and outside federal legislative power. *See, e.g.*, *Soc'y for the Propagation of the Gospel v. New Haven*, 21 U.S. (8 Wheat.) 464, 490-92 (1823) (applying treaty to protect property of a British corporation from escheat for alienage under state law); *Orr v. Hodgson*, 17 U.S. (4 Wheat.) 453, 462-65 (1819) (applying Article VI of the Treaty of Peace and Article 9 of Jay Treaty instead of state law on escheat of estates); *Craig v. Radford*, 16 U.S. (3 Wheat.) 594, 599-600 (1818) (reaffirming supremacy of Article 9 of Jay Treaty); *Chirac v. Lessee of Chirac*, 15 U.S. (2 Wheat.) 259, 270, 277-78 (1817) (finding it "unnecessary to inquire into the consequences" of a Maryland alien land ownership law because a treaty with France enabled the subjects of France to hold lands in the United States).

B. States' Rights Limitations On The Scope Of The Treaty Power Were Asserted In Connection With Defending Slavery, But Were Decisively Rejected By The Nation.

The argument that states' rights limited the substantive scope of the treaty power was revived in connection with the defense of slavery in the antebellum period, but was ultimately rejected as decisively as it had been in the early Republic. One flashpoint concerned the presence of free persons of African descent in the Southern states. In 1822, South Carolina passed the Negro Seamen Act, which provided for the jailing of black sailors when their ships docked in South Carolina ports and their sale as slaves if the captain of the ship failed to ransom them out by paying the expenses of their detention. *See* Golove, *Treaty-Making*, *supra*, at 1211-38. When this provision was applied to black sailors on British ships, the British government objected that this violated the terms of the Commercial Convention of 1815.

In a habeas case involving a detained black British sailor, the defenders of the South Carolina law asserted that the state had retained the sovereign right to protect its vital interests and that "the treaty making power can make no stipulation which shall impair the rights, which by the constitution are reserved 'to the States respectively, or to the people.'" Benjamin Faneuil Hunt, *The Argument of Benjamin Faneuil Hunt, in the Case of the Arrest of the Person Claiming to be a British Seaman, under the 3d Section of the State Act of Dec. 1822, in Relation to Negroes, &c., before the Hon. Judge Johnson, Circuit Judge of the United States,*

for 6th Circuit 1, 4 (1823), *reprinted in* 2 *Free Blacks, Slaves, and Slaveowners in Civil and Criminal Courts* at 1-22 (Paul Finkelman ed., 1988). Riding circuit, Supreme Court Justice William Johnson – a native South Carolinian and noted Jeffersonian – rejected this argument. Such a crabbed interpretation of the treaty power would render the Union, "like the old confederation . . . a mere rope of sand." *Elkison v. Deliesseline*, 8 F. Cas. 493, 496 (C.C.D. S.C. 1823). Outraged defenders of South Carolina's laws launched a campaign of criticism against the decision. In a series of essays, they argued that treaties could not interfere "with the numerous undefined powers reserved to the states" and that a treaty "is no more than an act of congress" and cannot "interfere . . . with the powers . . . reserved to the states respectively." *Caroliniensis No. 7*, *Charleston Mercury*, Aug. 28, 1823. Justice Johnson responded in his own series of essays defending the supremacy of the federal treaty power. Among other things, he noted, if the treaty power were limited in the way South Carolina suggested "we have been strangely inattentive to our rights for half a century past. For upon a cursory examination of treaties, I find no less than thirty-six instances in which the rights of the States have been invaded" and in which "treaties have acted upon subjects within the acknowledged reservation of the states." *Philonimus No. 7*, *Charleston Mercury*, Sept. 13, 1823.

Although the issue never directly reached the Supreme Court, it festered as a thorn in American-British relations because Southern states insisted that they would resist federal encroachment on what

they perceived as the most crucial domain of state police powers. In the continuing debate, future Chief Justice Roger Taney, then Attorney-General, would offer his own opinion in favor of the states' rights view on the relationship between the treaty power and the Negro Seaman Acts, but even he acknowledged that the Supreme Court was not likely to agree. *See* Golove, *Treaty-Making*, *supra*, at 1226-29.[2] Taney's arguments were intimately related to a broader conception of states' rights and "strict construction" that sought to carve out of the federal government's otherwise delegated powers an exclusive domain of state authority over issues such as slavery. Ultimately, the Nation repudiated this antebellum edifice of states' rights in the crucible of the Civil War. *See id.*

C. Throughout The Nineteenth Century, Treaties Regulated A Wide Variety Of Subjects Within The Police Powers Of The States.

While a few topics, like the Negro Seaman Acts, sparked controversy, throughout the nineteenth century, the federal government continued with little fanfare to enter into numerous treaties that touched on areas that would otherwise fall within states' traditional police powers. *See, e.g.*, Nicholas

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[2] When he was Attorney General, Caleb Cushing issued an elaborate opinion defending national treaty power against antebellum states' rights objections. *See* 8 Op. Att'y Gen. 417 (1857) (cited in *Hauenstein v. Lynham*, 100 U.S. 483, 490 (1880) and *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890)).

Pendleton Mitchell, *State Interests in American Treaties* 157-204 (1936) (listing treaties governing various topics affecting state powers). Dozens of treaties provided, *inter alia*, that aliens and their property should be protected under local law, *id.* at 159-60; for the right of aliens to dispose of their property, *id.* at 163-66; that aliens should have access to court, *id.* at 160-61; for the religious freedom of aliens, *id.* at 162; for consular powers, privileges and immunities, *id.* at 173-82; and extradition, *id.* at 185-202. *See also* Edward S. Corwin, *National Supremacy: Treaty Power vs. State Power* 134-36 (1913) (describing broad array of treaties in nineteenth century).

During this period, this Court applied treaties frequently and did not, in any instance, refuse to enforce a treaty on federalism grounds. *See* Duncan B. Hollis, *Treaties in the Supreme Court, 1861 to 1900*, *in International Law in the U.S. Supreme Court: Continuity and Change* 55, 55 (David L. Sloss et al. eds., 2011) [hereinafter *International Law in the U.S. Supreme Court*]; Charles H. Burr, *The Treaty-Making Power of the United States and the Methods of Its Enforcement as Affecting the Police Powers of the States*, 51 Proc. Am. Phil. Soc'y 270, 356 (1912) (discussing cases up to approximately 1909, and asserting "[s]uch is the unbroken series of cases decided by the Supreme Court of the United States, recognizing, stating, and enforcing the absolute supremacy of treaty provisions over State laws. No case has ever in the history of the United States been decided, which holds, for any reason or under any conditions a treaty provision to be subordinate to a State law or State right"). Indeed,

when the Court declared the 1870 Trademark Act beyond Congress's Article I commerce and intellectual property protection powers, it noted that it was "leaving untouched the whole question of the treaty-making power over trade-marks, and of the duty of Congress to pass any laws necessary to carry treaties into effect." *In re Trade-mark Cases*, 100 U.S. 82, 99 (1879).

In *Geofroy v. Riggs*, 133 U.S. 258 (1890), this Court upheld yet another treaty provision that, notwithstanding state laws, granted aliens the right to inherit real property. *Id.* at 267. The Court explained "[t]hat the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations is clear." *Id.* at 266. Indeed, citing *Ware v. Hylton* and other cases from the early Republic, the Court went on to say,

> [t]he treaty power, as expressed in the constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the states. It would not be contended that it extends so far as to authorize what the constitution forbids, or a change in the character of the government, or in that of one of the states, or a cession of any portion of the territory of the latter, without its consent. . . . But, with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any

> matter which is properly the subject of negotiation with a foreign country.

Id. at 267; *see also, e.g.*, *Burthe v. Denis*, 133 U.S. 514, 520-21 (1890) (finding that Louisiana state distribution laws must give way to a treaty requiring payment of an award to a French national); *Hauenstein v. Lynham*, 100 U.S. 483, 490 (1879) (enforcing treaty governing property of alien who died intestate and noting that it "is a fundamental principle in our system of complex national polity" that "the Constitution, laws, and treaties of the United States are as much a part of the law of every State as its own local laws and Constitution"); *In re Kansas Indians*, 72 U.S. (5 Wall.) 737, 756, 758, 760 (1866) (finding that state law purporting to tax lands held by three tribes could not be enforced since it was in conflict with treaties); *In re Ah Chong*, 2 F. 733, 737-38 (C.C.D. Cal. 1880) (striking down a state law that prohibited aliens from fishing in state waters, in part, because the law violated a treaty); *In re Tiburcio Parrott*, 1 F. 481, 494, 499 (C.C.D. Cal. 1880) (Hoffman, J.) (invalidating state law prohibiting employment of Chinese residents by California corporations and holding that "even if the reserved power of the state over corporations were as extensive as is claimed, its exercise in the manner attempted in this case would be invalid, because in conflict with the treaty"); *Baker v. City of Portland*, 2 F. Cas. 472, 473-74 (C.C.D. Or. 1879) (striking down an Oregon law prohibiting the employment of Chinese persons on public works projects as contrary to a treaty); *In re Ah Fong*, 1 F. Cas. 213, 216-18 (C.C.D. Cal. 1874) (invalidating on treaty and other

grounds a California law excluding "lewd" Chinese women).

Moreover, state courts operating under the obligations of the Supremacy Clause also enforced treaty obligations over inconsistent state laws. For example, the Louisiana Supreme Court held that a Louisiana tax on foreign heirs could not be applied where contrary to the terms of the 1853 France-U.S. consular convention. *See Succession of Louis Dufour*, 10 La. Ann. 391, 392-93 (1855) ("[The] said provision [of the treaty] being constitutionally valid must be [obeyed] as supreme law; [and] consequently the statute of Louisiana has become *pro tanto* inoperative."); *see also People v. Gerke*, 5 Cal. 381, 385 (1855) (enforcing treaty governing alien land ownership); *Forbes v. Scannell*, 13 Cal. 242, 283 (1859) (reaffirming *Gerke*).

The Executive Branch generally endorsed the same view. In 1898, for example, Attorney General John Griggs concluded that the federal government had the power to make a treaty regarding fisheries along the Canadian border notwithstanding the fact that "regulation of fisheries in navigable waters within the territorial limits of the several States, in the absence of a Federal treaty, is a subject of State rather than of Federal jurisdiction." 22 Op. Att'y Gen. 214 (1898); *cf. McCready v. Virginia*, 94 U.S. 391, 395 (1876) (finding fisheries "under the exclusive control of the State," in a case not involving a treaty). *See also* Golove, *Treaty-Making*, *supra*, at 1241-42 (discussing executive views); Charles Henry Butler, *The Treaty-Making Power of the United States* i-ii (2 vols. 1902) (endorsing broad federal treaty power).

D. In The Twentieth Century, This Court Reconfirmed The Broad Scope Of The Treaty Power And The Supremacy Of Treaties Over State Law.

1. In The First Decades Of The Twentieth Century, This Court Continued To Apply A Broad Conception Of The Treaty Power.

This Court's early twentieth century jurisprudence was notable for its stringent limitations of federal power, but the Court continued to uphold treaties even as the range of topics they covered expanded to include more areas that would otherwise fall within the states' control. Treaties in this time period frequently addressed not only international issues affecting individuals such as immigration, citizenship, and extradition, but also more typically domestic subjects including wildlife preservation,[3] water quality,[4] and drug control.[5] *See* Michael P. Van Alstine, *Treaties in the Supreme*

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[3] *See, e.g.*, Convention between the United States and Other Powers Providing for the Preservation and Protection of Fur Seals, July 7, 1911, 37 Stat. 1542, (providing for protection of wildlife).

[4] Boundary Waters Treaty, Jan. 11, 1909, 36 Stat. 2448, (establishing an international commission to oversee issues related to waters on the boundary between the United States and Canada including water pollution).

[5] International Opium Convention, Jan. 23, 1912, 38 Stat. 1912 (requiring nations to control opium).

Court, 1901 to 1945, *in International Law in the U.S. Supreme Court*, *supra*, at 191, 192.

The Court applied treaties in more than two hundred cases in the first part of the century. *See id.* at 193. For example, in *Neely v. Henkel*, 180 U.S. 109 (1901), the Court upheld an order of extradition to Cuba, and using language presaging the more famous opinion in *Missouri v. Holland*, noted that as long as a treaty is valid, Congress has the power to "make all laws necessary and proper for carrying into execution . . . such legislation as is appropriate to give efficacy" to the treaty. *Id.* at 121.

Shortly after the turn of the century, controversy arose when San Francisco tried to segregate Asian children into separate schools, prompting an objection from Japan based on the 1894 Treaty of Commerce and Navigation. *See* Golove, *Treaty-Making*, *supra*, at 1249-50. Facing federal pressure, the city backed down and rescinded the policy before the matter could be resolved in the courts. However, in response to this controversy, influential commentators reaffirmed the broad scope of the treaty power, responding to a minority of voices seeking to revive the states' rights arguments that had been rejected in earlier periods. *See, e.g.*, Elihu Root, *The Real Questions Under the Japanese Treaty and the San Francisco School Board Resolution,* 1 Am. J. Int'l L. 273, 278 (1907) ("It has been widely asserted or assumed that this treaty provision and its enforcement involved some question of state's rights. There was and is no question of state's rights involved, unless it be the question which was settled by adoption of the constitution."); Edward S. Corwin, *National Supremacy*, *supra*, at 296-308 (supporting

broad federal treaty power); Robert T. Devlin, *The Treaty Power Under the Constitution of the United States* 128-32 (1908) (same); Charles H. Burr, *The Treaty-Making Power of the United States*, *supra*, at 397-98 (1912) (same); Arthur K. Kuhn, *The Treaty-Making Power and the Reserved Sovereignty of the States*, 7 Colum. L. Rev. 172, 185 (1907) (same). *But see, e.g.*, Henry St. George Tucker, *Limitations on the Treaty-Making Power Under the Constitution of the United States* 392-95 (1915) (arguing that power to exclude children from public schools on basis of race falls within states' reserved powers and that federal government lacked power to compel admission of children to public schools on basis of treaty).

2. *Missouri v. Holland* Was Supported By Precedent When It Was Decided And Has Been Consistently Followed In The Ensuing Nine Decades.

This Court's 7-2 decision in *Missouri v. Holland*, 252 U.S. 416 (1920), thus was not a novel or ill-considered decision but was entirely consistent with long-standing interpretation of the treaty power, affirmed in the face of repeated challenges. While displaying Justice Holmes' characteristic conciseness, the opinion drew upon the long line of precedents already discussed as well as the writings of leading commentators, especially Edward Corwin's then-recent historical treatise on the issue. *See* Golove, *Treaty-Making*, *supra*, at 1257-58.

The treaty at issue in *Missouri* addressed the impending extinction of migratory birds in North America due to overhunting and, in doing so, entered into an area that had been held to fall within the

states' police powers. *See Geer v. Connecticut*, 161 U.S. 519, 523, 529, 534-35 (1896) (finding control of wild game to fall within state police power). Congress had tried to protect migratory birds by statute in 1913, but the lower courts had found that legislation unconstitutional. *See United States v. McCullagh*, 221 F. 288, 294-96 (D. Kan. 1915); *United States v. Shauver*, 214 F. 154, 159-60 (E.D. Ark. 1914).

At the same time, however, concern about the issue led to calls for the negotiation of a treaty on the topic, which President Wilson quickly pursued. The resulting treaty on migratory birds with Great Britain (on behalf of Canada) was ratified in 1916 and was followed by passage of the Migratory Bird Treaty Act of 1918, which this Court considered and upheld in *Missouri*. Even before it reached this Court, the outcome of this litigation seemed assured; all four lower courts considering challenges to the 1918 legislation upheld its validity. *See United States v. Rockefeller*, 260 F. 346, 348 (D. Mont. 1919); *United States v. Selkirk*, 258 F. 775, 776 (S.D. Tex. 1919); *United States v. Samples*, 258 F. 479, 484-85 (W.D. Mo. 1919), *aff'd sub nom. Missouri v. Holland*, 252 U.S. 416 (1920); *United States v. Thompson*, 258 F. 257, 268 (E.D. Ark. 1919).

Like Petitioner in this case, the State of Missouri argued strenuously that the statute intruded upon traditional state police powers. Brief for Petitioner, *Missouri v. Holland*, 252 U.S. 416 (1920). Missouri's argument was that under the Tenth Amendment "what an act of Congress could not do unaided, in derogation of the powers reserved to the States, a treaty cannot do." *Missouri*, 252 U.S. at 432. But, as

the Court pointed out, this claim ignored the fact that the treaty power is an independent grant of power to the federal government. *See id.* ("To answer this question it is not enough to refer to the Tenth Amendment, reserving the powers not delegated to the United States, because by Article II, § 2, the power to make treaties is delegated expressly."). As a result, the question reduced to "whether [the treaty] is forbidden by some invisible radiation from the general terms of the Tenth Amendment." *Id.* at 434. In finding that there was no such invisible radiation, the Court concluded that there is no realm in which the states are guaranteed exclusive regulatory powers notwithstanding the federal government's delegated authorities. The fact that "but for the treaty the State would be free to regulate this subject itself" was irrelevant since "most of the laws of the United States . . . deal with matters which in the silence of such laws the state might regulate." *Id.* at 434. Furthermore, the Court reasoned, the Constitution altogether forbids the states to conclude treaties, leaving them "incompetent to act." *Id.* at 433. Thus, denying the federal government the power to conclude treaties on subjects beyond Congress' enumerated authorities, but in which there may be "a national interest of very nearly the first magnitude," would leave the nation without "a power which must belong to and somewhere reside in every civilized government." *Id.* at 433-35 (quoting *Andrews v. Andrews*, 188 U.S. 14, 33 (1903), *abrogated on other grounds by Sherrer v. Sherrer*, 334 U.S. 343, 353 (1948)). Relying upon many of the precedents already discussed, the Court therefore rejected Missouri's argument and upheld the law.

Some of the *amici* in the instant case suggest that allegedly unforeseen developments in modern treaty practice – in particular, the development of human rights treaties – warrant revisiting the holding of *Missouri*. But, to the contrary, history shows that the *Missouri* Court was well aware of the ramifications of its decision for the nascent field of human rights treaties. The Court nevertheless endorsed Justice Holmes' opinion because it was consistent with constitutional text, structure, original meaning, and precedent. While human rights treaties have become more common over the later part of the twentieth century, they were not unknown or unforeseen in the 1920s. At the very moment *Missouri* was decided, the Senate was considering the Treaty of Versailles, which created the International Labor Organization. This provoked extensive public discussion of potential labor treaties governing matters such as child labor and wage and hour regulations. *See* Golove, *Treaty-Making*, *supra*, at 1267-68. Indeed, one of the briefs in *Missouri* argued that upholding the Migratory Bird Treaty Act would mean that, if the United States became party to the Versailles Treaty, Congress would thereby be empowered "with constitutional authority to control the employment of labor in local industries, within each of the sovereign states, to determine the conditions of labor, to prescribe a minimum wage, to regulate hours of labor, to prohibit child labor, and to determine the innumerable questions of a similar character which have always been supposed to be a

matter of state regulation." Brief for the State of Kansas, Amicus Curiae, at 28-29, 43, *Missouri v. Holland*, 252 U.S. 416 (1920). Under *Hammer v. Dagenhart*, 247 U.S. 251 (1918),[6] decided only two years before *Missouri*, child labor laws were as outside federal legislative power as the 1913 Migratory Bird Act had been; but the *Missouri* Court did not blanche at the prospect that a labor treaty could change that.

The holding of *Missouri* was consistently affirmed in subsequent rulings during this period. In *Asakura v. City of Seattle*, 265 U.S. 332 (1924), this Court ruled that the Treaty of Commerce and Navigation of April 5, 1911 with Japan trumped an inconsistent municipal ordinance regulating pawnbrokers. *Id.* at 343. As the Court explained, "[t]he treaty-making power of the United States is not limited by any express provision of the Constitution," but rather, "extend[s] to all proper subjects of negotiation between our government and other nations." *Id.* at 341. Moreover, "[t]he rule of equality established by [the treaty] cannot be rendered nugatory in any part of the United States by municipal ordinances or state laws." *Id.*; *see also Nielsen v. Johnson*, 279 U.S. 47, 52 (1929) (upholding treaty over state inheritance tax law and noting that "as the treaty-making power is

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[6] A few decades later, of course, this Court would overrule *Hammer* in *United States v. Darby*, 312 U.S. 110, 116-17 (1941), having learned, from decades under an incoherent Commerce Clause jurisprudence, "the imprecision of content-based boundaries used without more to define the limits of" federal power. *United States v. Lopez*, 514 U.S. 549, 574 (1995) (Kennedy, J., concurring).

independent of and superior to the legislative power of the states, the meaning of treaty provisions so construed is not restricted by any necessity of avoiding possible conflict with state legislation and when so ascertained must prevail over inconsistent state enactments"); *Santovincenzo v. Egan*, 284 U.S. 30, 40 (1931) (upholding treaty governing disposition of intestate aliens' property at death over a New York statute, noting that "[t]he treatymaking power is broad enough to cover all subjects that properly pertain to our foreign relations").

In short, far from being an ill-considered novelty, *Missouri* was strongly supported by precedent and has been followed in the ninety years since it was decided.

III. Attempts To Amend The Constitution To Narrow The Treaty Power Were Rejected In The 1950s.

Even assuming *arguendo* that conditions of the world have changed so dramatically since the Founding Period that constriction of the treaty power could be considered appropriate, as Petitioner's *amici* argue, there is a mechanism for doing that: constitutional amendment. Indeed, opponents of human rights treaties in the 1950s attempted precisely this path with a series of proposed amendments to the Constitution known as the Bricker Amendments. But these constitutional amendments were soundly rejected after extensive debate, and this Court should not now accept the invitation of petitioner and *amici* to overstep the separation of powers and amend the Constitution by judicial fiat.

A. Supporters Of The Bricker Amendments In The 1950s Tried Unsuccessfully To Constrict The Treaty Power.

In the 1950s, defenders of racial segregation were concerned about the potential for treaties to be a tool against racial discrimination. The U.N. Charter referred to protection of human rights as one of the goals of the post-war world order, and the Universal Declaration of Human Rights received the support of the Truman administration and the U.N. General Assembly in 1948. While the Universal Declaration itself was nonbinding, work soon began on drafting the two foundational human rights treaties that would ultimately be known as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Creative litigants had already tried to use the references to human rights in the U.N. Charter in dozens of cases to attack racially discriminatory laws. *See* Bert B. Lockwood, Jr., *The United Nations Charter and United States Civil Rights Litigation: 1946-1955*, 69 Iowa L. Rev. 901, 917-48 (1984). The isolationist President of the American Bar Association, Frank Holman, warned that a white motorist who struck and killed a black child could be hauled off to face international trial under the Genocide Convention. Duane Tananbaum, *The Bricker Amendment Controversy: A Test of Eisenhower's Political Leadership* 13 (1988).

Stoking fears generated by these developments, Senator John Bricker introduced a series of proposed constitutional amendments that would have limited the treaty power. Several versions of the amendment were proposed over a span of a few years. Many

included language – which critics said was circular – to the effect that treaties conflicting with the Constitution would have no effect. *See* Stephen E. Ambrose, *Eisenhower: The President* 68 (1984) (quoting President Eisenhower as having disparaged the amendment as "an addition to the Constitution that said you could not violate the Constitution"). But more far-reaching versions included language known as the "which" clause, which would have overruled *Missouri* by providing that a treaty "shall become effective as internal law in the United States only through legislation which would be valid in the absence of treaty [*sic*]." Tananbaum, *The Bricker Amendment Controversy*, *supra*, at 91-92.

In terms echoing some of the *amici* in this case, Bricker and his supporters argued amendment of the Constitution was necessary because otherwise international human rights treaties would be used to "control and regulate all education, including public and parochial schools, it could control and regulate all matters affecting civil rights, marriage, divorce, etc; it could control all our sources of production of foods and the products of the farms and factories; . . . it could regiment labor and conditions of employment." Frank E. Holman, *The Story of the "Bricker Amendment"* 38 (1954). Moreover, Bricker claimed, international treaties were "an attempt to repeal the Bill of Rights," a threat to freedom of religion, and "a blueprint for tyranny." 82 Cong. Rec. 97, 8255 (1951).

B. The Bricker Amendments Were Rejected Because It Would Have Crippled The Nation's Ability To Conduct Foreign Policy.

The Eisenhower administration led the opposition to the Bricker Amendments. President Eisenhower recognized that the Bricker Amendments – like the rule advocated by Petitioner and her *amici* in the instant case – would force the "Administration to represent 49 governments in its dealings with foreign powers, whereas he was convinced that in foreign affairs there could be only one United States." Memorandum by the Assistant White House Staff Secretary (Minnich) (Jan. 11, 1954), *in* 1 *Foreign Relations of the United States, 1952-1954*, at 1832 (William Z. Slany et al. eds., 1983); Letter from President Eisenhower to William F. Knowland, Majority Leader (Jan. 25 1954), *in Foreign Policy*, Congressional Quarterly Almanac 10 (1954) (stating proposed amendment would "shackle the federal government so that it is no longer sovereign in foreign affairs," and that it would show "to our friends as well as our enemies abroad that our country intends to withdraw from its leadership in world affairs"). The administration feared a return to the problems of the Articles of Confederation, "when American Ambassadors were subject to ridicule abroad because [they] represented thirteen states, not one central government." Tananbaum, *The Bricker Amendment Controversy*, *supra,* at 138.

As an illustration of the difficulties that would be posed by the amendment, the State Department submitted to Congress a list of eighty-four treaties negotiated between 1920 and 1955 that would not have been enforceable if the "which" clause were

adopted because they addressed "subject matter not within the delegated powers of the Congress and which in the absence of treaty is reserved to the jurisdiction of the States." *Hearing, Treaties and Executive Agreements Before the Sen. Judiciary Comm.*, 986-92 (1955). In the end, opposition was so strong that the version of the amendment that finally came to a vote in the Senate omitted the "which" clause. Tananbaum, *supra*, at 139-43, 148, 153. Even the weaker versions of the amendment were rejected, however, and the only version that came close to passage in even one house of Congress concerned executive agreements (concluded solely by the President) rather than treaties. *Id.* at 169-81.

In the aftermath of the Bricker Amendments controversy, this Court's opinion in *Reid v. Covert* reassured the nation that treaties could not be used to supersede Bill of Rights guarantees while reaffirming the essential holding of *Missouri*. 354 U.S. 1, 14, 18 (1957) (holding that treaties cannot abrogate individual rights while reaffirming *Missouri* and noting that "[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"). Since then, this Court has continued to emphasize the preemptive force of treaties over state law. *See, e.g.*, *Kolovrat v. Oregon*, 366 U.S. 187, 190-91 (1961) (finding that an Oregon law prohibiting the inheritance of Yugoslavian relatives of property within the state was inconsistent with and must give way to agreements between the U.S. and Yugoslavia and an 1881 treaty); *Zschernig v. Miller*, 389 U.S. 429, 440-41 (1968) ("The several States, of course,

have traditionally regulated the descent and distribution of estates. But those regulations must give way if they impair the effective exercise of the Nation's foreign policy. Where those laws conflict with a treaty, they must bow to the superior federal policy." (citation omitted)); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204 (1999) ("Although States have important interests in regulating wildlife and natural resources within their borders, this authority is shared with the Federal Government when the Federal Government exercises one of its enumerated constitutional powers, such as treaty making.").

C. This Court Should Not Narrow The Scope Of The Treaty Power By Judicial Fiat.

The history of the treaty power indicates that at various points in the nation's history, detractors have attempted to cabin the treaty power on claims of federalism and states' rights. Those claims have consistently failed, as this Court has again and again reaffirmed the scope of the federal treaty power that the Founders put in place. Even the supporters of the failed Bricker Amendments knew that an amendment was the only proper method for revising the scope of the treaty power. This Court should not accept the invitation of Petitioner and her *amici* to overrule over two centuries of precedent and embark on an uncharted course of judicial activism in foreign affairs. Text, structure, original meaning, and precedent all support only one conclusion in this case: the treaty power is an independent grant of authority to the federal government that was not intended to be limited by a judicially-imposed constraint on the

substantive topics treaties may address based on vague reserved police powers of the states. Nor should this Court invent an amorphous test that would call on courts to second-guess the considered judgment of the branches entrusted with the nation's foreign policy as to what genuinely implicates matters of international concern. Instead, the Court should leave settled precedent well enough alone.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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August 16, 2013