No. 10-545

In the
Supreme Court of the United States

LAWRENCE GOLAN, ET AL., *Petitioners*,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF *AMICUS CURIAE* THE CATO INSTITUTE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether Congress exceeded its enumerated powers by restoring copyright protections to certain works that were previously in the public domain, pursuant to a treaty.

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files amicus briefs. The present case centrally concerns Cato because it represents an opportunity to clarify the limits that the Constitution places on federal power.

SUMMARY OF ARGUMENT

The parties have presented the question of whether Congress exceeded its power under the Copyright Clause and/or violated the First Amendment by enacting Section 514 of the Uruguay Round Agreements Act (URAA), Pub. L. No. 103-465, 108 Stat. 4976. These issues are inextricably linked with a more fundamental issue: the scope of Congress's power to legislate pursuant to treaty. In the courts below, the government expressly relied upon Congress's purported freestanding power to execute trea-

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief by filing a blanket consent with the Court. Pursuant to Rule 37.6, *amicus* affirms that no counsel for any party authored this brief in any manner, and no counsel or party made a monetary contribution in order to fund the preparation or submission of this brief. No person other than *amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

ties. And the Tenth Circuit's analysis was driven, in large part, by the fact that the statute at issue was enacted to execute a treaty.

In *Missouri v. Holland*, 252 U.S. 416 (1920), this Court held that if a treaty commits the United States to enact some legislation, then Congress automatically obtains the power to enact that legislation, even if such power was otherwise absent. It held, in other words, that Congress's powers are not constitutionally fixed, but rather may be expanded by treaty.

Justice Holmes provided neither reasoning nor citation for the proposition that treaties may expand legislative power. The proposition appears in one conclusory sentence, in a five-page opinion that is primarily dedicated to a different question. And the Court has never elaborated. The most influential argument on the point, which has largely short-circuited jurisprudential debate, appears not in the United States Reports but in the leading foreign affairs treatise. But recent scholarship has shown that the premise of this argument is simply false.

The proposition that treaties can increase the power of Congress is inconsistent with the text of the Treaty Clause and the Necessary and Proper Clause. It is inconsistent with the fundamental structural principle that "[t]he powers of the legislature are defined, and limited." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803). It implies, insidiously, that that the President and the Senate can increase their own power by treaty. (And it implies, bizarrely, that the President alone—or a foreign government alone—can decrease Congress's power and render statutes unconstitutional.) In short, it creates a

doubly perverse incentive—to enter into treaties simply to increase legislative power.

Missouri v. Holland is inconsistent with constitutional text and structure, and the one historical argument advanced in its favor is based on scholarly error. On the question of legislative power pursuant to treaty, the case is wrong and should be overruled. The Court should hold that treaties, here and generally, did not and cannot vest Congress with additional legislative power.

ARGUMENT

I. CONGRESS'S POWER TO IMPLEMENT TREATIES IS AT ISSUE HERE BECAUSE IT CANNOT BE DISAGGREGATED FROM THE COPYRIGHT CLAUSE AND FIRST AMENDMENT ISSUES

This case arrives at the Court in a somewhat artificial posture. In this Court, the parties have framed the question presented as whether Congress exceeded its power and/or violated the First Amendment by enacting Section 514. But one need look no further than the name of the statute at issue—"The Uruguay Round Agreements Act"—to know that Congress enacted the statute not as a freestanding implementation of domestic copyright policy, but *for the express purpose of implementing a treaty*. In this case, the Copyright Clause question and the First Amendment question are inextricably tied to the question of Congress's power to implement treaties.

Supreme Court Rule 14.1 provides that "[t]he statement of any question presented is deemed to

comprise every subsidiary question fairly included therein." As this Court explained, any issue that is "intimately bound up," *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 540 (1999), "essential to analysis," *Procunier v. Navarette*, 434 U.S. 555, 559 n.6 (1978), or "inextricably linked," *City of Sherrill, N.Y. v. Oneida Nation of N.Y.*, 544 U.S. 197, 214 n.8 (2005), with the questions presented are thus appropriate for resolution. In this case, both the Copyright Clause and First Amendment issues are inextricably linked to Congress's power to implement treaties.

In the courts below, the government expressly argued that, regardless of the scope of Congress's ordinary powers, Congress can automatically implement treaties. It argued, in other words, that treaties can, and did, increase congressional power. See Gov't's Mot. Summ. J,, 32-34, Jun. 21, 2004; Gov't's Reply in supp. Mot. Summ. J., 26-29, Nov. 24, 2004. In the Tenth Circuit, the government dropped a footnote to preserve the argument, Brief for Appellees at 56 n.23 *Golan v. Gonzales*, 501 F.3d 1179 (10th Cir. 2007) (No. 05-1259), 2005 WL 6148019, and the International Coalition for Copyright Protection (ICCP), as amicus, pressed the point at length. See Brief of Int'l Coal. for Copyright Protection as Amicus Curiae Supporting Appellees at 16-21, *Golan v. Gonzales*, 501 F.3d 1179 (10th Cir. 2007) (No. 05-1259), 2005 WL 6148018. The Tenth Circuit did not rest on these grounds, stating (incorrectly) that the argument was "not mentioned by the parties," *Golan v. Gonzales*, 501 F.3d 1179, 1196 n.5 (10th Cir. 2007), but nevertheless the court did flag the issue: "Congress's treaty . . . power[] may provide Congress with the authority to enact § 514." *Id.*

The point is not just that the treaty power might be an additional power on which the government could—and did—rely. It is that the scope of the treaty-implementation power cannot be disaggregated from the Copyright Clause or First Amendment issues. The Berne Convention for the Protection of Literary and Artistic Works (Berne Convention), *concluded* July 24, 1971, S. Treaty Doc. No. 27, 99th Cong., 2d Sess. (1986), 1161 U.N.T.S. 3, and its requirements are plainly central to the analysis of both the Copyright Clause and First Amendment issues. The government argues that the URAA was a rational exercise of the copyright power *precisely because it implements the Berne Convention*, and it insists that the Act should survive First Amendment scrutiny *precisely because it is required by treaty*.

Moreover, the scope of Congress's power to implement treaties is a pure question of law that turns largely on the vitality of *Missouri v. Holland*. Since lower courts are, of course, bound by that case, there is little to be gained by remanding on this issue and allowing it to percolate further. Only this Court can give proper guidance on the issue, which is an increasingly important one in light of the dramatic expansion of America's treaty commitments. See Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 Mich. L. Rev. 390, 396 (1988) ("During the latter part of [the twentieth] century ...there has been a proliferation of treaties."). And it is "fairly included" within the questions presented here. This Court should hold that treaties cannot vest Congress with new legislative power.

II. TREATIES CANNOT INCREASE CONGRESS'S LEGISLATIVE POWER[2]

This case thus presents the question of whether a treaty may increase Congress's power. In 1920, this Court seemed to answer that question with a single sentence: "If the treaty is valid, there can be no dispute about the validity of the [implementing] statute under Article I, § 8, as a necessary and proper means to execute the powers of government." *Missouri v. Holland*, 252 U.S. at 432. On its face, this sentence means that if a treaty commits the United States to enact some legislation, then Congress automatically obtains the power to enact that legislation, even if it would lack such power in the absence of the treaty. Read literally, the sentence implies that Congress's powers are not constitutionally fixed, but rather may be expanded by treaty. And if the conventional wisdom is correct that there are no subject-matter limitations on the scope of the treaty power, see Restatement (Third) of the Foreign Relations Law of the United States § 302 cmt. c (1987), then it would follow from *Missouri v. Holland* that treaties may increase congressional power virtually without limit.

Justice Holmes provided neither reasoning nor citation for that proposition. Indeed, the entire opinion takes up all of five pages in the United States Reports. Yet that one conclusory sentence has the radical implication that Congress's legislative power can be increased, not only by constitutional amendment, but also by treaty. That idea is in deep tension with constitutional text, history, and structure, and with

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[2] The arguments that follow are developed more comprehensively in Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 Harv. L. Rev. 1867 (2005).

the fundamental principle of limited and enumerated legislative powers. The Court should clarify that this sentence cannot mean what it seems to say.

A. The President Cannot, by Entering into a Treaty, Thereby Increase Congress's Power under the Necessary and Proper Clause

The treaty issue here turns on the relationship between the Necessary and Proper Clause and the Treaty Clause. The first step is to understand how these clauses fit together. Article I provides:

> The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

U.S. Const. art. I, § 8.

The Treaty Clause provides:

> [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.

U.S. Const. art. II, § 2, cl. 2. By echoing the word "Power," the Treaty Clause leaves no doubt: the treaty power is an "other Power[]" referred to in the Necessary and Proper Clause.

That much is implicit in *Missouri v. Holland,* although Justice Holmes did not quote either clause, let alone discuss how they fit together. Indeed, the phrase "necessary and proper" and the phrase "to

make treaties" *never appear in the same sentence in the United States Reports*. But the conjunction of the two clauses is essential to analyzing whether a treaty may increase congressional power. Here, then, is the way that these two clauses fit together as a matter of grammar:

> The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution . . . [the President's] Power, by and with the Advice and Consent of the Senate, to make Treaties.

U.S. Const. art. I, § 8, art. II, § 2.

By neglecting to quote and conjoin these two clauses, Justice Holmes misconstrued the scope of this power.

1. The "Power . . . to make Treaties" is distinct from the power to execute treaties already made.

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

This power would certainly extend to laws appropriating money for the negotiation of treaties. As Rep. James Hillhouse explained in the House of Representatives, "the President has the power of sending Ambassadors or Ministers to foreign nations to nego-

tiate Treaties . . . [but] it is . . . clear that if no money is appropriated for that purpose, he cannot exercise the power." 5 Annals of Cong. 673-74 (1796). And this power would likewise embrace any other laws necessary and proper to ensuring the wise use of the power to enter treaties. These might include, for example, appropriations for research into the economic or geopolitical wisdom of a particular treaty. See David E. Engdahl, *The Necessary and Proper Clause as an Intrinsic Restraint on Federal Lawmaking Power,* 22 Harv. J.L. & Pub. Pol'y 107, 107 (1998) ("[T]he Necessary and Proper Clause enables Congress to create offices and departments to help the President carry out his Article II powers.").

But on the plain text of the conjoined clauses, the object itself is limited to the "Power . . . to *make* Treaties" in the first place. This is not the power to implement treaties already made.

Nor will it do to say that the phrase "make Treaties" is a term of art meaning "conclude treaties with foreign nations and then give them domestic legal effect." There is no indication that that the phrase "make Treaties" had such a meaning at the Founding. British treaties at that time were non-self-executing, requiring an act of Parliament to create enforceable domestic law, see Carlos Manuel Vazquez, *Laughing at Treaties*, 99 Colum. L. Rev. 2154, 2158 (1999) ("[T]reaties in Great Britain lacked the force of domestic law unless implemented by Parliament."), and yet Blackstone wrote simply of "the *king's* prerogative *to make treaties,"* without any suggestion that Parliament had a role in the making. 1 William Blackstone, *Commentaries* *249 (emphases added); see also *id.* at *243 ("[T]he king . . . may

make what treaties . . . he pleases." (emphasis added)); *id.* at *244 ("[T]he king may *make* a treaty." (emphasis added)). Blackstone understood the difference between *making* a treaty, which the King could do, and giving it domestic legal effect, which required an act of Parliament. The "Power . . . to make Treaties" is exhausted once a treaty is ratified; implementation is something else altogether.

This Court saw that textual point clearly when construing a statute with similar language. In *Patterson v. McLean Credit Union,* 491 U.S. 164 (1989), the Court construed a statute regarding the "right . . . to make . . . contracts." *Id.* at 176 (alterations in original) (quoting 42 U.S.C. § 1981 (1988) (current version at 42 U.S.C. § 1981(a) (2000)) (internal quotation mark omitted). This statutory phrase is textually and conceptually parallel to the constitutional "Power . . . to make Treaties" both because of the key infinitive verb "to make" and because, as Chief Justice Marshall explained, a non-self-executing treaty is itself like a contract. See *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) ("[W]hen the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the court."). This is what the Court said in *Patterson*:

> [T]he right to *make* contracts does not extend, as a matter of either logic or semantics, to conduct . . . *after* the contract relation has been established, including breach of the terms of the contract . . . . Such *postformation* conduct does not involve the right to *make* a

> contract, but rather implicates the *performance* of established contract obligations . . . .

Patterson, 491 U.S. at 177 (emphases added). Just so here. The "Power . . . to make Treaties" does not extend, as a matter of logic or semantics, to the implementation of treaties already made.

The URAA may or may not have been necessary to *implement* the Berne Convention, but it was certainly neither necessary nor proper to *make* the Berne Convention. And so the Berne Convention did not, and could not, confer power on Congress to enact the URAA.

2. The speculative prospect of foreign reciprocation cannot render a statute "necessary and proper."

One might be tempted to say that a law implementing a treaty already made is necessary and proper for carrying into execution the power to make treaties, because such a law might make it easier for the President "to make" the *next* treaty, by showing prospective treaty partners that the United States has power to perform its treaty obligations.

This argument must fail, because it proves far too much. The strongest facts for this theory would be a situation in which a prospective treaty partner explicitly conditions treaty negotiations on some legislation beyond the enumerated powers of Congress. One could imagine, for example, France declaring that it will not enter into any treaty negotiations whatsoever with the United States until Congress forbids guns near schools, despite *United States v. Lopez*, 514 U.S. 549 (1995). Clearly, under these circumstances, the President's "Power . . . to make

Treaties" with France would be enhanced by the Gun-Free School Zones Act. 18 U.S.C. § 922(q). But surely such a naked demand for legislation by a foreign country cannot be enough to render such legislation necessary and proper. The mere desire of a prospective treaty partner for certain legislation—even if the desire is framed as an express demand or condition—cannot suffice to bring such legislation within the legislative power. *A fortiori*, the speculative prospect that some treaty partners might be more amenable to negotiation if Congress had certain power cannot suffice to give Congress that power. And likewise, the mere speculative prospect that some treaty partners might treat American copyright holders more favorably cannot increase Congress's copyright power.

B. Congress's Legislative Power Can Be Increased Only by Constitutional Amendment, Not by Treaty

Under *Missouri v. Holland,* some statutes are beyond Congress's power to enact absent a treaty, but within Congress's power given a treaty. This implication runs counter to the textual and structural logic of the Constitution.

First, and most important, it means that Congress's powers are not constitutionally fixed, but rather may be increased by treaty. Under *Missouri v. Holland,* "[non-self-executing] treaties provide Congress with a new basis for subject-matter jurisdiction over the areas covered in the treaties." David Golove, *Human Rights Treaties and the U.S. Constitution*, 52 DePaul L. Rev. 579, 590 n.38 (2002); see also 1 Laurence H. Tribe, *American Constitutional Law*, § 4-4, 645-46 (3d ed. 2000) ("By negotiating a treaty and

obtaining the requisite consent of the Senate, the President . . . may endow Congress with a source of legislative authority independent of the powers enumerated in Article I."). Thus, the possible subject matter for legislation is not limited to the subjects enumerated in the Constitution. It extends instead to those subjects, plus any others that may be addressed by treaty. And according to the Restatement (Third) of the Foreign Relations Law of the United States:

> [T]he Constitution does not require that an international agreement deal only with "matters of international concern." The references in the Constitution presumably incorporate the concept of treaty and of other agreements in international law. International law *knows no limitations on the purpose or subject matter of international agreements,* other than that they may not conflict with a peremptory norm of international law. States may enter into an agreement on *any matter of concern to them,* and international law does not look behind their motives or purposes in doing so. Thus, the United States may make an agreement on *any subject suggested by its national interests* in relations with other nations.

Restatement § 302 cmt. c (emphases added) (citation omitted).

If this is so, then the legislative powers are not merely *somewhat* expandable by treaty; they are expandable *virtually without limit*. In theory, the United States might, ostensibly to foster better relations with another country, simply exchange reciprocal promises to regulate the citizenry so as to maxi-

mize the collective welfare. Under *Missouri v. Holland*, such a treaty would confer upon Congress plenary power.

That proposition is, of course, in deep tension with the basic constitutional scheme of enumerated powers, and it stands contradicted by countless canonical statements that Congress's powers are fixed and defined. Eleven years ago, Chief Justice Rehnquist wrote for the Court that "Congress' regulatory authority is not without effective bounds." *United States v. Morrison*, 529 U.S. 598, 608 (2000); see also *Printz v. United States*, 521 U.S. 898, 919 (1997) ("[T]he Constitution[] confer[s] upon Congress . . . not all governmental powers, but only discrete, enumerated ones . . . ."). But it was Chief Justice Marshall, almost two centuries before, who explained why in the clearest terms: "enumeration presupposes something not enumerated," *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824), or more emphatically, "[t]he powers of the legislature are *defined, and limited;* and that those limits may not be mistaken, or forgotten, the constitution is written." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) (emphasis added). These propositions are flatly inconsistent with *Missouri v. Holland*.

1. Congress only possesses the "legislative powers herein granted."

Chief Justice Marshall's view is reinforced by the juxtaposition of the three Vesting Clauses. Article I, Section 1, provides: "*All* legislative Powers *herein granted* shall be vested in a Congress of the United States." (emphases added). By contrast, Article II, Section 1, provides that "*[t]he* executive Power shall be vested in a President of the United States of

America," (emphasis added), and Article III, Section 1, provides that "*[t]he* judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." (emphasis added).

There is a simple explanation for this difference in the Vesting Clauses. Congress is the first mover in the mechanism of U.S. law. It "*make[s]* . . . Laws." U.S. Const. art. I, § 8, cl. 18 (emphasis added). By contrast, the executive branch subsequently "execute[s]" the laws made by Congress, see U.S. Const. art. II, § 3, and the judicial branch interprets those laws. The scope of the executive and judicial power, therefore, is *contingent* on acts of Congress. For example, the Constitution provides that the President "shall take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. By passing a new statute, therefore, Congress expands the President's powers by giving him a new law to execute. This structural fact explains the difference in phrasing between the first sentence of Article I and the first sentence of Article II. Vesting in the President only the executive power "herein granted" would have confused matters, because some executive powers are, in a sense, granted not by the Constitution but by acts of Congress. As Justice Jackson explained, "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right *plus all that Congress can delegate*." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (emphasis added).

In other words, the subject-matter jurisdiction of the executive power can be expanded by acts of Congress; it is not fixed by the Constitution. By contrast, the scope of the legislative power is not contingent on the acts of the other branches. It is fixed and defined by the Constitution. See *Marbury,* 5 U.S. (1 Cranch) at 176 ("[t]he powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written."). Congress has the enumerated powers "herein granted" and no others. See *Lopez*, 514 U.S. at 592 (Thomas, J., concurring) ("Even before the passage of the Tenth Amendment, it was apparent that Congress would possess only those powers 'herein granted' by the rest of the Constitution.").

But if the legislative power may be expanded by treaty, then the textual difference between Article I and Articles II and III would make no sense; the subject-matter jurisdiction of the legislative power, like the executive and judicial powers, would not be fixed and limited to those powers "herein granted," but would be expandable by the President and the Senate by treaty, just as the executive and judicial power can be expanded by act of Congress.

Indeed, Article III is even more telling. It provides that the judicial power shall "extend" to certain sorts of cases and controversies. See U.S. Const. art. III, § 2, cl. 1. The verb "to extend" suggests today just what it signified in 1789: stretching, enlarging. See, e.*g.*, Samuel Johnson, *A Dictionary of the English Language* (London, W. Strahan et al., 4th ed. 1773) ("To EXTEND . . . 1. *To stretch out* towards any part. . . . 5. *To enlarge;* to continue. . . . 6. To encrease in force or duration. . . . 7. To enlarge the comprehen-

sion of any position. . . . 9. To seize by a course of law." (emphases added)). And as Article III provides, "[t]he judicial Power shall *extend* to all Cases, in Law and Equity, arising under this Constitution, [and] *the Laws of the United States*." U.S. Const. art. III, § 2, cl. 1 (emphases added). Thus, the scope of the judicial power—like the scope of the executive power, but unlike the scope of the legislative power—is not entirely fixed by the Constitution but may be enlarged by acts of Congress. Therefore, it would not have made sense to vest in the judiciary only the judicial powers "herein granted." A new federal law can give the judiciary something new to do, thus expanding its power.

Even more to the point, "[t]he judicial Power shall *extend* to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, *and Treaties made, or which shall be made, under their Authority*." *Id.* (emphases added). This clause expressly provides that the scope of the judicial power may be expanded not only by statute but also by treaty. A new treaty, like a new statute, gives the judiciary something new to do, thus expanding its jurisdiction. So, again, it would not have made sense to limit the federal courts to the powers "herein granted," because the scope of the judicial power may be expanded, not only by statute but also by treaty.

But Article I has no such provision. The legislative power does not "extend . . . to Treaties made, or which shall be made." *Id.* Indeed, it does not "extend" at all. Rather, the only legislative powers provided for in the Constitution are those that it enumerates, those that it says are "herein granted." Contrary to *Missouri v. Holland,* the scope of the legislative

power—unlike the scope of the executive and judicial powers—does not change with the passage of statutes or the ratification of treaties.

This textual dichotomy between Article I and Articles II and III is consistent with the underlying theory of separation of powers. To create a tripartite government of limited powers, it is logically necessary that at least one of the branches have fixed powers—powers that cannot be increased by the other branches. And in a democracy, that branch naturally would be the legislature. As one would expect, Congress is the first branch of government, the first mover in American law, the fixed star of constitutional power. See Akhil Reed Amar, *Of Sovereignty and Federalism,* 96 Yale L.J. 1425, 1443 n.71 (1987) ("Congress remained in many ways *primus inter pares.* Schematically, Article I precedes Articles II and III. Structurally, Congress must exercise the legislative power before the executive and judicial powers have a statute on which to act." (citations omitted) (quoting U.S. Const. Art. I, § 8, c1. 18 (emphasis added)) (citing *The Federalist No. 51*, at 322 (James Madison) (Clinton Rossiter, ed., 1961)). Congress can increase the power of the President (and the courts), but the President cannot increase the power of Congress in return. If he could, the federal government as a whole would cease to be one of limited power.

Moreover, to the extent that the jurisdiction of any branch may increase, it is naturally left to a *different* branch to work the expansion. To entrust Congress to expand the subject-matter jurisdiction of the executive and the judiciary is consistent with the theories of Montesquieu and Madison, because Congress has no incentive to overextend the powers of

the other branches at its own expense. See 1 Blackstone at *142 ("[W]here the legislative and executive authority are in distinct hands, the former will take care not to entrust the latter with so large a power, as may tend to the subversion of [its] own independence, and therewith of the liberty of the subject."). But it is quite another matter to entrust treatymakers—the President and Senate—to expand the subject-matter jurisdiction of lawmakers—the President, Senate, and House. Here, there is no ambition to counteract ambition; instead, ambition is handed the keys to power. See Charles de Secondat, Baron de Montesquieu, *The Spirit of the Laws* bk. XI, ch. IV, at 161 (photo. reprint 1991) (J.V. Prichard ed., Thomas Nugent trans., G. Bell & Sons 1914) (1748) ("[E]very man invested with power is apt to abuse it, and to carry his authority as far as it will go."). As Henry St. George Tucker wrote in his treatise on the treaty power five years before *Missouri v. Holland,* "[s]uch interpretation would clothe Congress with powers beyond the limits of the Constitution, with no limitations except the uncontrolled greed or ambition of an unlimited power." Tucker, *Limitations on the Treaty-Making Power* § 113, at 130 (1915).

None of this is consistent with the text of the Constitution or with its underlying theory of separation of powers. See *INS v. Chadha*, 462 U.S. 919, 947 (1983) (noting "the profound conviction of the Framers that the powers conferred on Congress were the powers to be most carefully circumscribed"); The Constitutional Separation of Powers Between the President and Congress, 20 Op. Off. Legal Counsel 124, 131 (1996) ("Although the founders were concerned about the concentration of governmental power in any of the three branches, their primary

fears were directed toward congressional self- aggrandizement . . . ." (citing *Mistretta v. United States,* 488 U.S. 361, 411 n.35 (1989))); *The Federalist No. 49*, *supra,* at 313-14 (James Madison) ("[T]he tendency of republican governments is to an aggrandizement of the legislative at the expense of the other departments.").

The Court realized this long before *Missouri v. Holland,* in a case that Justice Holmes failed to cite. As the Court explained in 1836: "The government of the United States . . . is one of limited powers. It can exercise authority over no subjects, except those which have been delegated to it. Congress cannot, by legislation, enlarge the federal jurisdiction, *nor can it be enlarged under the treaty-making power*." *Mayor of New Orleans v. United States*, 35 U.S. (10 Pet.) 662, 736 (1836) (emphasis added).

2. *Missouri v. Holland* enables the circumvention of Article V.

Another way to put the point is that *Missouri v. Holland* permits evasion of Article V's constitutional amendment mechanism. As a general rule, the subject matter of the legislative power can be increased only by constitutional amendment. This expansion has happened several times. See U.S. Const. amend. XIII, § 2; amend. XIV, § 5; amend. XV, § 2; amend. XIX, cl. 2; amend. XXIII, § 2; amend. XXIV, § 2; amend. XXVI, § 2.

The process provided by the Constitution for its own amendment is of course far more elaborate than the process for making treaties. Compare U.S. Const. art. II, § 2, cl. 2, with Art. V. But under *Missouri v. Holland*, treaties may "provide Congress with a new

basis for subject-matter jurisdiction." Golove, *supra,* at 590 n.38. In other words, the legislative subject-matter jurisdiction of Congress may be increased not just by constitutional amendment but also by treaty.

The Court rejected an analogous implication in *City of Boerne v. Flores*, 521 U.S. 507 (1997). In that case, the Court considered whether the object of legislation under Section 5 of the Fourteenth Amendment—"to enforce . . . the provisions of" that Amendment—could be expanded by act of Congress:

> If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be "superior paramount law, unchangeable by ordinary means." It would be "on a level with ordinary legislative acts, and, like other acts, . . . alterable when the legislature shall please to alter it." Under this approach, it is difficult to conceive of a principle that would limit congressional power. Shifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V.

Id. at 529 (citations omitted) (quoting *Marbury,* 5 U.S. (1 Cranch) at 177).

In other words, under Section 5, the *nexus* between the legislation and its object may be relatively loose, but the object *itself* cannot be expanded by the political branches. If the object of such legislation—"to enforce . . . the provisions of" the Fourteenth Amendment—could be expanded by the political branches, the result would be an impermissible ex-

pansion of legislative power outside of Article V's amendment mechanism.

The situation is the same with treaties. Read literally, *Missouri v. Holland* renders an object of the Necessary and Proper Clause expandable with the ratification of each new treaty. Such an interpretation, in turn, allows for an expansion of legislative power by the President and Senate, which "effectively circumvent[s] the difficult and detailed amendment process contained in Article V." *Id*; see also *Reid v. Covert*, 354 U.S. 1, 17 (1957) (plurality opinion) ("It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights—let alone alien to our entire constitutional history and tradition—to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions. In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V.").

C. Either the President or a Foreign Government Can Unilaterally Abrogate a Treaty—But Neither the President nor a Foreign Government Can Thus Decrease Congress's Power and Render U.S. Laws Unconstitutional

If it is strange to think that the legislative power may be *expanded,* not by constitutional amendment, but by an action of the President with the consent of the Senate, it is surely stranger still to think that the legislative power may be *contracted* by the President alone. Yet this too is an implication of *Missouri v. Holland.*

As a general matter, "[i]f [a] statute is unconstitutional, it is unconstitutional from the start," The Attorney General's Duty To Defend and Enforce Constitutionally Objectionable Legislation, 4A Op. Off. Legal Counsel 55, 59 (1980); see also *Newberry v. United States*, 256 U.S. 232, 254 (1921) ("[T]he criminal statute now relied upon antedates the Seventeenth Amendment and must be tested by powers possessed at the time of its enactment. An after-acquired power can not *ex proprio vigore* validate a statute void when enacted."); 1 J.G. Sutherland, *Statutes and Statutory Construction* 176 (John Lewis ed., 2d ed. 1904) ("[I]f an act is invalid when passed because in conflict with the constitution, it is not made valid by a change of the constitution which does away with the conflict."). And, conversely, if a statute is constitutional when enacted, it generally can be *rendered* unconstitutional only by a constitutional amendment.

The Supremacy Clause confirms the point: "This Constitution, and the Laws of the United States which shall be *made* in Pursuance thereof . . . shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2 (emphasis added). Once a constitutional law is made it is the supreme law of the land from that moment forth, until it is repealed or the Constitution is amended. In other words, "[a] statute . . . must be tested by powers possessed at the time of its enactment." *Newberry*, 256 U.S. at 254.

Yet *Missouri v. Holland* creates an anomalous exception to this rule. Under the rule of that case, some exercises of legislative power would derive their authority not from the Constitution but from specific treaties. If so, then when such treaties are termi-

nated, their implementing statutes presumably *become* unconstitutional. Such statutes are suddenly rendered unconstitutional not by constitutional amendment but by the mere abrogation of a treaty.

And if it is strange to think of a statute *becoming* unconstitutional, surely it is stranger still to think that the President may render a statute unconstitutional *unilaterally and at his sole discretion*. Yet this is what follows from *Missouri v. Holland*. The President has power to abrogate treaties unilaterally. See Validity of Congressional-Executive Agreements That Substantially Modify the United States' Obligations Under an Existing Treaty, 20 Op. Off. Legal Counsel 389, 395 n.14 (1996) ("[T]he Executive Branch has taken the position that the President possesses the authority to terminate a treaty in accordance with its terms by his unilateral action."). If so, then the President, by renouncing a treaty, could unilaterally render any implementing acts of Congress unconstitutional (unless they could be sustained under some other head of legislative power).

This result is inconsistent with the basic proposition that "repeal of statutes, no less than enactment, must conform with [Article] 1." *INS v. Chadha*, 462 U.S. at 954. Thirteen years ago, this Court did not hesitate to strike down a statute that "authorize[d] the President himself to effect the repeal of laws, for his own policy reasons, without observing the procedures set out in Article I, § 7." *Clinton v. City of New York*, 524 U.S. 417, 445 (1998). As the Court said in that case, "[t]here is no provision in the Constitution that authorizes the President . . . to repeal statutes." *Id*. at 438. Yet under *Missouri v. Holland,* legislation that reaches beyond enumerated powers to imple-

ment treaties is, in effect, subject to a different rule. Here, in essence, the President has a unilateral power "to effect the repeal of laws, for his own policy reasons." *Id.* at 445. Whenever he chooses, he may abrogate a treaty and thus render any implementing legislation unconstitutional.

And that is not the worst of it. The President is not the only one who can terminate a treaty. Our treaty partners can likewise renounce treaties. See Louis Henkin, *Foreign Affairs and the United States Constitution* 204 (2d ed. 1996) ("[A treaty] is not law of the land if it . . . has been terminated or destroyed by breach (whether by the United States or by the other party or parties)."). Under *Missouri v. Holland*, therefore, it is not only the President who can, at his own discretion, render certain statutes unconstitutional by renouncing treaties. *Foreign governments can do this too.* Surely the Founders would have been surprised to learn that a federal statute—duly enacted by both Houses of Congress and signed by the President—may, under some circumstances, be rendered unconstitutional at the discretion of, for example, the King of England. After all, ending the King's capricious control over American legislation was the very first reason given on July 4, 1776, for the Revolution. See The Declaration of Independence paras. 2-4 (U.S. 1776). Yet this too is a consequence of *Missouri v. Holland*.

All these paradoxes can be resolved only if, *contra Missouri v. Holland*, Congress's legislative power cannot be expanded or contracted by treaty.

III. THE MOST INFLUENTIAL ARGUMENT SUPPORTING *MISSOURI V. HOLLAND* IS BASED ON A MISREADING OF CONSTITUTIONAL HISTORY

Justice Holmes set forth no arguments whatsoever for the proposition that treaties can increase Congress's legislative power. And subsequent scholars and courts have generally contented themselves with a citation to *Missouri v. Holland*. But one eminent scholar has presented a substantive argument in support of this proposition, based upon the drafting history of the Constitution. It is ostensibly an extremely forceful argument, and one with inherent authority because it appears in the leading treatise on the constitutional law of foreign affairs. Indeed, it is the *only* argument on this point in that treatise.

As discussed above, the legislative power, unlike the judicial power, does not expressly "extend to . . . Treaties made, or which shall be made." U.S. Const. art. III, § 2, cl. 1. Rather, the legislative power is limited by the Constitution to those powers that it enumerates—those that are "herein granted." U.S. Const. art. I, § 1. To this point, though, Professor Louis Henkin has an apparently devastating reply based on constitutional drafting history: *"The 'necessary and proper' clause originally contained expressly the power 'to enforce treaties' but it was stricken as superfluous."* Henkin, *supra*, at 481 n.111 (emphasis added).

If words were struck from the draft Constitution as superfluous during the Convention, then the words that remained should probably be interpreted to cover the ground of the words that were struck. The inference here is that the Framers actually

turned their attention to precisely the question at issue in *Missouri v. Holland*. On this drafting history, it would appear that the Framers specifically considered whether the Necessary and Proper Clause—in its final form, without those crucial words—still signifies the power "to enforce treaties" beyond the other enumerated powers. It appears to follow that the final text of the Necessary and Proper Clause must convey the power to make laws "to enforce treaties."

Unsurprisingly, this argument has proven quite influential. For example, when the Second Circuit was confronted with this question, its entire analysis of Congress's power to legislate pursuant to treaty boiled down to citations to *Missouri v. Holland* and its predecessor *Neely v. Henkel*, 180 U.S. 109 (1901), followed by the crucial citation to Henkin. *United States v. Lue,* 134 F.3d 79, 82 (2d Cir. 1998) ("[*S*]*ee also* Henkin, *supra*, at 204 & n.111 (2d ed. 1996) ('The "necessary and proper" clause originally contained expressly the power "to enforce treaties" but it was stricken as superfluous.') (citing 2 M. Farrand, *The Records of the Convention of 1787*, at 382 (rev. ed.1966)).").

Indeed, when this Court invoked *Missouri v. Holland* seven years ago, it too cited Henkin's treatise. *United States v. Lara*, 541 U.S. 193, 201 (2004) ("[A]s Justice Holmes pointed out, treaties made pursuant to [the treaty] power can authorize Congress to deal with 'matters' with which otherwise 'Congress could not deal.' *Missouri v. Holland* . . . ; see also Henkin, *supra*, at 72."). In short, Henkin's argument from constitutional history has greatly influenced—and

foreshortened—the debate on this issue both in the academy and in the judiciary.

But Professor Henkin was mistaken. As recent historical scholarship has demonstrated, he simply misread the constitutional history. The words "to enforce treaties" *never appeared in any draft of the Necessary and Proper Clause*. They were never struck as superfluous to that Clause, because they never appeared in that Clause at all. The phrase "enforce treaties" was apparently struck as superfluous from the Militia Clause, which was apparently the source of Henkin's confusion. But *that* drafting history provides no support for *Missouri v. Holland*. *See* Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 Harv. L. Rev. 1867, 1912-18 (2005).

In short, the leading treatise on the law of foreign affairs makes exactly one argument in favor of *Missouri v. Holland*'s crucially important, unreasoned statement that Congress has automatic power to enforce treaties. This treatise, and this argument, have profoundly influenced—and short-circuited—debate on this question. Yet Professor Henkin's only argument on this point is based on a historical premise that is simply false.

The words "enforce treaties" never appeared in the Necessary and Proper Clause. And there is no reason in constitutional history to believe that the clause as adopted entails power, beyond the other enumerated powers, to enforce treaties.

IV. *MISSOURI V. HOLLAND* IS A STRUCTURAL AND DOCTRINAL ANAMOLY

A. *Missouri v. Holland* Is in Tension with *Reid v. Covert*

If current doctrine and scholarship are correct that treaties may extend beyond the subjects enumerated in Article I, Section 8, and if Justice Holmes was wrong that such treaties themselves can confer legislative power, then a treaty might commit the United States to enact legislation even though Congress would have no power to fulfill the promise.

At first glance, this might seem an anomalous result, but the truth is that this result already obtains from *Reid v. Covert*, 354 U.S. 1 (1957). Under current doctrine, the President may, by non-self-executing treaty, promise that Congress will violate the Bill of Rights. Entering into such a treaty does not violate the Constitution, because a non-self-executing treaty has no domestic legal effect. But, as this Court made clear in *Reid v. Covert*, Congress is not thereby empowered to violate the Bill of Rights. *Id.* at 16-17 (plurality opinion). It is already true, therefore, that the President may make political promises by treaty that Congress lacks the legal power to keep.

> [T]he Government contends that [the statute at issue] can be sustained as legislation which is necessary and proper to carry out the United States' obligations under the international agreements made with those countries. The obvious and decisive answer to this, of course, is that no agreement with a foreign nation can *confer power on the Congress,* or on

> any other branch of Government, *which is free from the restraints of the Constitution.*

Id. at 16 (plurality opinion) (emphases added).

Reid is right, and it is *Missouri v. Holland* that creates the anomaly. The President has theoretical power to enter into a treaty promising that Congress will violate the Bill of Rights, but such a treaty does not empower the Congress to do so. Likewise, the President has theoretical power to enter into a treaty promising that Congress will exceed its legislative powers, but again, the treaty does not and cannot empower Congress to do so.

B. *Missouri v. Holland* Creates Doubly Perverse Incentives—Incentives for More International Entanglements, Which in Turn Increase Legislative Power

It might be argued that the rule of *Missouri v. Holland* allows desirable flexibility in the conduct of foreign affairs. But the flexibility afforded by the rule is entirely insidious.

The domestic "flexibility" afforded by treaties that reach beyond enumerated powers will of course be tempting to the President and the Senate. After all, they, plus the House of Representatives, will be the beneficiaries of the increased legislative power. Indeed, this prospect will constitute a powerfully perverse incentive to enter into treaties that go beyond enumerated powers. This is just the sort of self-aggrandizing "flexibility" that the Constitution was designed to prohibit. As Professor Walter Dellinger wrote while Assistant Attorney General for the Office of Legal Counsel: "Although the founders were concerned about the concentration of governmental

power in any of the three branches, their primary fears were directed toward congressional self-aggrandizement." The Constitutional Separation of Powers Between the President and Congress, 20 Op. Off. Legal Counsel 124, 131 (1996) (citing *Mistretta v. United States,* 488 U.S. 361, 411 n.35 (1989)).

Under current doctrine, "[i]t is not difficult to hypothesize possible abuses of the treaty power." Golove, *supra*, at 1298 n.756. There is, in fact, a trend toward treaties that encroach on the traditional domains of the states. These treaties can be very vague, see Curtis A. Bradley, *supra,* at 443 ("[T]reaties, especially multilateral treaties, may be more likely than domestic legislation to contain vague and aspirational language, making their effect on state prerogatives harder to anticipate during the ratification process."), and even if they are not so vague, at least one circuit court has concluded that implementing legislation need only bear a "rational relationship" to the treaty that it is ostensibly designed to execute. See *Lue*, 134 F.3d at 84.

The Constitution should not be construed to create this doubly perverse incentive—an incentive to enter "entangling alliances," Thomas Jefferson, First Inaugural Address (Mar. 4, 1801), *in* Thomas Jefferson, *Writings* 1136-39 (Merrill D. Peterson, ed.) (calling for "peace, commerce, and honest friendship with all nations, entangling alliances with none"); see also George Washington, Farewell Address (Sept. 17, 1796), *in* Presidential Documents 18, 24 (J.F. Watts & Fred L. Israel eds., 2000) ("It is our policy to steer clear of permanent alliances with any portion of the foreign world . . . ."), merely to attain the desired side effect of increased legislative power. In-

deed, the treatymakers apparently succumbed to just this temptation in *Missouri v. Holland* itself: "If ever the federal government could be charged with bad faith in making a treaty, this had to be the case." Golove, *supra,* at 1256.

Were Justice Holmes's *ipse dixit* rejected, the President would still have ample power to conclude treaties on all appropriate subjects. The only thing that would change is that the President and the Senate would lack the power—and thus the perverse incentive—to undertake additional international legal commitments just to increase the legislative power.

C. *Missouri v. Holland* Should Not Be Sustained on *Stare Decisis* Grounds

At first glance, *Missouri v. Holland* might appear to present the strongest possible case for application of *stare decisis*. It is 91 years old. It was written by Justice Holmes. It is canonical. And it affirms a power of the political branches in an area related to foreign affairs.

But the argument for *stare decisis* is not nearly as compelling as it may first appear. The opinion is canonical and it was written by Justice Holmes, but on the point at issue—Congress's power to legislate pursuant to treaty—it is also utterly unreasoned. The *stare decisis* force of an opinion turns, in part, on the quality of its reasoning and diminishes substantially if it provides no reasoning at all. See *Payne v. Tennessee,* 501 U.S. 808, 827 (1991) ("[W]hen governing decisions are . . . badly reasoned, 'this Court has never felt constrained to follow precedent.'" (quoting *Smith v. Allwright,* 321 U.S. 649, 665 (1944))).

Second, while *Missouri v. Holland* is 91 years old, its holding concerning legislative power pursuant to treaty has been all but irrelevant for most of that time. From 1937 to 1995, the Court did not strike down a single statute as beyond Congress's enumerated powers. Throughout the decades when the Commerce Clause power was construed to be essentially limitless, the question of expanding Congress's legislative power by treaty was almost entirely hypothetical. During those years, any legislation that Congress enacted to enforce a treaty could almost certainly have also been sustained under the Commerce Clause or some other enumerated power. See 1 Laurence H. Tribe, American Constitutional Law § 4-4, at 646 (3d ed. 2000) ("The importance of treaties as independent sources of congressional power has waned substantially in the years since *Missouri v. Holland* . . . [;] the Supreme Court [in the intervening period has] so broadened the scope of Congress' constitutionally enumerated powers as to provide ample basis for most imaginable legislative enactments quite apart from the treaty power."). Only after *United States v. Lopez*, 514 U.S. 549 (1995), did *Missouri v. Holland*'s holding on the scope of treaty-related legislative power recover even potential practical significance. Thus, any supposed reliance of the political branches on this holding must be dated from 1995, not 1920.

Even since 1995, the Supreme Court has struck down only three statutes as beyond the enumerated powers of Congress. See *Morrison,* 529 U.S. at 627 (invalidating part of the Violence Against Women Act); *Flores*, 521 U.S. at 536 (invalidating the Religious Freedom Restoration Act); *Lopez,* 514 U.S. at 567-68 (invalidating the Gun-Free School Zones Act).

It can hardly be said, therefore, that the conduct of foreign affairs by the political branches has been undertaken in substantial reliance on the rule that federal legislative power may be increased by treaty. Scholars only now are discovering *Missouri v. Holland*'s potential for evading the limits on congressional powers. See Rosenkranz, *supra* (collecting recent articles). If the political branches should move to act on the proposals of these scholars, *that* would present an unfortunate situation of reliance, in the foreign affairs realm, on erroneous constitutional doctrine. But right now—while these proposals are in the law reviews and not in *Treaties in Force* or the *Statutes at Large—Missouri v. Holland* may be overruled on this point without any dislocation of American foreign relations.

This Court has not hesitated to reconsider a canonical opinion when new scholarship in the *Harvard Law Review* demonstrates that the conventional historical account was simply wrong. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 72-73 n.5 (1938) (citing Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789,* 37 Harv. L. Rev. 49, 51-52, 81-88, 108 (1923)). And it has not hesitated to overrule such an opinion when it becomes clear that the opinion is fundamentally inconsistent with constitutional structure. *Erie*, 304 U.S. at 77 (overruling *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842)). This is just such a case. See Rosenkranz, *supra*.

In short, *Missouri v. Holland* may be canonical, but it does not present a strong case for *stare decisis*. It was wrongly decided, and it should be overruled.

CONCLUSION

A treaty cannot confer new power on Congress, and so neither of the treaties at issue here empowered Congress to enact Section 514 of the URAA. The Tenth Circuit's judgment should be reversed.

Respectfully submitted,

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