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> Robert C. Berring, *The Great Books: An Introduction to Chapter One*, 1 J.L.: Periodical Laboratory of Leg. Scholarship (1 Ch. One) 315 (2011).
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AVAILABLE AT

INTRODUCING A NEARLY VAST AMOUNT OF WORK TO BE DONE

Ross E. Davies[†]

This article is about two things. First, it is about the perplexing failure of law reviews (or law schools, or law professors) to do something that is undoubtedly worthwhile and within their reach: put online the sources, or at least the hard-to-find sources, cited in the law review articles they publish (or subsidize, or write). Second, it is about a plan to put those sources online anyway, by starting small and simple. The www.availableat.org website is, at least for starters, a plain online home for those hard-to-find cited sources that should and can be shared with readers – with a little bit of help from authors and law reviews.

I.
OUGHT

Fifteen or so years ago, I mentioned to the late Professor David Currie that the *Green Bag* was about to launch a website.[1] His immediate response was that we should use the site to give readers easy access to hard-to-find sources cited in the footnotes of articles the *Green Bag* published. After all, authors would have access to everything they had cited,[2] and getting those sources onto the website would be easy: just scan 'em and post 'em. Even for Internet naïfs like Currie and me it took only a few moments' thought to realize

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[1] We did and it is still there. *See* www.greenbag.org.

[2] Who, Currie asked with (as I recall the moment) a slight smile, would cite a source without having read it?

that his idea was unrealistic because it was based on a false premise – that putting things on the web was easy. It was not. (As an editor of the prosperous and well-staffed *University of Chicago Law Review* in 1997, I had recently gotten a sense of how much work might be involved in such an undertaking. We had coordinated the posting on the web of just one set of sources created for and cited in an article by Professor Randal Picker, a computer-savvy and congenial author, and yet it had still been a hassle.[3]) The *Green Bag* was not rich or well-staffed, so we gave up on the idea. Of course, being inexperienced and unsophisticated about the web world, we might have been wrong. Maybe we would have discovered that Currie's good idea was easy, if only we had given it a try. At the time, however, we were not alone. No other law journal, rich or poor, appeared inclined to play web-host to hard-to-find materials cited by its authors, at least not in any systematic way.

Several years later, Professor Eugene Volokh put forward an even more ambitious proposal in the *Yale Law Journal*'s *Pocket Part*:

> Many articles cite court decisions, agency rulings, pleadings, briefs, corporate policies, or datasets that haven't been published (in print or online). Let me suggest a new professional norm, or even a *Bluebook* rule: law reviews should generally place such unpublished materials online, and point readers to the online version.[4]

This proposal did not encompass everything covered by Currie's. Volokh left out published but hard-to-find sources, but his arguments in support of his proposal (for example, "If a source was useful for one article, it might be useful again. Why put others to the trouble, time, and expense of unearthing it again in the future?")

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[3] *See* Randal C. Picker, *Simple Games in a Complex World: A Generative Approach to the Adoption of Norms*, 64 U. CHI. L. REV. 1225, 1225 n.† (1997) ("A note about reading this paper. The computer simulations presented here are inherently dynamic, and the best way to grasp the dynamics is to see them. The published version of this paper includes a color insert that sets out snapshots of these dynamics. A CD-ROM version of the paper is also available from The University of Chicago Law Review. . . . Finally, the simulations are also posted at <http://www.law.uchicago.edu/Picker/aworkingpapers/norms.html>.").

[4] Eugene Volokh, *Law Reviews, the Internet, and Preventing and Correcting Errors*, 116 YALE L.J. POCKET PART 4, 4 (2006), www.thepocketpart.org/2006/09/06/volokh.html.

seemed to indicate that if asked he probably would have included those sources as well.

Volokh did, however, reach what appears to be a much different conclusion than Currie had about the difficulty of such an undertaking. According to Volokh,

> Naturally, there'll need to be some exceptions for sources that pose potential privacy or copyright problems (e.g., interviews with sources who were promised anonymity, or drafts of unpublished articles). But most sources should be put online, and easily can be – every law school has a scanner that can easily scan in even a long document.[5]

Or maybe not so different. Volokh (who has a well-developed and kindly sense of humor) also said that this web work could be done by "law reviews . . . without a vast amount of extra work."[6] That last line is the kind of thing a senior lawyer says to a junior lawyer on a Friday afternoon while handing the junior an assignment that (as both lawyers know) may not be a vast amount of work but is sufficiently almost-vast to ruin any plans the junior may have had to spend any part of the weekend away from the office. Thus, Volokh may have been simultaneously suggesting that law reviews commit to a big chunk of new work for no new reward and challenging them to do what he knew they could do if only they tried hard enough, all the while with tongue slightly yet vastly in cheek to signal that he recognized the scale of the challenge. Any difference between the Currie and Volokh assessments of easiness may also have been in part a matter of perspective. Volokh was calling for work to be done by law review editors, a numerous and extraordinarily industrious subspecies of law student widely viewed by legal scholars as a reservoir of free labor for the performance of brute tasks associated with the production and dissemination legal scholarship – checking and completing citations, proofreading, formatting, and the like. Adding to that workload the placement and maintenance of cited sources online might seem (from a certain professorial per-

[5] *Id.* at 5.
[6] *Id.* at 4.

spective) perfectly consistent with the natural order of things in legal academia. Currie, in contrast, was calling for work to be done by just a few of his friends – the four editors of the *Green Bag* – who already had full-time law jobs. Work can look a lot vaster when the burden is to be borne narrowly and close to home than it does when your role is limited to pointing at the burden and saying to the proletariat at large "lift!"[7]

II.
AIN'T

Whatever the reasons may be – whether they include the sheer volume of work involved or not – the fact is that law reviews are not doing much lifting in this area.[8] Neither are the other institutions most likely to have an interest in the subject – law schools (which are also the homes and primary funding sources for most law reviews and most authors of law review articles).

It certainly is not due to lack of ability or interest. Plenty of law reviews and law schools (and even a few law professors) have the technical ability to run (or arrange for the running of) a snazzy website, and do so.[9] Plenty also have shown interest in putting otherwise hard-to-find source materials online in a variety of contexts –

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[7] More generally, some people – especially academics, perhaps (but not Volokh, I am sure) – erroneously believe that electronic publishing is cheap and easy because the Internet makes things cheap and easy. *See* Adam Mossoff, *How Copyright Drives Innovation in Scholarly Publishing*, papers.ssrn.com/sol3/papers.cfm?abstract_id=2243264 (Apr. 2, 2013) at 13-15. In fact, designing and maintaining a good website requires considerable skill and effort. *The 100 Best Jobs*, U.S. NEWS & WORLD REPORT, money.usnews.com/careers/best-jobs/rankings/the-100-best-jobs (describing the skills, duties, and bright career prospects of the ninth-ranked job, web developer).

[8] One little indication of a lack of enthusiasm among the law reviews for Volokh's proposal that they shoulder responsibility for this kind of work is the rate at which the normally widely-cited Volokh is cited on this subject. Setting aside self-citations, citations by me, and bibliographic lists, Volokh's *Pocket Part* article has been cited once in a journal in Westlaw's big "Journals & Law Reviews (JLR)" database – a student note published in 2006. Nicholas Bramble, *Preparing Academic Scholarship for an Open Access World*, 20 HARV. J.L. & TECH. 209, 223 n. 68 (2006).

[9] *See, e.g.*, *The Georgetown Law Journal*, georgetownlawjournal.org; *University of Arkansas School of Law*, law.uark.edu; *Ian Ayres*, islandia.law.yale.edu/ayres/.

from ancient laws[10] to collected papers[11] to modern ephemera.[12] And there are enough isolated examples of efforts to make online connections between law review articles – the coin of the realm in legal academia – and the sources they cite to make it obvious that all the key players (journals, schools, and scholars) recognize the value of online source accessibility. But, weirdly, all that obvious ability and all that demonstrated interest have resulted in a disappointingly bad track record when it comes to making those law-review-citation-to-sources-posted-online connections, and then making them stick. A few examples – some involving law reviews, some involving law schools, and all involving authors – should be enough to make the point that ability and interest are not enough. Thus, this problem is perhaps best viewed as part of the larger widespread and well-known problem of broken links to all sorts of sources in law review articles, but with the added difficulty that many of the hard-to-find sources with which this article is concerned have yet to find any sort of home on the web in the first place.[13]

A. The Law Reviews

Again, law reviews can and do maintain sophisticated, attractive, user-friendly websites. And they can and do occasionally set up connections between citations to hard-to-find sources in a particular article and copies of the sources themselves.[14] Many of these efforts

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[10] *See, e.g.*, *Ancient, Medieval and Renaissance Documents*, in THE AVALON PROJECT, avalon.law.yale.edu/subject_menus/medmenu.asp.

[11] *See, e.g.*, *The Clarence Darrow Digital Collection*, darrow.law.umn.edu/index.php?.

[12] *See, e.g.*, *Oliver Wendell Holmes, Jr. Digital Suite*, in HARVARD LAW SCHOOL DIGITAL COLLECTIONS AND EXHIBITIONS, www.law.harvard.edu/library/digital/.

[13] *See, e.g.*, Benjamin J. Keele and Michelle Pearse, *How Librarians Can Help Improve Law Journal Publishing*, 104 LAW LIBR. J. 383, 391-93, 403-04 (2012). Casting stones is a risky business in this context. Libraries, courts, government agencies, and, I imagine, pretty much everyone else have problems with broken links. *See, e.g.*, Georgia Briscoe, *The Quality of Academic Library Online Catalogs and Its Effect on Information Retrieval*, 102 LAW LIBR. J. 599, 602, 606 (2010); Michael Whiteman, *The Death of Twentieth-Century Authority*, 58 UCLA L. REV. DISCOURSE 27 (2010); *see also, e.g.*, Hollee Schwartz Temple, *Fading Past: Are digitization and budget cuts compromising history?*, ABA J., May 2013, at 36.

[14] Indeed law review editors have probably been thinking along the same lines – about the value of online access to hard-to-find sources – for at least as long as Currie did and Volokh has. *See, e.g.*, note 3 above.

are, I suspect, undertaken as a courtesy to the author, and not because a law review intends to go into the business of building and maintaining an ever-expanding collection of online cited sources for the articles it publishes. And so law reviews are not putting systems in place to organize, perpetuate, and otherwise take care of even those few citation-to-source-on-the-web resources they do provide. These are, in other words, well-meant one-offs that are easily neglected or forgotten, and as a result sometimes lost.[15]

For example, a few weeks ago, I was reading an article by Professor Benjamin Barton in the September 2012 issue of the *Florida Law Review*.[16] When I reached this passage on pages 1147-48 . . .

> The four main documents underlying the study: the Justices database, the natural Courts database, the key to the databases, and the narrative version of the Justices' experiences are all posted online for purposes of transparency.[49]

. . . I looked to the bottom of page 1148 for footnote 49:

> David Barton, *Data Underlying Barton Supreme Court Justices' Experience Study*, FLORIDALAWREVIEW.COM, http://www.floridalawreview.com.

Ignoring the erroneous citation to "David" rather than "Benjamin" Barton, I typed "www.floridalawreview.com" into my web browser. I found an attractive, content-filled website, but no Barton databases and no clues to where I might find them. Fortunately, Barton is alive and well and accessible at the University of Tennessee College of Law. Here are the relevant parts of our correspondence about his databases:

> *Davies:* Dear Professor Barton[,] I cannot find the data referred to in footnote 49 of your excellent article, "An Empirical Study of Supreme Court Justice Pre-Appointment Experience," 64 Florida Law Review 1137. Would you,

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[15] Or mislaid, or abandoned. *See, e.g.*, R.H. Helmholz, *Equitable Division and the Law of Finders*, 52 FORDHAM L. REV. 313 (1983); *State v. Kealey*, 907 P.2d 319 (Wash. App. 1995); *Saritejdiam, Inc. v. Excess Ins. Co.*, Ltd., 971 F.2d 910 (2d Cir. 1992).

[16] Benjamin H. Barton, *An Empirical Study of Supreme Court Justice Pre-Appointment Experience*, 64 FLA. L. REV. 1137, 1148 n.50 (2012).

> please, point me in the right direction? (I fear this is evidence of my own incompetence as a researcher, for which I apologize.)
>
> *Barton:* [T]his law review . . . apparently stopped hosting the data I sent them and asked them to post on their website, so maybe a reader will assume my evil twin, David Barton, is the one at fault. Here are two datasets and a key. In the likely event that the datasets are confusing, feel free to email me back with any questions.[17]

So, while the *Florida Law Review* may have initially done what it was supposed to with Barton's data, within it a few months at most (the article was published in the September 2012 issue and read by me in March 2013), it was not.

It was worth the trouble to pester Barton. His databases are interesting, and they will be useful in my own work. But if Barton had been less responsive or less helpful, or in some more absolute sense unavailable, I would not have had access to the sources that he plainly intended and expected to be available in perpetuity at the *Florida Law Review*'s website. In addition, it was costly in terms of my time and his, at least when compared with the convenience of simply following the URL he provided to the sources he (and his publisher) promised.

The *Florida Law Review* is not the only law review to slip up in this way. Another case involving a different journal nicely illustrates how easy it is to slip. In 2011, the *Northwestern University Law Review* published a pair of articles in the ongoing "law school mismatch" debate over the proper role and actual effects of affirmative action in law school admissions. Both articles cited the same source – "*Data Sets for Northwestern University Law Review 105:2*, NW. U. L. REV." – at the same URL: http://www.law.northwestern.edu/lawreview/issues/105.2.data.html.[18] Unfortunately, it now leads to a

[17] Email exchange between Ross Davies and Benjamin Barton, Mar. 18-19, 2013 (on file with the author).

[18] Katherine Y. Barnes, *Is Affirmative Action Responsible for the Achievement Gap Between Black and White Law Students? A Correction, a Lesson, and an Update*, 105 NW. U. L. REV. 791, 794 n.8 (2011); Doug Williams, Richard Sander, Marc Luppino & Roger Bolus, *Revisiting Law School Mismatch: A Comment on Barnes (2007, 2011)*, 105 NW. U. L. REV. 813, 815 n.13

"Webpage Cannot Be Found" message. Fortunately, a Google search for "*Data Sets for Northwestern University Law Review*" easily turns up the missing page at a different URL. The difference between the old and new URLs is small. The new one lacks the "/issues" in the old one. It appears that someone – maybe at the law review, maybe in some other office at Northwestern University – rearranged the online files of the *Northwestern University Law Review*. How many more well-intentioned rearrangements (or file cleanups, or whatever) will it take before those "*Data Sets for Northwestern University Law Review*" become practically inaccessible? And, short of that, how much time will interested readers waste searching – perhaps successfully, perhaps not – for something that ought to take no time at all to find, and how many will give up before they find that data while it is still findable?

The mortality of authors as well as URLs is a genuine problem that predates law review websites, as an ink-on-paper example illustrates. In 2007, I sent this inquiry to the *Texas Law Review*:

> Dear Editors: Footnote 27 in Irving Younger, *What Happened in* Erie, 56 Tex. L. Rev 1011, 1013 (1978), refers to a letter from Bernard Nemeroff to the author, and reports that a copy of the letter is "in the files of the *Texas Law Review*." May I have a copy of your copy?[19]

After some back-and-forth, and what certainly seemed to be a good-natured and good faith effort on the part of the law review to find the letter, one of the editors replied:

> I have bad news. I just checked our off-site records, and they only go back [to] the 59th volume of TLR. Unfortunately, I simply have no idea where records for volume 56 would be located. Please let me know if you have any further questions, and I apologize for the bad news.[20]

(2011); *see also* Anne Joseph O'Connell, *Agency Rulemaking and Political Transitions*, 105 NW. U. L. REV. 471, 491 n.85 (2011) (same problem with same URL).

[19] Letter from Ross E. Davies to Editors, Texas Law Review, June 4, 2007.

[20] Email from Sarah Barr, Research Editor, Texas Law Review, to Martin Alaniz, Research Assistant to Ross Davies, Aug. 28, 2007.

What is a scholar seeking to follow Younger's work to do when confirmation and replication – fundamental features of good follow-on scholarship – are impossible? Do not-so-good scholarship and caution readers about it, I suppose, which is neither good nor satisfying.

So, this inability of law reviews to keep a handle on sources entrusted to them by authors is not just an Internet problem. It seems that putting sources, electronic or otherwise, into the custody of a law review is (and long has been) a risky business. Some things stay where they can be found when an article is published, but too many move away or disappear entirely, and the magic of the Internet has not put a stop to this problem.[21]

B. The Law Schools

What is true about law reviews' websites is doubly true for law schools' sites. Every law school has one, and many are impressively user-friendly and formidably comprehensive and elaborate.[22] If anyone is well-positioned to build up the online availability of hard-to-find sources cited in the law reviews, surely it is the law schools. And yet they are seemingly no more reliable than their own student-run law journals.

Conveniently enough, one of the *Northwestern University Law Review* articles discussed earlier provides a crisp illustration of law schools' uneven performance in online cited-source maintenance. The author of the first of the two *Northwestern* articles, Professor Katherine Barnes of the James E. Rogers College of Law at the University of Arizona, provided this helpful – and, as it turns out, unintentionally ironic – footnote:

> Transparency is the best way to curtail errors. For example, Professor Sander makes all of his programs and data available on his website, as I also have done for this Revision. *See* KATHIE BARNES DATA SETS, http://www.law.arizona.edu/faculty/barnesDataSets.cfm (last visited June 26, 2011).

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[21] *See* Mossoff, note 7 above.

[22] *See* Roger V. Skalbeck and Matt Zimmerman, *Top 10 Law School Home Pages of 2012*, 3 J.L.: PERIODICAL LABORATORY OF LEG. SCHOLARSHIP (2 J. LEGAL METRICS) 51 (2013).

> Although I commend this practice because it facilitates replication, law reviews should not leave the decision whether to make this information available to the individual researcher. Moreover, in the interest of transparency, all modeling decisions should be explicit. Unfortunately, in the context of a law review article written for a nontechnical audience, including every specific decision is unrealistic, but technical appendices, published on the law review's website, can help offset this concern.[23]

The URL Barnes provided does not disappoint. Her sources are there.

The Professor Sander referred to in the Barnes footnote is Richard Sander of the UCLA School of Law, a co-author of the second of the two *Northwestern University Law Review* articles. In his earlier "law school mismatch" articles Sander did indeed attempt to make his cited data and related sources available online, and for a while they probably were where he put them. For example, his famous and controversial[24] article in the November 2004 issue of the *Stanford Law Review* article included two URLs at his UCLA faculty website: http://www1.law.ucla.edu/~sander/Data%20and%20Procedures/SuppAnalysis.htm[25] and http://www1.law.ucla.edu/~sander/Data%20and%20Procedures/StanfordArt.htm.[26] Unfortunately, those URLs now lead to "500 Internal Server Error" messages.[27] The first page of Sander's faculty page at the UCLA Law School website contains what appears to be a lead – "More information about Sander

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[23] Barnes, note 18 above, at 793 n.7.

[24] *See, e.g.*, Affirmative Action in American Law Schools: A Briefing Before The United States Commission on Civil Rights Held in Washington, D.C., June 16, 2006, available (for now, at least) at www.usccr.gov/pubs/AALSreport.pdf, available (forever, we hope) at www.availableat.org; Emily Bazelon, *Sanding Down Sander: The debunker of affirmative action gets debunked*, SLATE, Apr. 29, 2005, www.slate.com/articles/news_and_politics/jurisprudence/2005/04/sanding_down_sander.html.

[25] Cited in Richard H. Sander, *A Systematic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 402, 405, 409 (2004).

[26] Cited in *id*. at 457 n.250.

[27] *See also, e.g.*, Richard H. Sander, *A Reply to Critics*, 57 STAN. L. REV. 1963, 1980 n.34 (2004) ("http://www1.law.ucla.edu/~sander/Data%20and%20Procedures/StanfordArt.htm" leads to server error message); *id*. at 1982 n.42 ("http://www1.law.ucla.edu/~sander/Documents/CCKL%20Critique.pdf" leads to server error message).

and his research is available at the faculty webpage:" followed by a hotlink labeled "../sander"[28] – but that leads nowhere.[29] A bit of additional digging elsewhere (more effort than what was required to find the *Northwestern University Law Review* data, but not vastly more) turns up other pages on the UCLA Law School website containing links to what appear to be sources Sander cited in the *Stanford Law Review*, as well as handy additions such as an "Errata" document.[30] But some of those pages feature "*CURRENTLY BEING UPDATED*" banners in red type.[31] Perhaps those pages will end up providing a home to sources identifiable as the ones Sander originally cited in the *Stanford Law Review*, and perhaps the paths from the original cites in his articles to those sources will be reestablished.

The UCLA School of Law is not the only school that has housed sources that are now homeless or hard to find or identify. Another case involving a different school nicely illustrates how easy it is to lose track of sources cited by a law school faculty member and stored on that school's site. Even linkages constructed entirely within a single institution can break down.

Recall that back in 1997 the *University of Chicago Law Review* coordinated the placement of a set of Randal Picker's sources online (see page 2 above). Those sources were actually hosted by Picker's home law school at the time – the University of Chicago – where he still teaches today. And yet if you key the URL in Picker's article into your browser, you will find: "Motion Denied Sorry, we couldn't find the page or file you're looking for." To recap: The *University of Chicago Law Review* collaborated with a University of Chicago law professor to put a set of that professor's sources on the

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[28] *See* http://law.ucla.edu/faculty/all-faculty-profiles/professors/Pages/richard-sander.aspx.

[29] *See* http://www.law.ucla.edu/_layouts/spsredirect.aspx?oldUrl=http%3A%2F%2Fwww%2Elaw%2Eucla%2Eedu%2Fsander. Sander's page at Project SEAPHE does not appear to have those sources either. *See* http://seaphe.org/richardsander/.

[30] *See, e.g.*, http://www2.law.ucla.edu/sander/Systemic/SA.htm; http://www2.law.ucla.edu/sander/Systemic/Misc.htm; http://www2.law.ucla.edu/sander/Systemic/errata/Errata.pdf.

[31] *See, e.g.*, http://www2.law.ucla.edu/sander/Systemic/Supp.htm; http://www2.law.ucla.edu/sander/Systemic/SuppCritic.htm; http://www2.law.ucla.edu/sander/Systemic/SuppMM.htm.

website of the University of Chicago Law School. Today, that law review, that law professor, and that law school are all still together – indeed, still in the same location – and yet still the sources are missing.

Then again, it is not just the law schools that have trouble keeping things up-to-date on the web. For example, one resourceful law professor – Michael Hoeflich of the University of Kansas School of Law – took matters into his own hands. Or, rather, he put some of the hard-to-find sources cited in his 2010 book *Legal Publishing in Antebellum America* into the hands of Scribd, an online document-sharing service.[32] The website Hoeflich set up to enable readers of his book to make connections between sources cited in his footnotes and the sources themselves on Scribd is still in operation.[33] Unfortunately, there is only one source available at Hoeflich's website now, and the Scribd link on that page takes the reader to this message: "Oops, page not found. Sorry, that page doesn't exist. Please check the link and try again." A search of Scribd for "Legal Publishing in Antebellum America" turns up nothing.[34]

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[32] *See* www.scribd.com.

[33] *See* www.antebellumlegalpublishing.org, *cited in, e.g.*, M.H. HOEFLICH, LEGAL PUBLISHING IN ANTEBELLUM AMERICA 37 n.38, 99 n.69, 100 n.71, 105 nn.1, 2 (2010); *see also id.* at xiii-xiv.

[34] Even a professor who makes the most complete of arrangements for online access to the hard-to-find sources she cites can run into problems. For example, Professor Lee Epstein – currently of the University of Southern California's Gould School of Law, formerly of the Northwestern University School of Law, and before that of the Washington University School of Law – runs her own server that moves when she moves. But she still has to keep the links to her accumulating body of work up-to-date. Email exchange between Ross Davies and Lee Epstein, Apr. 30, 2013 (on file with the author). *See, e.g.*, Lee Epstein and Andrew D. Martin, *Is the Roberts Court Especially Activist? A Study of Invalidating (and Upholding) Federal, State, and Local Laws*, 61 EMORY L.J. 737, 737 n.** (2012) ("The dataset we use in this Article is available at http://epstein.usc.edu/research/RobertsActivism.html."); Lee Epstein, William M. Landes, and Richard A. Posner, *Inferring the Winning Party in the Supreme Court from the Patter of Questioning at Oral Argument*, 39 J. LEGAL STUD. 433, 433 n. (2010) ("We have made a replication data set available at http://epstein.law.northwestern.edu/research/oralargument.html."); Lee Epstein and Jeffrey A. Segal, *Trumping the First Amendment?*, 21 WASH. U. J.L. & POL'Y 81, 81 n.* (2006) ("The project's web site (http://epstein.wustl.edu/research/FirstAmend.html) houses the database."); Lee Epstein, Jack Knight, and Andrew D. Martin, *The Supreme Court as a* Strategic *National Policymaker*, 50 Emory L.J. 583, 583 n.*** (2001) ("All data used in this Article are available at http://artsci.wustl.edu/~polisci/epstein/.").

Ah, the wild, wonderful Internet. The place where almost anything can be found, and absolutely anything can be lost.

C. The Legal Academy Problem

As should be clear by now, this is not a law review problem. Indeed it seems that relying on a law school to preserve online connections to hard-to-find sources cited in law review footnotes is as risky as relying on a law review to do it. And while authors themselves may be willing to help as long as they are alive, the one-at-a-time, one-on-one inquiry approach is inefficient and uncertain, and what usefulness it has is limited by the human lifespan. For similar reasons, as well as the limited lessons of experience, it would be unreasonable to expect all authors to establish and maintain permanent online homes for the hard-to-find sources they cite. This is, in other words, a general legal academy problem.

In addition, identifying who or what is in fact behind any one of the online law review and law school lacunae described here – or any of the others out there on the web – is not only beyond the scope of this article, but also probably impossible in many cases and fruitless in all.[35] For the frustrated reader who just wants to see a cited source, it really does not matter whether the cause of the source's absence from its home address on the web is authorial or institutional or fateful, the product of negligence or an intentional act or bad luck.

In the editorial offices of the *Green Bag*, our guess (call it a theory if you like) is that the main problem is truly prosaic. It is the entirely reasonable focus of all three interests – law reviews, law schools, and law professors – on the creation of new scholarly prose by current authors and editors in the here and now, not on the tiresome administrative preservation of online links to old sources cited in old scholarly prose produced in the past, even though access to those old sources will likely be valuable to scholars in the here and now and in the future. More specifically:

[35] And some of them may have been repaired by the time you read this article, or have been fine all along, with only the appearance of a problem as a result of the persistent Internet incompetence of the author.

For law reviews, inattention to preserving sources posted online in the past (even the recent past) is consistent with the publishing culture of which they are a part. Law review editors work themselves to frayed ends finishing up one issue of their journal while juggling the early and intermediate stages of the next couple of issues. By the time they've put the first issue to bed, deadlines are looming for the next one and they are moving on. They don't look back (except maybe to check errata or deal with a letter to the editors) because they don't have time and can only focus on so many things at once. And before they know it graduation is upon them and a new crew is sprinting onto the editorial hamster wheels. In fact, when this business of posting sources online is viewed from the perspective of a law review editor, it is remarkable than any sources ever get posted, much less maintained.

Analogously, law schools are engaged in a perennial struggle to support the current work of their current faculty members, and there is never enough support to go around. A law school might quite reasonably rely on faculty members to monitor the condition of their own sources housed on the school's website. After all, an administrator might reason (consciously or not), if an online source is not important enough to be occasionally checked on by the author who cited it, then it does not merit attention from the school either. Moreover, it may well be that to the extent that a professor tries to shoulder the burden personally (like a Hoeflich or an Epstein, for example) or a law review appears to be taking responsibility (for example, some of the data to which Sander cited is "on file with the *Stanford Law Review*,"[36] and much of it is "on file with author"[37]), that professor's home law school might be inclined to invest its limited resources elsewhere and rely on the professor or the law review to continue to bear that load. Thus, those who have shown some ability and willingness to fend for themselves likely will be left to do so, even if it turns out that they do need some help. And both rationales apply with greater force to former faculty. To get a sense of the priority schools are likely to place on the websites of former faculty,

[36] Sander, note 27 above, at 1980 n.34.
[37] *Id.* at 1968 n.13, 1985 n.54, 1986 n.55 & 1999 n.87.

imagine this: At a faculty meeting, the dean announces a gift from a grateful alum, and then calls for a vote on whether to allocate the new funds to either (a) support for current projects of current faculty or (b) evergreen preservation of the source-bearing websites of former faculty who have moved on to law schools further up the *U.S. News* food chain, or into retirement or the hereafter. Some predictions do not take a lot of imagination.

Law professors – like law review editors and, indeed, linked to them – are running on their own hamster wheels, performing their roles in the publishing process. They are cranking out their articles (and other forms of scholarship), responding to comments and requests from editors, and juggling several works at various stages of completion in much the same state of focus and distraction as editors working on multiple journal issues.

Furthermore, law professors are, in an important sense, in a much worse position than the others. Law reviews and law schools may operate under pressures and priorities that limit their capacity to steadily support online sources, but at least they are operating in their own bailiwicks, with some control over what goes onto the web and what stays there. Law professors lack even that level of control. Their writings – and thus, at least in the current environment, links to the associated sources – are scattered across some or all the schools in which they have worked and all the law reviews with which they have published. The only ones over which professors can expect to have any influence are their current employer and, to a very limited extent, the law reviews based in that school. The cost of monitoring for errors (that is, missing and broken links and lost postings) across all those places is likely to be high, and the difficulty of arranging corrections is likely to be even higher.

Consider again the cases of Barton, Sander, and Hoeflich. What is Barton supposed to do? Visit the *Florida Law Review* website to check on the status of his online sources every week or every month for the rest of his life? And do the same with every other law review to which he entrusts online sources? And if he does make such an investment, and he does find that sources are missing on some site, what recourse does he have? Sander's situation at UCLA may not be

as bleak, but what, really, can he do? First of all, it may well be that changes in overall university administration of its web presence make it practically impossible for the law school to accommodate him. (And thus the web pages described earlier in this article may constitute the best online source accessibility his law school can provide.) Second, even if it is possible, his school may have many higher priorities, and what can he do about that? Whine and complain? Go on strike to force his school to put his sources back where they were, at the URLs provided in his *Stanford Law Review* footnotes? And someday, by force of ambition or of nature or something else, Sander will be gone from UCLA. Then what happens? What can he do to convince UCLA to allocate faculty support resources to maintain in perpetuity on its website a bunch of online sources belonging to a former professor? Hoeflich's sources may be housed in a different environment, but he must deal with roughly the same monitoring costs and the same lack of recourse if things go wrong.

For authors, it boils down to this: In the current environment, keeping an eye on the entities that are supposed to be keeping hard-to-find sources cited in your work online is burdensome, impractical, and probably pointless. There is no way to make sure that those sources will stay where they belong. No way, that is, short of becoming your own permanent webmaster, which you may not be competent to do and probably do not want to do.

The current state of affairs – hard-to-find sources that ought to be online but aren't, law reviews and law schools that are demonstrably (at least for now) ill-suited to provide reliable service, and authors who are hamstrung by the very structure of legal academia and law review publishing – is nobody's fault. It is just the way things are.

What authors need is really quite simple: a convenient place where they can (a) house hard-to-find sources they cite in their footnotes, (b) visit once in a while without too much difficulty to confirm that sources are where they should be, and (c) get things fixed if need be.

The *Green Bag* may not be perfectly suited to satisfy that need, but it may be better situated than any of the current players. Anyway, we are going to give it a try.

III.
THE "AVAILABLE AT" PROJECT

The "Available at" project is a variation on the Currie/Volokh proposals, refocused (a) mostly away from law reviews and mostly toward authors, and (b) toward sources cited in already-published articles as well as those cited in new articles:

> Many authors of law review articles cite documents, datasets, and other materials that haven't been published or were published long ago and are now hard to find. We suggest a new norm: authors who cite such materials should put them online, and law reviews should include citations to those online sources in footnotes. Authors are in the best position to determine: (a) which sources are useful enough to merit the investment in online posting and maintenance; and (b) which should not be posted due to privacy or copyright concerns. Authors are also in the best position to prepare true and useable electronic copies of sources, and can easily do so – every law school has a scanner that can easily scan in even a long document. Authors are not, however, best-suited to do the actual posting and maintenance, and for now it seems law reviews and law schools are not either. So, authors should provide those sources to someone who is ready to do that work. The *Green Bag* volunteers to do it (or try to) by posting sources on a freely accessible and easily searchable website (www.availableat.org) and providing the most basic of website management until someone better comes along to take over.
>
> – and –
>
> This should not be limited to new citations. There are many dead old links out there, and many sources that were not put online when an article was published but still ought to be.

The www.availableat.org site is up now. The *Green Bag* is ready to receive submissions of sources, whether cited in new articles or in old ones. All an author must do is email us a completed "Permission and Conditions Form" with each source. The form is on the page after this one, and is also available at www.availableat.org.

PERMISSION AND CONDITIONS FORM

Instructions: (1) complete this form; (2) email it to editors@greenbag.org with the source you want the *Green Bag* to post on the "Available at" website (www.availableat.org).

Promises/permissions: I (check one) __ hold the copyright in the source described in and accompanying this form, or __ guarantee it is in the public domain. I have the authority to permit (and do permit) the *Green Bag* to post the source (and this form) on www.availableat.org and any other sites, no strings attached, and to transfer all this to anyone else who assumes responsibility for carrying on the "Available at" project.

Your name (please print): _____

Your signature: _____ Date: __/__/__

Your email for reader queries: _____

Full citation to the attached source: _____

_____

_____

_____

Conditions attached to its use: _____

_____

_____

Full citation to your published work in which you cite the attached source:

_____

_____

_____

If you have more sources, please complete another form for each one.

A. An Almost-Vast Amount of Work

If this proposal looks disturbingly like work for authors, that is because it is. But not much of the work is for authors. All they need to do is prepare and submit their sources with copies of the little form on the previous page, and then visit the www.availableat.org website occasionally to check on the condition of their sources. The bulk of the work, which could approach near-vastness if this idea catches on, will fall on the *Green Bag*, manager of the website.

For authors who create and own their own sources – empirical scholars like Barton with his datasets or Picker with his simulations, for example[38] – this is going to be easy. Just fill out a form, attach a source, and send them in. The same can be said for authors who work with old public domain documents and are expert preparers of digital copies – Hoeflich with his pre-Civil War law pamphlets, for example. Indeed, he is making arrangements to post his lost-on-the-web *Legal Publishing in Antebellum America* sources on www.available at.org this summer.[39] It is a nice way to start this project.

For an author who cites sources that require a bit more work – whether it be settling questions about copyright and privacy, or preparing good digital copies – the only question is whether the author believes that making the sources available online is worth the effort. Long experience at the *Green Bag* teaches that authors tend to be indiscriminately enthusiastic about having a law review editor track down and duplicate a document, or research and secure a copyright, but they are not so gung-ho about doing that work or bearing those costs themselves. Unless, that is, they believe there is real value in reproducing a particular source. Then they are willing to shoulder responsibility. That perfectly understandable outlook is the perfect sorting mechanism for the "Available at" project. The *Green Bag* will only post sources that authors judge to be genuinely important, because we will only post sources authors are willing to prepare for posting. Of course, there is no requirement that an au-

[38] Or artists like Professor David Carlson, who create their own illustrations. *See, e.g.*, David Gray Carlson, *Tales of the Unforeseen*, 4 GREEN BAG 2D 335 (2001).

[39] Email from Michael Hoeflich to Ross Davies, Apr. 30, 2013.

thor personally break a sweat. Nothing prevents authors from employing subordinates or contractors to do legwork. We are confident they will do so when they believe it is worth it.

Even this simple system will have problems. We will need to tinker, and we will not be perfect administrators. Website management at the *Green Bag* is characterized more by enthusiasm and energy than technical savvy or design genius. Just take a look at www.greenbag.org and our other sites. But we will do our best. Because we are easy to monitor (go to www.availableat.org, scroll and click around, checking on the things that matter to you, and then email editors@greenbag.org about any problems you spot), we have good reason to expect that the people with the strongest interests in seeing this site run well – authors, law review editors, and readers – will help us catch and fix problems. And we will keep things simple by dealing only with authors who are reasonable collaborators. Most will be, we expect, but perhaps not all.

B. The Reasonable Author

To get a sense of what might be reasonable or unreasonable in the context of the "Available at" project, read the light-hearted scenarios below. They are caricatures of authorial and editorial quirks but they do reflect the spirit of the project: We seek to work with conscientious and congenial authors to make hard-to-find sources that they cite in their scholarship available to the readers who are consuming that scholarship. And we seek to do this work as easily as possible, and on friendly terms with everyone.

Scenario 1

> *Author:* Dear Green Bag, attached please find my very important article by my very important self containing many valuable and hard-to-find sources. Please post them on your wonderful new website.
>
> *Green Bag:* Dear Author, thank you very much for your interest in our website, and for your kind words. Please follow the process outlined in the little "Permission and Conditions Form" available at www.availableat.org.

Author: Dear Green Bag, here is a copy of your form. On it I have granted you permission to post any or all of the many sources cited in my article.

Green Bag: Dear Author, thank you again for your interest. Alas, the way this works is that you must identify each source individually (including its status as copyrighted by you or in the public domain), and then provide us with a suitable electronic copy to post. The idea is that you are in the best position to do this work intelligently and efficiently.

Author: Dear Green Bag, why don't you just quickly and easily go through the article and give me a list of the sources that should go up on your website, and then let me know what you will need from me for each one? Then I will be able to get back to you. You can get copies of the sources from the law review in which my article appears, or from one of my assistants.

Green Bag: Dear Author, thank you again for your interest. You are the one who must tell us which sources belong on our website. And it is you who must provide us with good electronic copies of those sources.

Administrative or Research Assistant to the Author: Dear Green Bag, the Author has tasked me with getting from you your requirements for posting of the Author's sources on your website. If you send me your requirements I will provide you with the information you require and copies of the sources, and I will work with you to complete this project.

Green Bag: Dear Assistant, thank you for your inquiry. Please ask the Author to follow the process in the little "Permission and Conditions Form" available at www.availableat.org.

Author: #*!&@$ petty bureaucrats![40]

. . . and, sadly, none of those valuable and hard-to-find sources ends up online.

[40] The standard epithet when law professors are compelled to choose between doing work they do not want to do and not getting what they want. Petty bureaucrats bear full responsibility, for example, for all unwelcome adjustments in teaching responsibilities and all unpleasant committee assignments.

Scenario 2

Law Review Editor: Dear Green Bag, we are publishing a very important article by a very important Author who has asked that the following valuable and hard-to-find sources be posted on your nifty new website so that we can cite to them. Please do post them.

Green Bag: Dear Editor, thank you very much for your interest, and for your kind words. The Author will need to follow the process in the "Permission and Conditions Form" available at www.availableat.org. [see Scenario 1 for the rest of the story]

Scenario 3

Author: Dear Green Bag, attached please find a completed "Permission and Conditions Form" and a clean, compact, convenient electronic copy of a Mickey Mouse cartoon feature that I cite in my important article, *Free Mickey!*

Green Bag: Dear Author, thank you for your interest. Alas, we do not believe your claim that you hold the copyright to the Mickey Mouse cartoon feature.

Author: Dear Green Bag, attached please find a revised "Permission and Conditions Form" and a clean, compact, convenient electronic copy of the Mickey Mouse cartoon feature.

Green Bag: Dear Author, thank you for your interest. Alas, we do not believe your claim that the Mickey Mouse cartoon feature is in the public domain.

Author: Dear Green Bag, all information should be free. That is the great liberating power of the Internet. This is a fight that must be fought for the benefit of all humanity. Do this thing and I will cover any legal expenses you may incur. I promise.

Green Bag: No.

Author: #*!&@$ bureaucratic toadies to the 1%!

. . . and, fortunately, the *Green Bag* stays out of court.

Scenario 4

Author: Dear Green Bag, attached please find a completed "Permission and Conditions Form" and a clean, compact, convenient electronic copy of my dataset that I cite in my new article. You may post it on your website, subject to the attached lengthy "you need not pay but you must obey" Internet publishing license.

Green Bag: Dear Author, thank you for your interest. Alas, we cannot afford to get tangled up in even the beginnings of such a web of licensing requirements. If you want people who pull your source from our site to comply with a license, you should put that in the "Conditions" section of the form.

Author: Dear Green Bag, but all the cool, cutting-edge scholars impose "you need not pay but you must obey" licenses on everyone they can.

Green Bag: Dear Author, thank you again. Licenses can indeed be valuable tools, and we would like to think that scholars and other people who use them know their terms and purposes and deploy them accordingly. But we are not cool, we do not want to be imposed upon, and we do not think a license applicable to us is appropriate in this context. (A friendly cautionary note: "you need not pay but you must obey" licenses may be the height of academic hipness now, but for the indiscriminate and extravagant licensor they could eventually turn out to be like a politically incorrect tattoo – nothing to be proud of and hard to get rid of. Just a thought.) If you feel that you cannot post your source on our site unless we submit to a license, we will have to turn you down. No hard feelings, of course.

Author: Dear Green Bag, fair enough. I'll abandon the demand for a license applicable to you. I value making my source accessible to my readers more than I desire to make an academic fashion statement at your expense or exert a control over you that I really don't care about anyway.

. . . and the Author and the *Green Bag* live happily ever after.

Scenario 5

Author: Dear Green Bag, attached please find clean, compact, convenient electronic copies of 117 hard-to-find sources – all of which I intend to cite in forthcoming articles – and a completed "Permission and Conditions Form" for each one.

Green Bag: Dear Author, thank you very much for your interest. For now, at least, our "Available at" service is limited to posting such sources once they are cited in published (or about-to-be-published) law review articles.

Author: Dear Green Bag, but it would be so much more convenient for me if I could simply shift onto you the burden of maintaining a complete collection of my hard-to-find sources.

Green Bag: Dear Author, we agree that it would be more convenient for you, but it would be less convenient for us, and right now we have our hands full just trying to make the basic "Available at" plan work. So, we are going to have to insist that you get back to us when you have a published article (or one that is about to be published) and a set of hard-to-find sources cited in it.

Author: Dear Green Bag, okay, will do. But you have to admit it was a good idea and worth a try.

Green Bag: Dear Author, yes, yes, we suppose so. Best wishes for success placing your articles.

. . . and the Author and the *Green Bag* meet again on many occasions in the future, on friendly and unlicensed terms.

Anyone who has been a law review editor can probably come up with additional scenarios.

C. The Available Future

Like any start-up, the "Available at" project is more likely to fail than to succeed. But at least we are starting out knowing that we are on roughly the same page as a couple of respectable scholars (Currie and Volokh) with experience and success in the scholarly law publishing business of which www.availableat.org is to be a part. And

while those two chose not to act on their ideas, we would like to think that they chose not to act because it looked like too darn much work – too big of a commitment – and not because it looked like needless work.

In any case, the work is getting done now. Here is a short and probably incomplete list of what we hope will happen with the "Available at" project:

1. We will do a good job of running the www.availableat.org website, and we will manage to perform that work without being overcome by a vast amount of it.

2. The site will be so user-friendly and useful that we will soon have posted online dozens or hundreds or thousands – a veritable vast collection – of hard-to-find sources cited in old and new articles.

3. The site will become so useful and respectable that some greater entity than the *Green Bag* – maybe an existing organization such as the AALS, or a new one such as the consortium of law reviews proposed by Volokh in his *Pocket Part* article,[41] or Westlaw, or a single fine law school or law review – will swoop down and either steal the "Available at" idea or (more politely) offer to take over our site and run it better. That is why the form on page 18 includes this line: "and to transfer all this to anyone else who assumes responsibility for carrying on the 'Available at' project." A transfer to a superior administrator will be easier if there is no doubt about permissions. That is also the reason for setting this project up on a website separate from the *Green Bag*'s – to make for a simpler lock-stock-and-barrel transfer if that turns out to be the right thing to do.

4. Or perhaps the *Green Bag* will just run the site forever. After all, its parent, The Green Bag, Inc., is a corporation, with all the powers of elasticity and immortality (and other things) included in or implied by that status.[42]

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[41] *See* Volokh, note 4 above, at 5.

[42] This is not a *Citizens United* a joke. The *Green Bag* may have a sense of humor, but the The Green Bag, Inc., being a corporation, does not. *Cf. Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010); *Federal Communications Commission v. AT&T Inc.*, 131 S.Ct. 1177, 1185 (2011).

5. And if all of this works out well, and there are additional related services that ought to be added to the "Available at" project, we will add them if we can.

It is also quite possible that other developments in the web world will overtake this project. Some established online archiving operation – CrossRef,[43] the Internet Archive,[44] Scribd,[45] or YouTube,[46] for example – might develop in a direction that makes it a superior home for hard-to-find sources of the sorts dealt with here. Or something new and completely different could emerge. If so, so be it.

But for now, www.availableat.org looks to us like something that could be helpful. And so we're on it. Give it a try.

[43] *See* www.crossref.org.
[44] *See* www.archive.org.
[45] *See* www.scribd.com.
[46] *See* www.youtube.com.

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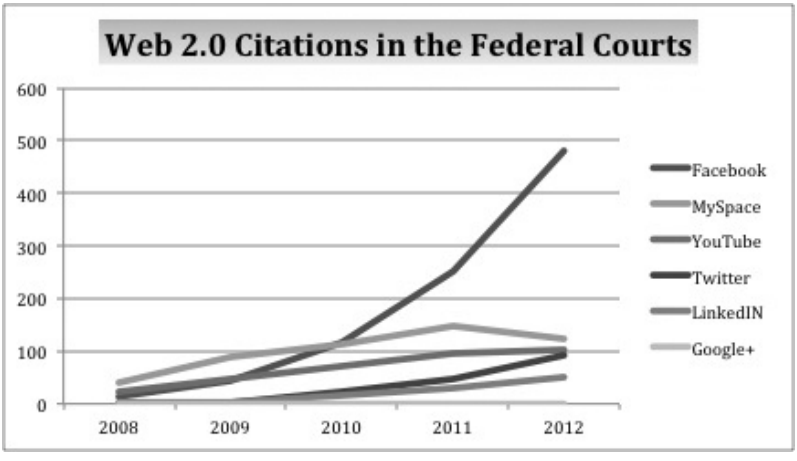

Journal of Legal Metrics

About the cover

Web 2.0 Citations in the Federal Courts

By Adam Aft, Tom Cummins, and Joshua Cumby. For the whole story see "Web 2.0 Citations in the Federal Courts," beginning on page 31 of this issue.

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WEB 2.0 CITATIONS IN THE FEDERAL COURTS

Adam Aft, Tom Cummins & Joshua Cumby[†]

A picture is worth a thousand words. But spelling things out also has its uses. The snapshot of federal court citations to Web 2.0 sites on the cover of this issue of the *Journal of Legal Metrics*, for example, merits a few words. (By Web 2.0, we mean websites that facilitate user-generated content.[1])

First, our method. It was simple. Or so we thought when we began the data collection. We searched the Westlaw "ALLFEDS" database for each of the terms listed above and the results are displayed in the graph at the front of this issue (and in the Appendix below). Follow-up searches of WestlawNext's "All Federal" database using the same terms unexpectedly yielded different results depending on who the subscriber/end user was.[2] Searches using an academic subscription to WestlawNext yielded a number of false positives; other subscribers' results were "clean." We've gone through and scrubbed the results and the list of false positives appears in the Appendix.[3]

[†] Adam Aft is a co-Editor-in-Chief of the *Journal of Legal Metrics*. Tom Cummins is a senior editor on the *Journal of Legal Metrics*. Joshua Cumby is a senior editor of the *Journal of Legal Metrics* and a visiting assistant professor of law at George Mason University.

[1] *See generally* Edward Lee, *Warming Up to User-Generated Content*, 2008 U. ILL. L. REV. 1459; *but see* Note, *Badging: Section 230 Immunity in A Web 2.0 World*, 123 HARV. L. REV. 981, 981 (2010) (observing that "[t]he concept of Web 2.0 is 'a bit of a muddle'" (quoting Tim O'Reilly, *What Is Web 2.0: Design Patterns and Business Models for the Next Generation of Software*, O'REILLY (Sept. 30, 2005), *available at* oreilly.com/lpt/a/6228)).

[2] For concrete examples from our data set, see the Appendix.

[3] What explains this phenomenon? Arbitrary algorithmic adjustment? Or is it deliberate? Stay tuned, faithful reader.

Additionally, our goal was not to create a comprehensive examination of all the well known websites cited in federal court[4] but an illustration of trends over the past five years. And there, we think, the graph speaks for itself.

Facebook, Twitter, and LinkedIN citations are growing exponentially – cites to these sites have roughly doubled year-over-year since 2010.[5] Eventually, each may go the way of MySpace, whose wave appears to have crested.[6] But whatever befalls these particular websites, Web 2.0 appears to be in federal court for the foreseeable future. Privacy,[7] free expression,[8] intellectual property,[9] and criminal law;[10] tech giant versus tech giant[11] and user versus user – Web 2.0 continues to present fundamental and novel issues.

Finally, while we were looking into citations to Web 2.0 websites, we also looked at three tried-and-true Web 1.0 standbys: Google, Yahoo, and AOL. The results may not be surprising to those who follow the financial pages,[12] but they are still interesting enough to share.

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[4] Bittorrent, for example, was excluded from our data set, although it had 271 federal court citations in 2012. Wikipedia similarly was excluded, although it had 107 cites in 2012.

[5] *See id*.

[6] *See generally*, Felix Gillette, *The Rise and Inglorious Fall of Myspace*, BLOOMBERG BUSINESSWEEK, June 22, 2011, at 52, *available at* www.businessweek.com/magazine/content/11_27/b4235053917570.htm.

[7] *See*, *e.g.*, Mark Burdon, *Privacy Invasive Geo-Mashups: Privacy 2.0 and the Limits of First Generation Information Privacy Laws*, 2010 U. ILL. J.L. TECH. & POL'Y 1.

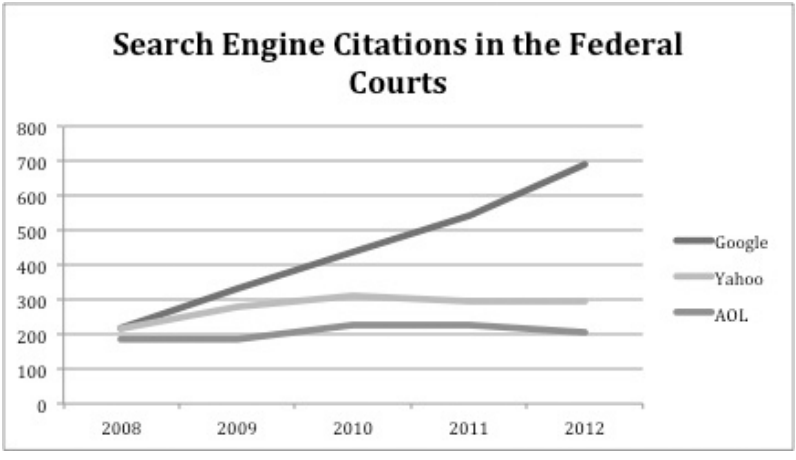
[8] *See*, *e.g.*, Kara D. Williams, Comment, *Public Schools vs. MySpace & Facebook: The Newest Challenge to Student Speech Rights*, 76 U. CIN. L. REV. 707 (2008).

[9] *See*, *e.g.*, Matthew Sag, *Predicting Fair Use*, 73 OHIO ST. L.J. 47 (2012).

[10] *See*, *e.g.*, Mary Anne Franks, *Unwilling Avatars: Idealism and Discrimination in Cyberspace*, 20 COLUM. J. GENDER & L. 224, 238-39 (2011); Michael J. Henzey, *Going on the Offensive: A Comprehensive Overview of Internet Child Pornography Distribution and Aggressive Legal Action*, 11 APPALACHIAN J.L. 1, 29-30 (2011).

[11] *See*, *e.g.*, Joseph Turow, *From: Concurring Opinions - The Disconnect Between What People Say and Do About Privacy*, 2 J.L.: PERIODICAL LABORATORY OF LEG. SCHOLARSHIP (1 THE POST) 479, 482 n.2 (2012) (citing Byron Acohido, Scott Martin, and Jon Swartz, "Consumers in the Middle of Google-Facebook Battle," USA TODAY, January 26, 2012, *available at* www.usatoday.com/tech/news/story/2012-01-25/google-facebook-competition/52796502/1).

[12] Alternatively, for an illustration of why Google continues its year-over-year growth while its peers do not, one need only . . . well, what site would you go to to start your search?


Search Engine Citations in the Federal Courts
800
700
600
500
400
300
200
100
0
2008
2009
2010
2011
2012
Google
Yahoo
AOL

APPENDIX

Web 2.0 Citations in Federal Court Cases					
	2008	2009	2010	2011	2012
Facebook	14	44	118	252	480
MySpace	39	88	113	147	125
YouTube	23	47	70	95	103
Twitter	0	4	23	46	93
LinkedIN	3	3	15	30	50
Google+	0	0	0	0	0

Search Engine Citations in Federal Court Cases					
	2008	2009	2010	2011	2012
Google	218	332	435	544	692
Yahoo	215	281	313	293	297
AOL	186	186	226	225	205

Westlaw Search Discrepancies[13]

Twitter

Twitter 2008: 0 (Academic subscription also has 0)
Twitter 2009: 4 (Academic has 5 because of false positive – *Lucent*[14])
Twitter 2010: 23 (Academic has 24 because of false positive – *Quon*[15])
Twitter 2011: 46 (Academic has 48 because of two false positives – *Patel*[16] and *Offenback*[17])
Twitter 2012: 93 (Academic has 94 because of false positive – *Glazer*[18])

[13] *See supra* notes 2-3 and accompanying text.
[14] Lucent Technologies, Inc. v. Gateway, Inc., 580 F.3d 1301 (Fed. Cir. 2009).
[15] City of Ontario, Cal. v. Quon, 130 S. Ct. 2619 (2010).
[16] Patel v. Havana Bar, Rest. & Catering, CIV.A. 10-1383, 2011 WL 6029983 (E.D. Pa. Dec. 5, 2011).
[17] Offenback v. L.M. Bowman, Inc., 1:10-CV-1789, 2011 WL 2491371 (M.D. Pa. June 22, 2011).
[18] Glazer v. Fireman's Fund Ins. Co., 11 CIV. 4374 PGG FM, 2012 WL 1197167 (S.D.N.Y. Apr. 5, 2012).

Myspace

Myspace 2008: 39 (Academic has 40 because of false positive – *Chicago Lawyers*[19])
Myspace 2009: 88 (Academic also has 88)
Myspace 2010: 113 (Academic also has 113)
Myspace 2011: 147 (Academic has 148 because of false positive – *Black*[20])
Myspace 2012: 125 (Academic also has 125)

Youtube[21]

"Youtube" 2008: 23 (Academic has 24 because of false positive – *UMG Recordings*[22]). "You Tube" adds 2; so total: 25.
"Youtube" 2009: 47 (Academic has 48 because of false positive – *Iqbal*[23]). "You Tube" adds 3; so total: 50.
"Youtube" 2010: 70 (Academic also has 70). "You Tube" adds 4; so total: 74.
"Youtube" 2011: 95 (Academic has 97 because of two false positives – *Maremont*[24] and *Facebook*[25]). "You Tube" adds 7; so total: 102.
"Youtube" 2012: 103 (Academic has 104 because of false positive – *Cambridge University*[26]). "You Tube" adds 11; so total: 113.

LinkedIN

LinkedIN 2008: 3 (Academic also has 3)
LinkedIN 2009: 3 (Academic also has 3)
LinkedIN 2010: 15 (Academic also has 15)
LinkedIN 2011: 30 (Academic has 32 because of two false positives – *Maremont*[27] and *In Re Facebook Privacy Litigation*[28])
LinkedIN 2012: 50 (Academic has 51 because of false positive – *In re iPhone Application Litigation*[29])

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[19] Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666 (7th Cir. 2008).
[20] Black v. Google, Inc., 457 F. App'x 622 (9th Cir. 2011).
[21] We also include "You Tube" in the data set, which explains many of the discrepancies.
[22] UMG Recordings, Inc. v. Veoh Networks, Inc., 620 F. Supp. 2d 1081 (C.D. Cal. 2008).
[23] Ashcroft v. Iqbal, 556 U.S. 662 (2009).
[24] Maremont v. Susan Fredman Design Grp., Ltd., 10 C 7811, 2011 WL 6101949 (N.D. Ill. Dec. 7, 2011).
[25] Facebook, Inc. v. Teachbook.com LLC, 819 F. Supp. 2d 764 (N.D. Ill. 2011).
[26] Cambridge Univ. Press v. Becker, 863 F. Supp. 2d 1190 (N.D. Ga. 2012).
[27] Maremont v. Susan Fredman Design Grp., Ltd., 10 C 7811, 2011 WL 6101949 (N.D. Ill. Dec. 7, 2011).
[28] In re Facebook Privacy Litig., 791 F. Supp. 2d 705 (N.D. Cal. 2011).
[29] In re iPhone Application Litig., 844 F. Supp. 2d 1040 (N.D. Cal. 2012).

Google+

Not applicable.

Facebook

Facebook 2008: 14 (Academic also has 14)
Facebook 2009: 44 (Academic also has 44)
Facebook 2010: 118 (Academic also has 118)
Facebook 2011: 252 (Academic also has 252)
Facebook 2012: 480 (Academic also has 480)

Google

Google 2008: 218 (Academic has 219 because of false positive – *Jacobsen*[30])
Google 2009: 332 (Academic also has 332)
Google 2010: 435 (Academic also has 435)
Google 2011: 545 (Academic also has 545)
Google 2012: 692 (Academic also has 695)

Yahoo

Yahoo 2008: 215 (Academic also has 215)
Yahoo 2009: 281 (Academic also has 281)
Yahoo 2010: 313 (Academic has 314 because of false positive – *TradeComet.com*[31])
Yahoo 2011: 293 (Academic also has 293)
Yahoo 2012: 297 (Academic also has 297)

AOL

AOL 2008: 187 (Academic also has 187)
AOL 2009: 186 (Academic also has 186)
AOL 2010: 226 (Academic has 227 because of false positive – *WiAV Solutions*[32])
AOL 2011: 225 (Academic also has 225)

# # #

[30] Jacobsen v. Katzer, 535 F.3d 1373 (Fed. Cir. 2008).
[31] TradeComet.com LLC v. Google, Inc., 693 F. Supp. 2d 370 (S.D.N.Y. 2010).
[32] WiAV Solutions LLC v. Motorola, Inc., 631 F.3d 1257 (Fed. Cir. 2010).

APPELLATE REVIEW II

OCTOBER TERM 2011

Tom Cummins & Adam Aft[†]

Twenty percent.[1] In reviewing the judgments of the federal courts of appeals during the October Term 2011 ("OT11"), the Supreme Court affirmed only 20 percent of the time. The year before, only 28 percent.[2] The circuit courts, it would appear, have a lousy batting average. But appearances can be deceiving.

As we introduced last year, a different picture emerges when the focus is placed on the "parallel affirmance rate" – a broader metric of circuit court performance based on analyzing the Court's resolutions of circuit splits.[3] (Since we published our first ranking this type of appellate review has gained additional attention.[4]) Last year, we reviewed the most recent term for which this data was available, the October Term 2010 ("OT10"). This year, we update the stats for the most recent term, OT11.

Just as the Supreme Court benefits from the development of issues in the federal courts of appeals,[5] we benefit from watching the

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[1] *See* SCOTUSblog, Stat Pack for October Term 2011 (September 25, 2012), at sblog.s3.amazonaws.com/wp-content/uploads/2013/03/SCOTUSblog_Stat_Pack_OT11_Updated.pdf ("SCOTUSblog Stat Pack").

[2] *Id.*

[3] *See* Tom Cummins & Adam Aft, *Appellate Review*, 2 J.L.: PERIODICAL LABORATORY OF LEG. SCHOLARSHIP (1 J. LEGAL METRICS) 59 (2012).

[4] *See, e.g.*, John S. Summers & Michael J. Newman, *Towards a Better Measure and Understanding of U.S. Supreme Court Review of Courts of Appeals Decisions*, 80 U.S.L.W. 393 (2011); *see generally* CIRCUIT SPLITS, www.circuitsplits.com (last visited Apr. 1, 2013).

[5] *See, e.g.*, RICHARD H. FALLON, JR., ET AL., HART AND WECHESLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1476 (6th ed. 2009) (citing RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 163 (1985)). *But see id.* at 1477 (citing opposite viewpoints that the argument in favor of letting issues develop in the federal courts of appeal are "an inflated excuse for failing to take steps sorely needed to restore the health of our system of national law").

resolution in the Court itself. For OT10, we observed a marked difference between the affirmance rate on "primary review"[6] (28 percent) versus "parallel review"[7] (64 percent). We also observed that the majority-circuit approach was adopted 90 percent of the time.[8] From this, we concluded that the courts of appeals are getting the hard questions (i.e., those that split the circuits) right more often than not.[9]

This year, we again see that on parallel review the circuits' affirmance rate more than doubles. As noted, the judgments of the circuit courts were affirmed just 20 percent of the time on primary review. On parallel review, however, the affirmance rate climbs to 44 percent. And the Court followed the majority-circuit approach 68 percent of the time.[10]

Still, there was a year-over-year drop in both the primary and parallel review affirmance rate – with the latter metric falling below 50 percent. In short, the Court decided that for the circuit split decisions it reviewed, the circuits got it wrong more often than not. What happened? One explanation, we suggest, can be found in the wisdom of Yogi Berra,[11] who observed: "Slump? I ain't in no

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[6] With "primary review," we refer to the Court's evaluation of the particular decision on which the writ of certiorari was issued.

[7] With "parallel review," we refer to the Court's evaluation of not only the particular decision on which the writ of certiorari was issued, but also the parallel, conflicting decisions on the issue that are evaluated by the Court in resolving the circuit split.

[8] *See* Cummins & Aft, *supra* note 3, app. tbl. 3.

[9] As Justice Jackson once observed of the Supreme Court, "We are not final because we are infallible, but we are infallible only because we are final." Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

[10] As we did last year, we count the circuits like base runners. So ties (even splits) go to the runners, and are rolled into the "majority approach" calculus. For the curious, of the 22 cases in our sample set this year, there were 5 ties. Seven times the Court affirmed the minority approach. The majority won the remainder.

[11] To understand our seemingly gratuitous baseball references please see Adam Aft, Alex B. Mitchell, & Craig D. Rust, *An Introduction to the Journal of Legal Metrics*, 2 J.L.: PERIODICAL LABORATORY OF LEG. SCHOLARSHIP (1 J. LEGAL METRICS) 15 (2012); *see also* Ross E. Davies, Craig D. Rust, & Adam Aft, *Supreme Court Sluggers: Introducing the Justices Scalia, Fortas, and Goldberg Trading Cards*, 2 J.L.: PERIODICAL LABORATORY OF LEG. SCHOLARSHIP (1 J. LEGAL METRICS) 155 (2012); Ross E. Davies, Craig D. Rust, & Adam Aft, *Justices at Work, or Not*, 14 GREEN BAG 2D 217 (2011); Ross E. Davies, Craig D. Rust, & Adam Aft, *Supreme Court Sluggers: Justice John Paul Stevens is No Stephen J. Field*, 13 GREEN BAG 2D 465 (2010); Ross E. Davies & Craig D. Rust, *Supreme Court Sluggers: Behind the Numbers*, 13 GREEN BAG 2D 213

slump. . . . I just ain't hitting."[12] More formally, the study of statistics requires an adequate sample size for reliable results.[13] Which brings us to our first caveat. For all the findings presented here, we caution that we require a few more years of data before we will call our sample size sufficient to support firm conclusions.

Now, however, we are pleased to present *Appellate Review II*. First, we review the data from OT11, including the much anticipated circuit scorecard. In addition to counting how the circuits fared in the circuit split resolutions, we again compile data on how the Court resolved the splits (from unanimous opinions through 5-4 decisions). We also track the depths of the splits on which the Court granted cert (from splits between only two of the courts, or a 1-1 split, to splits between almost all the circuits, or 6-5 splits[14]). And, for the first time this year, we track the subject matter of the splits (spoiler: expect a lot of statutory interpretation). Finally, we highlight some of the granularity we are hoping to develop in the data for the future *Appellate Review*.

I. THE DATA

A. The Method

We generally used the same method to gather the data that we used last year. Our circuit split data starts with the Supreme Court Database.[15] From there, we eliminated cases that did not explicitly reference or did not resolve a circuit split. Also, we excluded the Federal Circuit for the reasons we noted last year.[16]

(2010).

[12] We of course kid. After all, if (as we expect) the average over time is close to 50 percent, then all of the courts of appeal deserve a spot in the Hall of Fame; hitting .500 is pretty impressive.

[13] Frankly, we do not think the drop is all that surprising. Averaged over the two years we have tracked this statistic, the parallel review rate is 52 percent, which is consistent with Hansford's prior findings. *See* Cummins & Aft, *supra* n. 3 (discussing Eric Hansford, *Measuring the Effects of Specialization with Circuit Split Resolutions*, 63 STAN. L. REV. 1145 (2011)).

[14] Yes, attentive reader, 6-5 was the deepest split resolved in OT11. *See infra* tbl. 2. It came in *Reynolds v. United States*, 132 S. Ct. 975 (2012).

[15] *The Supreme Court Database*, scdb.wustl.edu (last visited Apr. 1, 2013).

[16] Cummins & Aft, *supra* note 3, at 67.

B. The Scorecard

Without further ado, this year's circuit scorecard:

October Term 2011 Parallel Review Affirmance Rates		
Rank	Court of Appeal	Rate
1	Fourth	78%
2	Eleventh	56%
3	D.C., Sixth	50%
5	Ninth	44%
6	Second, Third	40%
8	Tenth	38%
9	Seventh	36%
10	First, Fifth	33%
12	Eighth	25%

A surprising result on this scorecard is the movement among the circuits. OT10's top three circuits, for example, all fall to the bottom third of the OT11 rankings. Specifically, the Tenth Circuit, which led the rankings last year with a 100 percent affirmance rate, falls to eighth place. OT10's second place finisher, the Fifth Circuit, falls to a two-way tie for tenth place. And there it meets last year's third place finisher, the First Circuit.

Conversely, two of last year's laggards make substantial gains. The D.C. Circuit, which placed twelfth last year, climbs to a two-way tie for third place with the Sixth Circuit, which itself was near the bottom of the rankings last year (placing tenth).

While there was movement at both ends of the rankings, there was also consistency – both at the poles and in the middle. The Ninth Circuit held steady in the middle of the pack (indeed, climbing a couple of spots from seventh to fifth), again suggesting that its reputation as an outlier is not merited in all respects. The Second and Seventh Circuits likewise held their positions (maintaining their respective ranks of sixth and ninth places). The Eighth Circuit continued its losing streak (falling from eleventh to twelfth place). And the Fourth continued its winning streak, rising from third place to first.

We are a long way from concluding that the Fourth Circuit is the Yankees, however, or that the Eighth Circuit is the Cubs. We need

more data. But, consistent with prior observations we again find that the rankings "do not seem explicable on 'political' grounds."[17] For example, those circuits commonly believed to be the most "liberal"[18] (the Second, Third, and Ninth) are squarely in the middle of the pack.

C. The View from One First

Though the Supreme Court has the last word,[19] its address is 1 First Street, NE, in Washington, D.C. In OT11, how the Court resolved the splits, like the circuit court rankings, showed both continuity and change from OT10.

First, consistent with last year's findings, [20] circuit splits were not particularly more likely to divide the Court than the other types of issues. For example, of all the cases that the Court decided by a signed opinion during OT11,[21] 45 percent were unanimous.[22] Of the cases involving circuit splits, 40 percent were decided by a unanimous opinion, and another 9 percent were decided over a lone dissent. Thus, simply because different circuits reached opposite conclusions did not make it markedly more likely that One First would do so in OT11.[23]

At the other end of the spectrum, 20 percent of the Court's signed opinions during OT11 were 5-4 decisions, the same as in OT10.[24] Yet in OT10 there was not a single 5-4 opinion that explicitly addressed a circuit split. [25] In OT11, in contrast, 27 percent of the cases on parallel review were resolved on a 5-4 vote.

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[17] Cummins & Aft, *supra* note 3, at 70 (quoting Hansford, *supra*, at 1164).
[18] *See* Hansford, *supra* note 13, at 1164 (collecting sources).
[19] See *Brown*, 344 U.S. at 540 (Jackson, J. concurring).
[20] During the October Term 2010, the Court rendered a unanimous judgment in 48 percent of its merits opinions. On parallel review, the Court rendered a unanimous judgment at almost precisely the same rate, 50 percent of the time. *See* Cummins & Aft, *supra* note 3, at 70.
[21] The Court decided 11 additional cases by summary reversal. *See* SCOTUSblog Stat Pack, *supra* note 1.
[22] *See* SCOTUSblog Stat Pack, *supra* note 1.
[23] This is largely consistent with what we found for OT10, where the Court resolved 70 percent of the cases by an overwhelming majority (either unanimously or over a lone dissent).
[24] *See* Cummins & Aft, *supra* note 3, at 70.
[25] *Id.* at 70.

Cases Resulting in a 5-4 Court Vote Split and Corresponding Circuit Split	
Case	Circuit Split
Florence (5-4)	3 to 8
Hall (5-4)	2 to 1
Ramah (5-4)	1 to 1
Christopher (5-4)	1 to 1
Dorsey (5-4)	3 to 3
NFIB (5-4)	2 to 1

Frankly, we're uncertain what this observation means. Initially, we hypothesized that perhaps the 5-4 splits would only occur in shallow splits. The data did not support this hypothesis – at least not fully.

In OT11, the average split resolved by a 5-4 decision involved 4.5 circuits. The overall average involved 4.92 circuits (compared with an overall average of 5.76 circuits in OT10[26]). It is possible, of course, that *Florence*[27] skewed this result. As with all of our findings, we are going to let a few more years of data accumulate before we decide to definitively call this one way or another.

Similarly, based on the OT11 data we cannot say that the Court is more likely to grant cert the deeper the split. *Roberts*,[28] *Filarsky*,[29] and *Christopher*[30] were 1-1 splits. *Reyonlds*,[31] in contrast, was a 6-5 split. Likewise, outsized circuit majorities are no guarantee of how the Court will vote. *Taniguchi*[32] was a 1-7 split; *Judulang*,[33] a 1-8 split. In both cases, the minority approach prevailed.

D. How One Plays the Game

New for this year is our tracking of the splits' subject matter. Statutory interpretation makes up the vast majority of the circuit split cases, 82 percent. (We include here *Rehberg*[34] and *Filarsky*,[35]

[26] As noted, there were no splits explicitly resolved by a 5-4 decision in OT10.
[27] Florence v. Bd. of Chosen Freeholders of the Cnty. of Burlington, 132 S. Ct. 1510 (2012).
[28] Roberts v. Sea-Land Servs., Inc., 132 S. Ct. 1350 (2012).
[29] Filarsky v. Delia, 132 S. Ct. 1657 (2012).
[30] Christopher v. Smithkline Becham Corp., 132 S. Ct. 2156 (2012).
[31] Reynolds v. United States, 132 S. Ct. 975 (2012).
[32] Taniguchi v. Kan Pac. Saipan, Ltd., 132 S. Ct. 1997 (2012).
[33] Judulang v. Holder, 132 S. Ct. 476 (2011).
[34] Rehberg v. Paulk, 132 S. Ct. 1497 (2012).
[35] Filarsky v. Delia, 132 S. Ct. 1657 (2012).

which are both § 1983 cases.[36]) The remaining 18 percent concern constitutional questions.[37]

All of the circuit split cases that were resolved by unanimous decision in OT11 concerned questions of statutory interpretation. In contrast, 50 percent of the circuit split cases that concerned constitutional questions were decided 5-4.[38] As tempting as it is to speculate about what this might signify, the sample size is too small for us to offer any suggestions regarding these results.

II. THE FLYOVER COUNTRY

Notwithstanding our caution, we do see some trends emerging.[39] In OT10, the average split was 3.67 to 2.29. This term, the average split was 2.45 to 3.00. That is, the average size of the split remains about 3-3, give or take. If this persists, we can expect that the parallel affirmance rate will hover around 50 percent. But why about 3-3?

An often cited benefit of not instantly resolving every split is that the additional courts of appeals weighing in on the same legal issue against different facts or arguments allows issues to more fully develop before the Court decides an issue.[40] Conversely, waiting to resolve circuit splits leaves an uncertainty in the law.[41] Thus, there

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[36] 42 U.S.C. § 1983. We realize that the language of Section 1983 is so broad that it resembles something closer to a blank canvas than a specific command from the legislative branch. Congress essentially said, "Dear Courts: Please find a blank canvas and paint enclosed. Love, Congress." *See also* Herbert Hovenkamp, *Federal Antitrust Policy* § 2.1b, at 52 (3d ed. 1994) ("The framers of the Sherman Act believed that they were simply 'federalizing' the common law of trade restraints."). Nevertheless, the Court has determined that it engages in statutory interpretation in applying the statute. *See, e.g.*, Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989).

[37] Nat'l Fed'n of Indep. Business v. Sebelius, 132 S. Ct. 2566 (2012); S. Union Co. v. United States (2012); Florence v. Bd. of Chosen Freeholders of the County of Burlington, 132 S. Ct. 1510 (2012); Perry v. New Hampshire, 132 S. Ct. 716 (2012).

[38] Florence, 132 S. Ct. at 1510; National Federation of Independent Business, 132 S. Ct. 2566; Hall v. United States, 132 S. Ct. 1882 (2012); Salazr v. Ramah Navajo Chapter, 132 S. Ct. 2181 (2012); Christopher v. Smithkline Becham Corp., 132 S. Ct. 2156 (2012); Dorsey v. United States, 132 S. Ct. 2321 (2012).

[39] Again, we are excited to keep gathering this data over a long enough period to reach more certain conclusions.

[40] *See supra* note 5.

[41] *Cf.* Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 457, 461

are costs and benefits to the Court's decision to wait. And, significantly, neither one clearly outweighs the other. Thus, we hypothesize that on average the Court's cost-benefit calculation will split the difference – allowing half the courts of appeals to weigh in before resolving the issue.

Excluding the Federal Circuit (which has statutorily distinct, and far more limited, jurisdiction than other circuits), there are 12 federal circuit courts. Consequently, if we do indeed find that the average split the Court reviews remains roughly 3-3 over time, we will not be particularly surprised. On average, the Court will have waited for about half of the courts of appeals to have weighed in before settling the question.[42]

III. ALWAYS WORKING

We highlighted last year our goal of considering the issues in each case to determine whether there were any issue-based generalizations we could make about circuit split cases. The initial results on this metric are provocative, as noted above, but require fuller development.

We are always thinking of what else we could add to our data collection to enable us to obtain an even better picture of the circuit split cases and the parallel affirmance rate. Although we did not start tracking the data this year, we hope to add in the future data

(1897) ("The object of [the study of law] is prediction, the prediction of the incidence of the public force through the instrumentality of the courts. . . . The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.").

[42] The counter-point, of course, are the blockbuster cases where the Court takes a split that is still developing. OT11 provides a fascinating look at this issue through the health care cases. *See* National Federation of Independent Business, 132 S. Ct. 2566. First, as a process note, we treated these cases as one case for the purpose of our data. While there was certainly more nuance to the split and we could have taken a different approach, we thought that counting the cases as one would keep that particular split from being overrepresented in our data for this term. In passing we note that the Court did not expressly decide this case as resolving a circuit split. Thus, we can take no credit for our prediction that the majority approach would prevail (though it did). We do, however, take full blame for our prediction that the decision would not be 5-4 (no, like everyone else, we had no idea that the only issue that would garner a seven-justice majority was the Medicaid expansion provision). *See* Cummins & Aft, *supra* note 3, at 71.

about which judges have decided the circuit split cases. Based on anecdotal observations we expect this data may yield some interesting results, but we will have to wait to see.

IV. HARVEST TIME

The most important conclusion that we draw this year is the potential trend in the data to the importance of the deliberative process in working through complex or contentious issues prior to the Court's review. This benefit, however, plainly comes at a cost – where the circuits are split, the same federal law yields different outcomes depending on geography. Waiting for about six federal courts of appeals to weigh in appears to be where the Court has drawn the cost-benefit line. As we continue to develop this metric with increased granularity, we will be able to discern more about the nature of developing the law along this path.

To be continued . . .

APPENDIX

Table 1
Wins, Losses, At Bats, and Winning Percentage
(sorted by winning percentage)

Circuit	Wins	Losses	AB	PCT
Fourth	7	2	9	77.78%
Eleventh	5	4	9	55.56%
D.C.	3	3	6	50.00%
Sixth	7	7	14	50.00%
Ninth	8	10	18	44.44%
Second	4	6	10	40.00%
Third	4	6	10	40.00%
Tenth	3	5	8	37.50%
Seventh	4	7	11	36.36%
First	2	4	6	33.33%
Fifth	4	8	12	33.34%
Eighth	2	6	8	25.00%

Table 2
Wins, Losses, At Bats, and Winning Percentage in Unanimous Decisions
(sorted by winning percentage)

Circuit	Wins	Losses	AB	PCT
Fourth	4	1	5	80.00%
D.C.	2	1	3	66.67%
Sixth	3	2	5	60.00%
Eighth	1	1	2	50.00%
Second	1	2	3	33.33%
Third	2	4	6	33.33%
Seventh	1	2	3	33.33%
Ninth	3	6	9	33.33%

Circuit	Wins	Losses	AB	PCT
Eleventh	1	2	3	33.33%
Fifth	2	5	7	28.57%
First	0	1	1	0.00%
Tenth	0	2	2	0.00%

Table 3
The Cases and Votes

Case	Cite	Split	Winning Circuits	Losing Circuits	Court vote
Barion Perry v. New Hampshire	132 S. Ct. 716	3 to 2	1, 2, 6	3, 7	8 to 1 (Thomas concurs, Sotomayor dissents)
Pacific Operators Offshore, LLP, et al. v. Luisa L. Valladolid et al.	132 S. Ct. 680	2 to 1	9	3, 5	9-0 (Scalia concurring in-part with Alito joining)
Joel Judulang v. Eric H. Holder, Jr., Attorney General	132 S. Ct. 476	1 to 8	2	1, 3, 5, 6, 7, 8, 9, 10	9 to 0 (no separate writings)
Marcus D. Mims v. Arrow Financial Services, LLC	132 S. Ct. 740	2 to 6	6, 7	2, 3, 4, 5, 9, 11	9 to 0 (no separate writings)
Billy Joe Reynolds v. United States	132 S. Ct. 975	6 to 5	4, 5, 6, 7, 9, 11	1, 2, 3, 8, 10	7 to 2 (Scalia dissenting with Ginsburg)
Dana Roberts v. Sea-Land Services, Inc., et al.	132 S. Ct. 1350	1 to 1	9	5	9 to 0 (Ginsburg concurring in part and dissenting in part)
Monroe Ace Setser v. United States	132 S. Ct. 1463	4 to 4	5, 8, 10, 11	2, 6, 7, 9	6 to 3 (Breyer dissenting with Kennedy and Ginsburg)

Case	Cite	Split	Winning Circuits	Losing Circuits	Court vote
Panagis Vartelas v. Eric H. Holder, Jr., Attorney General	132 S. Ct. 1479	2 to 1	4, 9	2	6 to 3 (Scalia dissenting with Thomas and Alito)
Charles A. Rehberg v. James P. Paulk	132 S. Ct. 1497	3 to 7	3, 4, 11	2, 5, 6, 7, 9, 10, DC	9 to 0 (no separate writings)
Albert W. Florence v. Board of Chosen Freeholders of the County of Burlington, et al.	132 S. Ct. 1510	3 to 8	3, 9, 11	1, 2, 4, 5, 6, 7, 8, 10	5 to 4 (in-part, Kennedy loses majority (Thomas) for one section) (Breyer dissenting with Ginsburg, Sotomayor, and Kagan)
Steve A. Filarsky v. Nicholas B. Delia	132 S. Ct. 1657	1 to 1	6	9	9 to 0 (Ginsburg and Sotomayor each write concurrences)
Asid Mohamad, Individually and for the Estate of Azzam Rahim, Deceased, et al. v. Palestinian Authority, et al.	132 S. Ct. 1702	3 to 1	4, 9, DC	11	9 to 0 (Breyer concurs, Scalia joins all but one section)
Lynwood D. Hall, et ux. v. United States	132 S. Ct. 1882	2 to 1	9, 10	8	5 to 4 (Breyer dissents, joined by Kennedy, Kagan, and Ginsburg)

Case	Cite	Split	Winning Circuits	Losing Circuits	Court vote
Michael J. Astrue, Commissioner of Social Security v. Karen K. Capato, on Behalf of B.N.C., et al.	132 S. Ct. 2021	5 to 2	4, 5, 6, 8, DC	3, 9	9 to 0 (no separate writings)
Kouichi Taniguchi v. Kan Pacific Saipan, Ltd., DBA Marianas Resort and Spa	132 S. Ct. 1997	1 to 6	7	1, 5, 6, 8, 9, DC	6 to 3 (Ginsburg dissents, joined by Breyer and Sotomayor)
Eric H. Holder, Jr., Attorney General v. Carlos Martinez Gutierrez	132 S. Ct. 2011	3 to 1	3, 4 (dicta), 5	9	9 to 0 (no separate writings)
Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak	132 S. Ct. 2199	1 to 4	DC	7, 9, 10, 11	8 to 1 (Sotomayor dissenting)
Salazar v. Ramah Navajo Chapter	132 S. Ct. 2181	1 to 1	10	DC	5 to 4 (Roberts dissents, joined by Ginsburg, Breyer, and Alito)
Michael Shane Christopher, et al. v. Smithkline Beecham Corporation DBA Glaxosmithkline	132 S. Ct. 2156	1 to 1	2	9	5 to 4 (Breyer dissents, joined by Ginsburg, Sotomayor, and Kagan)
Southern Union Co. v. United States	132 S. Ct. 2344	4 to 1	2, 6, 7, 9	1	6 to 2 (Breyer dissents, joined by Kennedy and Alito)

Case	Cite	Split	Winning Circuits	Losing Circuits	Court vote
Edward Dorsey, Sr. v. United States	132 S. Ct. 2321	3 to 3	1, 3, 11	5, 7, 8	5 to 4 (Scalia dissents, joined by Roberts, Thomas, and Alito)
National Federation of Independent Business, at al. v. Kathleen Sebelius, Secretary of Health and Human Services, et al.	132 S. Ct. 2566	2 to 1	4 ,6	11	5-4 (Scalia, Kennedy, Thomas, Alito, joint dissent)

# # #

TOP 10 LAW SCHOOL HOME PAGES OF 2012

Roger V. Skalbeck & Matt Zimmerman[†]

In 2012, the variety of devices available to access websites expanded greatly, especially in the area of portable technology. During 2012, we saw the introduction of the iPhone 5, the iPad Mini, the Google Nexus 7, as well as two sizes of Amazon's Kindle Fire HD. Each of these devices has different screen resolutions, but all have an important thing in common: they provide access to Internet content through a web browser. For people accessing law school web sites, it should not matter how or where you access the content. People simply want websites to work. It is a daunting challenge to provide complex content with rich features to an expanding number of platforms and devices.

For the fourth consecutive year,[1] we try to identify law school home pages that are well-executed and adopt best practices. We evaluated all ABA-accredited home pages based on objective criteria. The attempt is to find the best-designed, best-performing sites. We continue to refine the methodology to account for changes and evaluate them consistently. For the 2012 study, twenty-six separate elements are evaluated across three categories (Design Patterns and Metadata, Accessibility and Validation, and Marketing and Communications). We added four new elements,[2] combined two,[3] and

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[†] Roger Skalbeck is Associate Law Librarian for Electronic Resources & Services, Georgetown Law Library. Matt Zimmerman is Web Application Developer, Georgetown Law Library.

[1] Roger V. Skalbeck, *Top 10 Law School Home Pages of 2011*, 2 J.L.: PERIODICAL LABORATORY OF LEG. SCHOLARSHIP (1 J. LEGAL METRICS) 25-52 (2012), Jason Eiseman & Roger V. Skalbeck, *Top 10 Law School Home Pages of 2010*, 2011 GREEN BAG ALMANAC & READER 339 (2011); Roger V. Skalbeck, *Top 10 Law School Home Pages of 2009*, 2010 GREEN BAG ALMANAC & READER 289 (2010).

[2] Elements: Responsive Design; W3C i18N; W3C Mobile OK; and Enhanced Social.

[3] Elements: Microformats and Dublin Core (combined into Semantic Markup).

dropped one[4] from prior studies.

The design diversity of the top ten sites should show that the methodology is not skewed towards a specific visual aesthetic. Creating a site that conforms to best practices requires care. Under criteria we evaluate, most elements do not require sophisticated tools or expensive procedures.

RESPONSIVE WEB DESIGN

This year, we added one element where sophistication is necessary but effort seems rewarding: Responsive Web Design. This brings to mind a statement overheard on Twitter: "It's not ROCKET science, but it is COMPUTER science."[5]

With the rise of mobile computing, a wide variety of devices are used to view the web. This means that web designers must consider how their sites will appear on many screen sizes, from the biggest of widescreens to the smallest of smartphones.

In 2010, Ethan Marcotte addressed this challenge by calling for a new model for page layout and image display. Rather than creating separate sites optimized for distinct platforms, Marcotte called for responsive web design. That is, web design to create sites that respond to their environments, dynamically changing layout and the size and quality of images based on the size of the viewer's screen. Marcotte outlined a technique for achieving this functionality based on CSS3 media queries.[6]

Since Marcotte coined the term, responsive web design has become a hot topic. It was named one of the top web design trends of 2012 by .net Magazine, and Mashable has declared 2013 "the year of responsive web design."[7] Skeptics argue that the extra effort and

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[4] Element: alt Attribute.

[5] John P. Mayer, Twitter (@johnpmayer) (Feb. 13, 2012 9:44 AM), twitter.com/johnpmayer/status/297354762909798401.

[6] Ethan Marcotte, *Responsive Web Design*, A LIST APART (May 25, 2010), alistapart.com/article/responsive-web-design.

[7] Craig Grannell, *15 Top Web Design & Development Trends for 2012*, NET MAGAZINE (Jan. 9, 2012), www.netmagazine.com/features/15-top-web-design-and-development-trends-2012; Pete Cashmore, *Why 2013 Is the Year of Responsive Web Design*, MASHABLE (Dec. 11, 2012), mashable.com/2012/12/11/responsive-web-design/.

code required to bring a responsive site up to snuff may not be worth it, but Marcotte's vision is undeniably appealing, and its influence is growing.[8]

Our survey discovered 14 law school websites that incorporate responsive design principles. Each of these sites receives three bonus points. We identified these sites with the use of extensive browser resizing as well as using the "View Responsive Layouts" option in the Web Developer browser add-on.

- American University [www.wcl.american.edu]
- Chapman University School of Law [www.chapman.edu/law]
- City University of New York [www.law.cuny.edu]
- George Mason University [www.law.gmu.edu]
- Gonzaga University [www.law.gonzaga.edu]
- Oklahoma City University [law.okcu.edu]
- Pace University [www.law.pace.edu]
- Southern Methodist University [www.law.smu.edu]
- University of Arkansas, Fayetteville [law.uark.edu]
- University of Kansas [www.law.ku.edu]
- University of Nebraska [law.unl.edu]
- University of New Hampshire School of Law [law.unh.edu]
- University of Pennsylvania [www.law.upenn.edu]
- University of Tennessee [www.law.utk.edu]

SEMANTIC MARKUP CHANGES

For the 2012 report, we combined two elements previously counted separately: Microformats and Dublin Core markup. These are two examples of ways to mark up your website code with semantic meaning, such as adding details for events, contact information, or location coordinates. Announced in 2011, Schema.org is one more way sites are choosing to markup their content. Because each of these methods can achieve the same goal of semantic content enhancement, it did not make sense to count each markup model

[8] Tom Kadlec, *Responsive Responsive Design*, 24 WAYS TO IMPRESS YOUR FRIENDS (Dec. 5, 2012), 24ways.org/2012/responsive-responsive-design/; Tom Ewer, *Is Responsive Design Still Not Worth It?*, MANAGEWP BLOG (Oct. 8, 2012), managewp.com/is-responsive-design-still-not-worth-it.

separately, so all are combined into a single element worth a maximum of three points.

Because Dublin Core markup can break website validation rules,[9] it does not make sense to advocate for its use while potentially penalizing sites for the problems it causes with site validation. That said, a choice to use the Dublin Core metadata standard represents a conscious effort to add semantic markup to web content, so it is still recognized in our study

Of course, HTML headings such as <h1> and <h2> can have significant semantic context for websites, and we continue to evaluate that element by looking at home page outline structure.

SOCIAL MEDIA INTEGRATION

In this year's study, just two dozen schools chose not to link to social media networks on the home page. All the rest did, and schools choose a wide variety of networks to reference on their home pages. When a school links to *any* social network, the same number of points are awarded. Not surprisingly, Facebook and Twitter are the most-referenced networks. Here is a look at the number of schools who link to these and several other social network destinations.

- Facebook: 164
- Twitter: 144
- Flickr: 40
- Google Plus: 12
- Vimeo: 10
- Foursquare: 5
- Goodreads: 2
- Pinterest: 2
- Delicious.com: 1
- Instagram: 0

Expanding a look into social media presence on law school home pages, this year we add an element to look for schools directly integrating this content. Examples include live twitter posts, Facebook Connect integration, and other methods of trying to integrate social media content directly into a law school home page. We chose to give schools +1 points for integrating social media content with a coincidental nod to Google Plus.

[9] Mathias Roth, *HTML5 and Microformats*, WORDPRESS BLOG-LOUNGE WEB-SERVICES (Sept. 10, 2012), blog-lounge.org/html5-microformats-schema/.

ACCENT ON ACCESSIBILITY

Once again, we highlight those elements that contribute the most to a site's accessibility. With Cascading Style Sheets, they can have many accessibility benefits, such as helping separate content from presentation, and avoiding "'tag misuse' – the practice of misusing a structural element for its expected stylistic effects."[10] One test dropped from the report is specific evaluation of 508 compliance that looks for the alt attribute for non-text page elements.[11] Though this has been a valuable test, the evaluation tool used to assess this performed too slowly and inadequately for reliable results.[12] The Accessibility elements assessed for 2012 are:

- [h] Cascading Style Sheet (CSS)
- [i] Wave Errors: Output of a test using the Wave Accessibility Evaluation tool: five.wave.webaim.org/.
- [j] Strict use of HTML headings to organize page content.

Eighteen schools achieve a perfect score for the use of these three elements:

- American University [www.wcl.american.edu]
- Arizona State University [www.law.asu.edu]
- Duke University [www.law.duke.edu]
- Florida International School of Law [law.fiu.edu]
- Northern Illinois University [law.niu.edu/law]
- Southern Illinois University-Carbondale [www.law.siu.edu]
- University of California-Hastings [www.uchastings.edu]
- University of Illinois [www.law.illinois.edu]
- University of Mississippi [law.olemiss.edu]
- University of Nebraska [law.unl.edu]
- University of New Mexico [lawschool.unm.edu]
- University of Notre Dame [law.nd.edu]
- University of Texas at Austin [www.utexas.edu/law]

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[10] *Accessibility Features of CSS*,W3C (Aug. 4 1999), www.w3.org/TR/CSS-access.

[11] alt Attribute: 508 Standards, Section 1194.22, (a) A text equivalent for every non-text element shall be provided (e.g., via "alt", "longdesc", or in element content).

[12] This is the HiSoftware Cynthia Says Portal Section 508 Accessibility Report, www.cynthiasays.com/ (last visited Mar. 28, 2013).

- Wake Forest University [law.wfu.edu]
- Washington And Lee University [law.wlu.edu]
- William And Mary School of Law [law.wm.edu]
- William Mitchell College of Law [www.wmitchell.edu]
- Yale University [www.law.yale.edu]

CORRECTIONS FROM 2011 REPORT

In the Top 10 Law School Home Pages of 2011, two errors were discovered. Thankfully, there are no known instances of over-reporting or inflated statistics that detract from any school's scores.

> Thomas M. Cooley Law School [www.cooley.edu]
> [e] Microformats – 3 pts.
> Revised score: 94 | Revised rank: 2
>
> University of North Carolina [www.law.unc.edu]
> [a] Search Form – 9 pts.
> Revised score: 77.5 | Revised rank: 64

Each year, we try diligently to report all data accurately, which can be tricky for more than 5,000 data points. All materials reviewed are kept on file for verification. When errors are discovered, apologies will be issued on the spot, and corrections will be published the following year in print.

RANKING PROCESS

This survey includes all United States law schools accredited by the American Bar Association. The site evaluation process includes a combination of human assessment and automated analysis. To improve data validity, we evaluated the source code for every site using computer-based pattern matching to detect elements such as links to social media, use of HTML tables, and anything with predictable text patterns. The authors verified the data, with help from a research assistant. As is the case each year, the goal remains similar to advice sometimes given to bar examiners: "Look for points." With every site checked, we have tried to look for valid points.

We completed all evaluation in October and November 2012. We captured all screen shots in the survey on November 6, 2012.

Some sites have changed since then, which is an unfortunate but inevitable byproduct of assessing dynamic content on a fixed date.

The scale for the 2012 list again includes 100 possible points for the raw score. In addition, up to nine bonus points are available, and deductions of up to two points are possible.

EVALUATION CRITERIA

Category	Element	Score	Bonus
Design Patterns & Metadata [22 points]	[a] Search Box	8	
	[b] Content Carousel	4	
	[c] RSS Autodiscovery	4	
	[d] Embedded Media	3	
	[e] Semantic Markup	3	
	[f] HTML5		+3
	[g] Responsive Design		+3
Accessibility & Validation [36 points]	[h] CSS*	8	
	[i] Wave Errors*	8	+1
	[j] Headings*	8	
	[k] Valid Markup*	5	+1
	[l] YSlow Score*	4	
	[m] W3C Mobile OK*	2	
	[n] W3C i18N	1	
	[o] <b> <i>		-0.5
	[p]		-0.5
	[q] <font>		-0.5
	[r] <u>		-0.5
Marketing & Communications [42 points]	[s] Meaningful Page Title	10	
	[t] Address	8	
	[u] Phone	8	
	[v] Social Media Links	6	
	[w] Thumbnail Images	4	
	[x] Favicon	3	
	[y] News Headlines	3	
	[z] Enhanced Social		+1

* Partial credit available.

DESIGN PATTERNS & METADATA: 22 POINTS POSSIBLE

Search Form [a] 8 pts.

Users can initiate a search using a form on the home page. Home pages with a link to a separate search page get no points.

Content Carousel [b] 4 pts.

This refers to the display of meaningful content a user can browse using on-screen controls in a carousel-like fashion in fixed space on a website. A site feature that simply loads a random image or displays a rotating slide show with no controls or links to other content receives no credit.

RSS Autodiscovery [c] 4 pts.

RSS is an easy way to notify users of new content. A single line of code alerts computers to available RSS feeds. Points are awarded if automatic discovery is enabled with an "application/rss+xml" reference in the page header.

Embedded Media [d] 3 pts.

Embedded media, whether audio or video, can be played directly from the home page, in the browser. A page overlay (often called a lightbox) receives points, but a link to a separate page does not.

Semantic Markup [e] 3 pts.

Any of several semantic markup techniques are present on a page. We tested for: Microformats (www.microformats.org), Schema.org, and Dublin Core.

HTML5 [f] +3 bonus pts.

For any home page created with the HTML5 doctype, three bonus points are awarded, in order to reward sites adopting this developing markup language.

Responsive Design [g] +3 bonus pts.

If a site was created with responsive design principles, it receives three bonus points. We used multiple techniques to identify sites using responsive design features.

ACCESSIBILITY & VALIDATION: 36 POINTS POSSIBLE

Cascading Style Sheet (CSS) [h] 8 pts.

Use of Cascading Style Sheets (CSS) is a common best practice in web design, in that it allows you to separate content marked up in HTML from design elements like colors and typography. Page layout is also best handled through CSS rather than HTML tables. Home pages that include limited use of HTML tables for layout receive half the point total, which is meant to recognize designs that at least partially leverage CSS for the benefits it provides in page layout.

Wave Errors [i] 8 pts. +1 bonus pt.

For this element, we evaluated each site for a series of accessibility features using the Wave Accessibility Evaluation tool: five.wave.webaim.org/. Sites are scored on a scale, based on incidence of errors, with a perfect score receiving one bonus point.

0–5 errors: 8 pts.; 6–10 errors: 6pts.;
11–15 errors: 4 pts.; 16–20 errors: 2 pts.; 20+ errors: 0 pts.

Headings [j] 8 pts.

Header tags such as <h1> and <h2> are used to create hierarchical relationships for home page content. Proper headings are important for good search engine optimization and accessibility. A 2012 study shows that for people using screen reader software, navigation by headings has increased from 50.8% to 60.8% since October 2009.[13] Also, headings add significant semantic context to web

[13] *Screen Reader User Survey #4 Results*, WEBAIM: WEB ACCESSIBILITY IN MIND, webaim.org/projects/screenreadersurvey4/ (last visited Mar. 28, 2013).

pages by signaling document structure.[14] Partial use of headings gets half credit here.

Valid Markup [k] 5 pts. +1 bonus points for W3C validation

Using valid markup can be important for many reasons. Validating a site can be used to prevent errors, future-proof a site, and more. We checked every home page with the World Wide Web Consortium Validation Service.[15] Sites are scored on a scale, based on incidence of errors. A site receives one bonus point when passing W3C validation.

0–10 errors: 5pts.; 11–20 errors: 4pts.; 21–30 errors: 3pts.;
31–40 errors: 2pt.; 41-80 errors: 1 pt.; 80+ errors: 0 pts.

ySlow Score [l] 4 pts.

Provided on the Yahoo! Developer Network, ySlow is a service that "analyzes web pages and suggests ways to improve their performance based on a set of rules for high performance web pages."[16] For this element, we used the browser add-on with a pre-set collection of 17 rules for Small Sites or Blogs, which are assigned a score between 0 and 100. Based on this score, a maximum of four points are awarded to each law school home page.

95–100: 4 pts.; 91–94: 3 pts.;
86–90: 2 pts.; 80–85: 1 pt.; 0–79: 0 pts.

W3C Mobile OK [m] 2 pts.

The World Wide Web Consortium provides a validation service intended to assess whether sites are designed to be friendly to mobile devices.[17] This runs a series of tests from the W3C mobileOK Basic Tests 1.0.[18] Based on errors reported, points are awarded using the

[14] *Creating Semantic Structure*, WEBAIM: WEB ACCESSIBILITY IN MIND, webaim.org/techniques/semanticstructure/ (last visited Mar. 28, 2013).
[15] *Markup Validation Service*, W3C, validator.w3.org/ (last visited Mar. 28, 2013).
[16] *YSlow*, YAHOO! DEVELOPER NETWORK, developer.yahoo.com/yslow/ (last visited Mar. 28, 2013).
[17] *W3C mobileOK Checker*, W3C, validator.w3.org/mobile/ (last visited Mar. 28, 2013).
[18] *W3C mobileOK Basic Tests 1.0*, W3C (Dec. 8, 2008), www.w3.org/TR/mobileOK-basic10-tests/.

following scale, with one exception. A very limited number of sites could not be evaluated with this tool, so they were assigned a single point, which is the rounded average of values across all sites checked.

0-9: 2 points; 10-15: 1 point; 16+: 0 points

W3C i18N [n] 1 pts.

The World Wide Web Consortium Internationalization Checker "performs various tests on a Web Page to determine its level of internationalisation-friendliness."[19] Based on these tests, sites are awarded a single point when they pass the test. A very limited number of sites returned no value in this test, so they were assigned a single point, which is the rounded average of values across all sites checked.

Point deductions for coding conventions

We analyzed each site's source code programmatically to detect five different coding practices, two of which (<b> and <i>) are combined into a single element. A half point is deducted for each site using each coding convention, irrespective of how often they are used.

<b> / <i> [o] ½ pt. deduction
 [p] ½ pt. deduction
<font> [q] ½ pt. deduction
<u> [r] ½ pt. deduction

MARKETING & COMMUNICATIONS: 42 POINTS POSSIBLE

Meaningful Page Title [s] 10 pts.

The home page has a meaningful page title. Usability expert Jakob Nielsen cites page titles with low search engine visibility as one of his top ten design mistakes.[20] Nielsen also notes that page titles are usually used as the clickable headline on search engine results pages, and also the default entries when users bookmark pages.

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[19] *W3C Internationalization Checker*, W3C, validator.w3.org/i18n-checker/ (last visited Mar. 28, 2013).

[20] Jakob Nielsen, *Top 10 Mistakes in Web Design*, NIELSON NORMAN GROUP (Jan 1, 2011), www.nngroup.com/articles/top-10-mistakes-web-design/.

Address [t] 8 pts.

A physical address is included in the text of the home page.

Phone [u] 8 pts.

A phone number is included in the text of the home page.

Social Media Links [v] 6 pts.

Points awarded for any items linked directly to a social media site, including Facebook, Twitter, Flickr, YouTube, iTunes, FourSquare, Pinterest, and even Goodreads.

Thumbnail Images [w] 4 pts.

Thumbnail images, reflecting the subject of a linked story or event, can provide quick visual cues of the linked item's content. Pages with thumbnails associated with news stories or similar content links are awarded points. If thumbnail images are associated only with a content carousel, no points are awarded, to avoid double counting.

Favicon [x] 3 pts.

A favorites icon, also known as a favicon, is a small graphic associated with a website. The favicon often appears in the browser location bar, in bookmarks and favorite files, or on browser tabs. The favicon can be an important and valuable branding graphic.

News Headlines [y] 3 pts.

The home page features headlines about news or events related to the law school.

Enhanced Social Media Integration [z] +1 bonus

Social media content is integrated into the home page directly. This can include recent posts to Twitter, integration with Facebook Connect, Google+, or other integration models. Use of a bookmark sharing widget such as AddThis.com or AddToAny is not awarded points, absent other content or functionality integration.

#1 (tie) Thomas M. Cooley Law School

[www.cooley.edu]

Design Patterns & Metadata: 22 | Accessibility & Validation: 34 | Marketing & Communications: 42 | Bonus: 3

Total: 101 points

Elements: [a][b][c][d][e][h][i][j][[k][l ¾][m ½][n][s][t][u][v][w][x][y] Bonus: [f]

#1 (tie) University of Pennsylvania Law School
[www.law.upenn.edu]
Design Patterns & Metadata: 19 | Accessibility & Validation: 33 | Marketing & Communications: 42 | Bonus: 7
Total: 101
Elements: [a][b][c][d][e][h][i][j][[k][l ½][m ½][n][s][t][u][v][w][x][y] Bonus: [f][g][z]

Note: The "infinite scroll" feature of the University of Pennsylvania Law School homepage complicated the screen capture process. The image shown here is a modified version of the original.

#3 (tie) Univ. of Arkansas School of Law

[law.uark.edu]

Design Patterns & Metadata: 18 | Accessibility & Validation: 34 | Marketing & Communications: 42 | Bonus: 6

Total: 100

Elements: [a][b][c][d][e][h][i][j][[k][l ½][m][n][s][t][u][v][w][x][y] Bonus: [f][g]

#3 (tie) University of Houston Law Center
[www.law.uh.edu]
Design Patterns & Metadata: 22 | Accessibility & Validation: 33 | Marketing & Communications: 42 | Bonus: 3
Total: 100
Elements: [a][b][c][d][e][h][i][j][[k][l ½][m ½][n][s][t][u][v][w][x][y] Bonus: [f]

#5 (tie) Florida Coastal School of Law

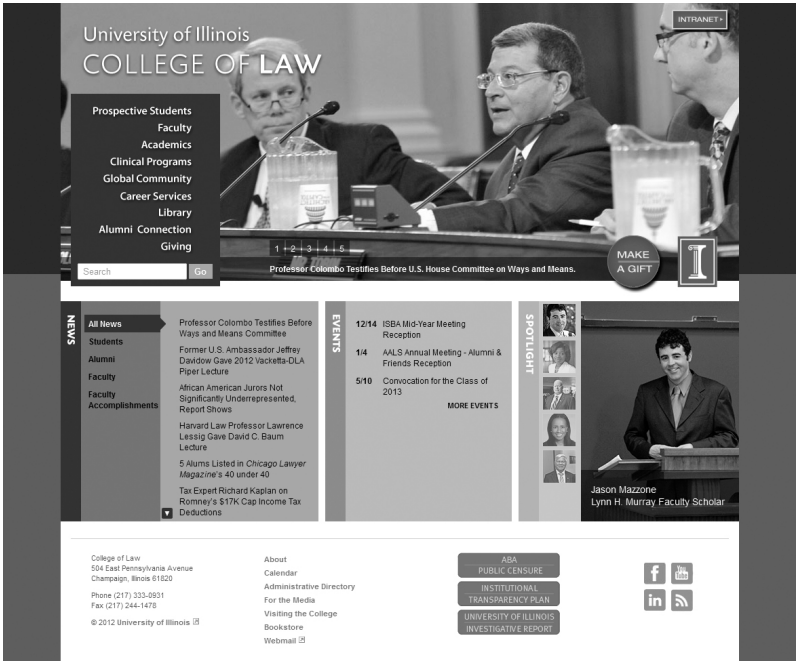
[www.fcsl.edu]

Design Patterns & Metadata: 19 | Accessibility & Validation: 34 | Marketing & Communications: 42 | Bonus: 3

Total: 98

Elements: [a][b][c][d][e][h][i ¾][j][[k][l][m][n][s][t][u][v][w][x][y] Bonus: [f]

#5 (tie) University of Illinois College of Law
[www.law.illinois.edu]
Design Patterns & Metadata: 16 | Accessibility & Validation: 35 | Marketing & Communications: 42 | Bonus: 5
Total: 98
Elements: [a][b][c][h][i][j][[k][l ¾][m][n][s][t][u][v][w][x][y] Bonus: [f][i][k]



#5 (tie) University of Mississippi School of Law

[www.olemiss.edu/depts/law_school]

Design Patterns & Metadata: 18 | Accessibility & Validation: 34 | Marketing & Communications: 42 | Bonus: 4

Total: 98

Elements: [a][b][c][d][e][h][i][j][[k.8][l][m ½][n][s][t][u][v][w][x][y] Bonus: [f][i]

#8 Arizona State University Sandra Day O'Connor College of Law
[www.law.asu.edu]
Design Patterns & Metadata: 19 | Accessibility & Validation: 32 | Marketing & Communications: 42 | Bonus: 4
Total: 97
Elements: [a][b][c][e][h][i][j][[k][m ½][n][s][t][u][v][w][x][y] Bonus: [f][i]

#9 New England School of Law

[www.nesl.edu]

Design Patterns & Metadata: 19 | Accessibility & Validation: 32.5 | Marketing & Communications: 42 | Bonus: 3

Total: 96.5

Elements: [a][b][c][e][h][i][j][[k.8][l][n][o][s][t][u][v][w][x][y] Bonus: [f][i]

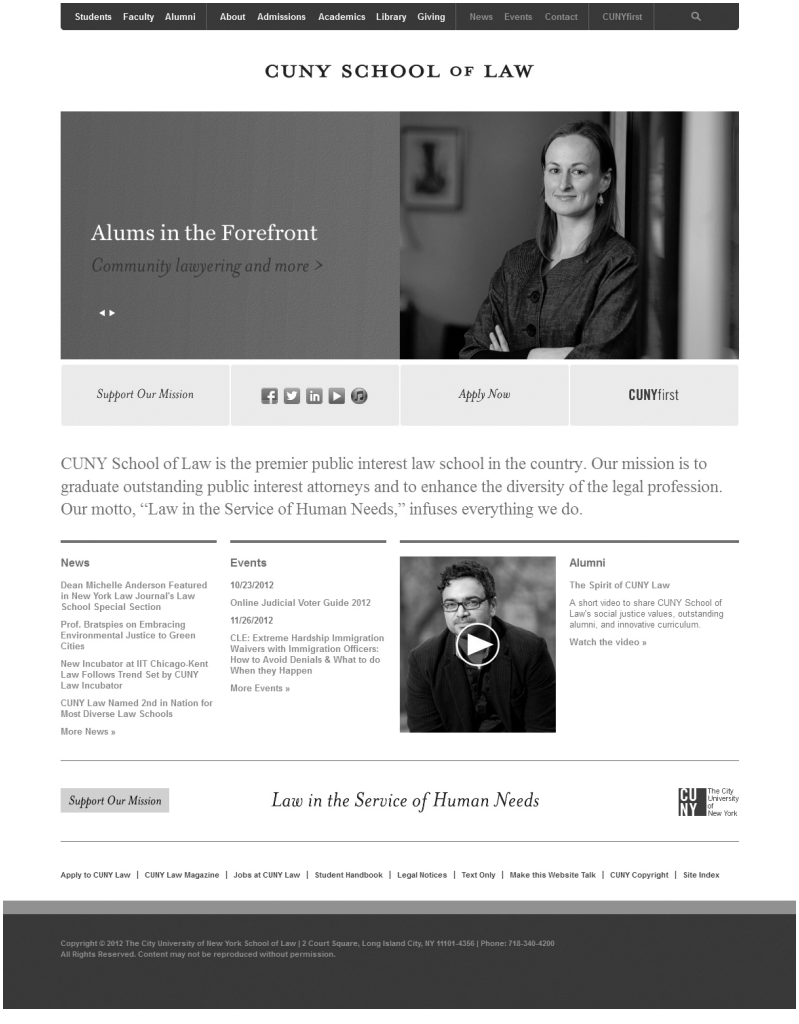
#10 City University of New York School of Law

[www.law.cuny.edu]

Design Patterns & Metadata: 19 | Accessibility & Validation: 33 | Marketing & Communications: 38 | Bonus: 6

Total: 96

Elements: [a][b][c][d][h][i][j][[k][l ½][m][n][s][t][u][v][w][x][y] Bonus: [f][g]



TABULATION

Key
R = Rank
S = Score
B = Bonus points
* = partial credit possible

Design Patterns & Metadata [22 pts.]

[a] Search Box.....8
[b] Content Carousel 4
[c] RSS Autodiscovery 4
[d] Embedded Media.....3
[e] Semantic Markup.....3
[f] HTML5..... +3
[g] Responsive Design .... +3

Accessibility & Validation [36 pts.]

[h] CSS* 8
[i] Wave Errors* 8
[j] Headings*..... 8
[k] Valid Markup*..... 5
[l] ySlow Score* 4
[m] W3C Mobile OK*..... 2
[n] W3C i18N 1
[o] <b> <i>..... -.5
[p] ..... -.5
[q] <font> ..... -.5
[r] <u> ..... -.5

Marketing & Communications [42 pts.]

[s] Meaningful Page Title 10
[t] Address 8
[u] Phone 8
[v] Social Media Links..... 6
[w] Thumbnail Images 4
[x] Favicon 3
[y] News Headlines..... 3
[z] Enhanced Social ..... +1

R	S	School [URL]	a	b	c	d	e	h	i	j	k	l	m	n	o	p	q	r	s	t	u	v	w	x	y	B
1	101	Thomas M. Cooley Law Sch. [www.cooley.edu]	x	x	x	x	x	x	x	x	x	0.75	0.5	x					x	x	x	x	x	x	x	f
	101	Univ. of Pennsylvania [www.law.upenn.edu]	x	x	x		x	x	x	x	x	0.5	0.5	x					x	x	x	x	x	x	x	f,g,z
3	100	Univ. of Arkansas, Fayetteville [law.uark.edu]	x		x	x	x	x	x	x	x	0.5	x	x					x	x	x	x	x	x	x	f,g
	100	Univ. of Houston [www.law.uh.edu]	x	x	x	x	x	x	x	x	x	0.5	0.5	x					x	x	x	x	x	x	x	f
5	98	Florida Coastal Sch. of Law [www.fcsl.edu]	x	x	x		x	x	0.75	x	x	x	x	x					x	x	x	x	x	x	x	f
	98	Univ. of Illinois [www.law.illinois.edu]	x	x	x			x	x	x	x	0.75	x	x					x	x	x	x	x	x	x	f,i,k
	98	Univ. of Mississippi [www.olemiss.edu/depts/law_school]	x		x	x	x	x	x	x	0.8	x	0.5	x					x	x	x	x	x	x	x	f,i
8	97	Arizona State Univ. [www.law.asu.edu]	x	x	x		x	x	x	x	x		x	x					x	x	x	x	x	x	x	f,i
9	96.5	New England Sch. of Law [www.nesl.edu]	x	x	x		x	x	x	x	0.8	x		x	x				x	x	x	x	x	x	x	f
10	96	City Univ. of New York [www.law.cuny.edu]	x	x	x	x		x	x	x	x	0.5	0.5	x					x	x	x	x		x	x	f,g
11	95.5	Univ. of New Hampshire Sch. of Law [law.unh.edu]	x	x				x	x	x	x	x	x	x	x				x	x	x	x	x	x	x	f,g
	95.5	American Univ. [www.wcl.american.edu]	x		x	x	x	x	x	x	x	x	x	x	x				x	x	x	x		x	x	g,i
13	95	Univ. of North Carolina [www.law.unc.edu]	x	x	x		x	x	0.5	x	x	0.75	0.5	x					x	x	x	x	x	x	x	f,k
	95	Univ. of Utah [www.law.utah.edu]	x	x			x	x	x	x	x	x	0.5	x					x	x	x	x	x	x	x	f
	95	Wake Forest Univ. [law.wfu.edu]	x	x	x	x		x	x	x	0.8	0.5	x	x					x	x	x	x	x	x		f,i
16	94	Charlotte Sch. of Law [www.charlottelaw.org]	x	x	x			x	x	x	0.8	0.75	0.5	x					x	x	x	x	x	x	x	f
	94	George Mason Univ. [www.law.gmu.edu]	x				x	x	x	x	x	x	x						x	x	x	x	x	x	x	f,g
	94	Univ. of St. Thomas Sch. of Law [www.stthomas.edu/law]	x	x	x			x	x	x	x	0.25	0.5	x					x	x	x	x	x	x	x	f,z
19	93.5	Univ. of Notre Dame [law.nd.edu]	x	x			x	x	x	x	x	0.25	x	x	x				x	x	x	x	x	x	x	f,i
20	93	John Marshall Law Sch. [www.jmls.edu]	x	x	x			x	x	x	x	0.25	0.5	x					x	x	x	x	x	x	x	f
	93	Thomas Jefferson Sch. of Law [www.tjsl.edu]	x	x	x		x	x	x	x	0.6		0.5						x	x	x	x	x	x	x	f,z
	93	Univ. of La Verne [law.laverne.edu]	x	x	x			x	x	x	x	0.25	0.5	x					x	x	x	x	x	x	x	f
	93	Univ. of Massachusetts [www.umassd.edu/law/]	x	x			x	x	x	x	x	0.5	0.5	x					x	x	x	x	x	x	x	f
24	92.5	Gonzaga Univ. [www.law.gonzaga.edu]	x	x	x			x	x	x	x		x	x	x				x	x	x	x	x		x	f,g
	92.5	Duke Univ. [www.law.duke.edu]	x	x			x	x	x	x	0.8	0.25	0.5	x	x				x	x	x	x	x	x	x	f,i,z
26	92	John Marshall Law Sch. - Atlanta [www.johnmarshall.edu]	x	x	x		x	x	0.75	x	x	0.5	0.5	x					x	x	x	x	x	x	x	
	92	Univ. of Florida [www.law.ufl.edu]	x	x	x			x	x	x	x		0.5	x					x	x	x	x	x	x	x	f
	92	Univ. of Nebraska [law.unl.edu]	x	x				x	x	x	x		0.5						x	x	x	x	x	x	x	f,g,i,z
	92	Univ. of Texas at Austin [www.utexas.edu/law]	x		x		x	x	x	x	0.8	x	x	x					x	x	x	x		x	x	f,i
30	91	Elon Univ. [www.elon.edu/e-web/law]	x	x	x	x		x	x	x	0.8	0.25	0.5						x	x	x	x	x	x	x	
	91	Ohio Northern Univ. [www.law.onu.edu]	x	x	x			x	x	x	x	0.75	0.5						x	x	x	x	x	x	x	
	91	Univ. of Hawaii [www.law.hawaii.edu]	x	x	x			x	x	x	0.2	x	0.5						x	x	x	x	x	x	x	f
	91	Univ. of New Mexico [lawschool.unm.edu]	x		x			x	x	x	x	x	0.5	x					x	x	x	x	x	x	x	i,k

	90	Univ. of Chicago [www.law.uchicago.edu]	x	x	x			x	0.75	x	x	0.5	x							x	x	x	x	x	x	x	x	k								
	90	Univ. of Detroit Mercy [www.law.udmercy.edu]	x	x	x			x	x	x	0.6		0.5	x						x	x	x	x	x	x	x	x	f								
34	90	Univ. of Maine [mainelaw.maine.edu]	x	x		x	x	x	x	x	0.8	0.25		x						x	x	x	x	x	x	x	x									
	90	Univ. of Southern California [law.usc.edu]	x	x	x		x	x	x	x	0.6		0.5	x						x	x	x	x	x	x	x	x									
	90	Washburn Univ. [www.washburnlaw.edu]	x		x			x	x	x	x	x	x	x						x	x	x	x	x	x	x	x									
39	89.5	Michigan State Univ. Coll. of Law [www.law.msu.edu]	x	x			x	x	x	x	0.8	0.5	x	x	x					x	x	x	x	x	x	x	x									
40	89	Lewis and Clark Law Sch. [law.lclark.edu]	x				x	x	x	x	x	x	x	x						x	x	x	x	x	x	x	x									
	89	Univ. of North Dakota [law.und.edu]	x	x		x		x	0.5	x	x	0.25	x							x	x	x	x	x	x	x	x	f,z								
42	88.5	Univ. of Colorado [www.colorado.edu/Law]	x		x		x	x	x	x	x	0.5		x		x				x	x	x	x	x	x	x	x									
	88.5	Univ. of Wyoming [www.uwyo.edu/law/]	x	x		x		x	x	x	x		0.5	x	x					x	x	x	x	x	x	x	x	z								
	88	Appalachian Sch. of Law [www.asl.edu]	x	x		x		x	x	x	x	0.75	0.5	x						x	x	x	x	x		x										
	88	George Washington Univ. [www.law.gwu.edu]	x	x		x	x	x	x	x	0.2	0.25	0.5	x						x	x	x	x	x	x	x	x									
44	88	Georgetown Univ. [www.law.georgetown.edu]	x	x	x	x		x	x	x			0.5	x						x	x	x	x	x	x	x	x	z								
	88	Univ. of Arkansas at Little Rock [www.law.ualr.edu]	x		x	x	x	x	x	x	x	0.5	0.5	x						x	x		x	x	x	x	x	f								
	88	Washington and Lee Univ. [law.wlu.edu]	x	x	x			x	x	x	0.2	0.5	0.5	x						x	x	x	x	x	x	x	x	i								
	88	Wayne State Univ. [www.law.wayne.edu]	x	x	x	x	x	x		x	0.4	0.25	0.5	x						x	x	x	x	x	x	x	x	f								
	87	Chapman Univ. Sch. of Law [www.chapman.edu/law]	x	x			x	x	0.75	x			0.5	x						x	x	x	x	x	x	x	x	f,g								
50	87	Pepperdine Univ. [law.pepperdine.edu]	x	x	x			x	0.75	x	x		0.5	x						x	x	x	x	x	x	x	x									
	87	Stetson Univ. [www.law.stetson.edu]	x	x		x		x	x	x	0.6	0.25	0.5	x						x	x	x	x	x	x	x	x									
53	86.5	Drake Univ. [www.law.drake.edu]	x	x	x	x		x	x		x	0.75	0.5	x	x					x	x	x	x	x	x	x	x									
	86	Columbia Univ. [www.law.columbia.edu]	x	x	x			x	x	x		0.5	0.5	x						x	x	x	x	x	x	x	x									
54	86	Univ. of Iowa [www.law.uiowa.edu]	x				x	x	x	x	0.8		0.5	x						x	x	x	x	x	x	x	x	f								
	86	Univ. of South Carolina [usclaw.sc.edu]	x				x	x	x	x	0.4	0.75	0.5							x	x	x	x	x	x	x	x	f								
	86	William Mitchell Coll. of Law [www.wmitchell.edu]	x	x				x	x	x	x		0.5	x						x	x	x	x	x	x	x	x	i								
58	85.5	Valparaiso Univ. [www.valpo.edu/law]	x	x	x	x		x	0.75	x	0.4	0.25	0.5		x					x	x	x	x		x	x	f								
	85	Univ. of Miami [www.law.miami.edu]	x	x		x		x	x	x	0.2	0.5	0.5	x	x	x				x	x	x	x	x	x	x										
	85	Univ. of Missouri-Columbia [www.law.missouri.edu]	x	x				x	x	0.5	x	x								x	x	x	x	x	x	x										
59	85	Univ. of Missouri-Kansas City [www.law.umkc.edu]	x	x				x	x	x	0.8	0.25	0.5	x						x	x	x	x	x	x	x										
	85	Univ. of Oklahoma [www.law.ou.edu]	x	x	x			x	x		x	0.5	x	x						x	x	x	x	x	x	x	z									
	85	Univ. of Pittsburgh [www.law.pitt.edu]	x	x	x			x	0.75	x	0.2	0.75	0.5							x	x	x	x	x	x	x										
	85	Western New England Coll. [www1.law.wnec.edu]	x	x	x			x	0.5	x	0.4	0.75	0.5	x						x	x	x	x	x	x	x										
65	84.5	Vermont Law Sch. [www.vermontlaw.edu]	x	x	x			x	x	x	0.2	0.25	x	x	x					x	x	x	x	x		x	z									
	84	Southwestern Univ. [www.swlaw.edu]	x	x				x	x	x	0.8		0.5	x						x	x	x	x	x	x	x										
66	84	Univ. of Baltimore [law.ubalt.edu]	x	x				x	x	x	0.6	0.25	0.5	x						x	x	x	x	x		x	f									
	84	Univ. of California at Davis [www.law.ucdavis.edu]	x	x			x	x	x	x	x	0.75	x	x						x	x		x	x	x	x										
	83	Depaul Univ. [www.law.depaul.edu]	x	x				x	x	x	0.8	0.75	0.5	x						x	x	x	x		x	x										
	83	Indiana Univ. - Indianapolis [indylaw.indiana.edu]	x			x		x	x	x	0.2	0.25	0.5							x	x	x	x	x	x	x	f									
	83	McGeorge Sch. of Law [www.mcgeorge.edu]	x	x		x		x	0.5	x	x	0.75	0.5	x						x	x	x	x		x	x										
69	83	Ohio State Univ. [moritzlaw.osu.edu]	x		x			x	x	x	0.2	0.5	0.5	x						x	x	x	x	x	x	x										
	83	Univ. of California at Berkeley [www.law.berkeley.edu]	x	x				x	0.75	x	0.2	0.75	0.5	x						x	x	x	x	x	x	x	z									
	83	Univ. of Maryland [www.law.umaryland.edu]	x	x				x	x	x	0.8	0.75	0.5	x						x	x	x	x		x	x										
	83	Univ. of San Diego [www.sandiego.edu/law]	x					x	0.75	x	x	0.5	x	x						x	x	x	x	x	x	x	k									
	83	Univ. of South Dakota [www.usd.edu/law]	x	x			x	0.5	x	x	0.8		x							x	x	x	x	x	x	x										
	82.5	Hamline Univ. [law.hamline.edu]	x	x		x		0.5	x	x	0.2	0.5	x	x	x					x	x	x	x	x	x	x										
77	82.5	Univ. of Wisconsin [www.law.wisc.edu]	x	x				x	x	x	0.8	0.75	x		x					x	x	x	x		x	x										
	82.5	Washington Univ. [www.wulaw.wustl.edu]	x	x				x	x	x	x	0.5	0.5	x	x					x	x	x	x		x	x										
	82	Capital Univ. [www.law.capital.edu]	x	x				x	x	x	0.2	0.25	0.5	x						x	x	x	x	x	x	x										
	82	Loyola Univ.-New Orleans [law.loyno.edu]	x					x	x	x	x	0.25	x							x	x	x	x	x	x	x										
80	82	State Univ. of New York At Buffalo [www.law.buffalo.edu]	x			x	x	0.5	x	x		x	0.5	x						x	x	x	x	x	x	x										
	82	Univ. of Tulsa [www.law.utulsa.edu]	x					x	x	x	0.6	0.5	x	x						x	x	x	x	x	x	x										
	82	Vanderbilt Univ. [law.vanderbilt.edu]	x	x	x			x	0.75	x	0.6	0.75	0.5		x		x			x	x	x	x		x	x										
85	81.5	Harvard Univ. [www.law.harvard.edu]	x	x	x			0.5	x	x	x	0.75	x	x	x					x	x		x	x	x	x	i									
	81	Charleston Sch. of Law [www.charlestonlaw.org]	x	x				x	0.5	x	0.4	0.75	0.5	x						x	x	x	x	x	x	x										
	81	Dwayne O. Andreas Sch. of Law [www.barry.edu/law]	x	x				x	x		0.8	0.75	0.5							x	x	x	x	x	x	x	f									
86	81	Indiana Univ. - Bloomington [www.law.indiana.edu]	x			x		x	x	x	0.4			x						x	x	x	x	x	x	x	z									
	81	Pace Univ. [www.law.pace.edu]	x	x	x			x	0.75	x	0.8		0.5	x						x	x		x	x	x	x	g									
	81	Univ. of California-Hastings [www.uchastings.edu]	x			x		x	x	x	x	0.5	x	x						x	x		x	x	x	x	i,z									
	80	Georgia State Univ. [law.gsu.edu]	x	x	x			x	0.5	x	0.2			x						x	x	x	x	x	x	x										
91	80	Marquette Univ. [law.marquette.edu]	x	x				0.5	x	x	x		0.5							x	x	x	x	x	x	x										
	80	Univ. of Virginia [www.law.virginia.edu]	x	x	x			x	x		0.2	0.5	0.5	x						x	x	x	x	x	x	x	z									
94	79.5	Brooklyn Law Sch. [www.brooklaw.edu]	x	x				x	0.5	x	0.8		0.5	x	x					x	x	x	x	x	x	x										
	79.5	Whittier Coll. [www.law.whittier.edu]	x	x				x	0.75	x	0.8		x	x	x					x	x	x	x		x											
96	79	Quinnipiac Univ. Sch. of Law [law.quinnipiac.edu]	x	x				0.5	x	x	0.8			x						x	x	x	x	x	x	x										
	79	Rutgers Univ.-Newark [www.law.newark.rutgers.edu]	x		x			0.5	x	x	0.4		x	x						x	x	x	x	x	x	x										

	79	Univ. of Kansas [www.law.ku.edu]	x	x				x	0.75	0.5	0.2		0.5	x					x	x	x	x	x	x	x		g,z
99	78	Nova Southeastern Univ. [www.nsulaw.nova.edu]	x	x				x	x	x	0.4		0.5	x					x	x	x	x			x	x	
100	77.5	Univ. of Denver [www.law.du.edu]	x		x		x	x	0.75		0.6	0.25	x	x	x				x	x	x	x	x	x	x	x	
	77	Hofstra Univ. [law.hofstra.edu]	x	x		x		x	x	x	0.8		0.5	x					x	x	x				x	x	
	77	Illinois Institute of Technology [www.kentlaw.edu]	x	x		x		x	0.25	x	0.2	0.75	0.5	x					x	x	x	x		x	x		
	77	Liberty Univ. [law.liberty.edu]	x	x				x	0.75	x	0.2	x	0.5	x					x	x	x		x	x	x		
101	77	Univ. of Cincinnati [www.law.uc.edu]	x					x	x	x	x	0.5	x						x	x	x		x	x	x		
	77	Univ. of Georgia [www.law.uga.edu]	x	x	x		x	0.5	0.5	x	x		0.5						x	x	x		x	x	x		
	77	Univ. of Tennessee [www.law.utk.edu]	x	x				x	x	x	0.6	0.25	x	x						x	x	x		x	x	f,g	
	77	Southern Illinois Univ.-Carbondale [www.law.siu.edu]	x	x				x	x	x	x		0.5	x					x	x	x		x		x	i	
108	76.5	Roger Williams Univ. [law.rwu.edu]	x	x				0.5	x	0.5	x	0.25	0.5		x				x	x	x	x	x	x	x		
	76	Albany Law Sch. of Union Univ. [www.albanylaw.edu]	x			x		0.5	0.75	x	0.2			x					x	x	x	x	x	x	x	f	
	76	Regent Univ. [www.regent.edu/acad/schlaw]	x	x	x			x	0.5	0.5	0.2		0.5						x	x	x	x	x	x	x		
	76	Univ. of California-Irvine [www.law.uci.edu]	x	x				x	x	0.5	0.4	0.25	0.5	x					x	x	x	x	x		x		
109	76	Univ. of Dayton [www.law.udayton.edu]	x					0.5	x	x	0.6		0.5	x					x	x	x	x	x	x	x	i	
	76	Univ. of Idaho [www.law.uidaho.edu]	x	x				x	0.25	x		0.25	0.5	x					x	x	x	x	x	x	x	z	
	76	Univ. of Richmond [law.richmond.edu]	x	x				x	x		0.4	0.25	x						x	x	x	x	x	x	x	z	
	76	Widener Univ.-Harrisburg [law.widener.edu]	x	x				x	x		0.6	0.25	0.5	x					x	x	x	x	x	x	x		
	76	Yale Univ. [www.law.yale.edu]	x			x		x	x	x	0.4	0.25		x					x	x	x		x	x	x	i	
117	75.5	Univ. of Connecticut [www.law.uconn.edu]	x				x	0.5	x	x	0.4		0.5		x				x	x	x	x	x	x	x		
	75	Santa Clara Univ. [law.scu.edu]	x	x				x	0.5	0.5	0.4		x	x					x	x	x	x	x	x	x		
118	75	Southern Methodist Univ. [www.law.smu.edu]	x	x				x	0.75	0.5	x	0.25	0.5	x					x	x		x	x	x	x	g	
	75	West Virginia Univ. [law.wvu.edu]	x	x				x	x	x	0.4	0.5	0.5	x	x		x		x	x		x	x	x	x		
	75	William S. Boyd Sch. of Law [www.law.unlv.edu]	x					x	0.75	x	0.4		0.5						x	x	x	x	x	x	x		
122	74.5	Howard Univ. [www.law.howard.edu]	x					0.5	x	x	0.8	x	0.5		x	x	x		x	x	x	x	x		x		
	74	Drexel Univ. [www.earlemacklaw.drexel.edu]	x	x				0.5	0.75	x			0.5	x					x	x	x	x	x	x	x		
123	74	New York Law Sch. [www.nyls.edu]	x	x			x	x	0.25	0.5	0.2	0.25	0.5	x	x		x		x	x	x	x	x	x	x		
	74	Northeastern Univ. [www.northeastern.edu/law]	x					x	0.75		x	0.5	x	x					x	x	x	x	x	x	x		
	74	Univ. of Alabama [www.law.ua.edu]	x		x			x	x	0.5	0.4	x	0.5	x					x	x		x	x	x	x		
127	73.5	Univ. of Akron [www.uakron.edu/law]	x	x					x	x				x	x				x	x	x	x	x	x	x	f	
	73	Florida A&M Sch. of Law [law.famu.edu]		x				x	x	x	0.2	0.5	x	x					x	x	x	x			x		
128	73	Inter American Univ. of Puerto Rico [www.derecho.inter.edu]	x	x				x	x		x	0.5	x						x	x	x		x	x	x		
	73	Northern Illinois Univ. [law.niu.edu/law]	x	x				x	x	x	x	0.5	x	x					x			x	x	x	x	i	
131	72.5	Seton Hall Univ. [law.shu.edu]	x					x	x	x	0.6		0.5	x			x		x	x	x		x	x	x		
	72	Northwestern Univ. [www.law.northwestern.edu]	x	x			x	0.5	0.75	0.5	0.2	0.25			x		x		x	x	x	x	x	x	x		
	72	Temple Univ. [www.law.temple.edu]	x	x	x		x	0.5	0.75	x		0.75	0.5							x	x	x			x	x	f	
132	72	Univ. of Oregon [www.law.uoregon.edu]	x	x				x	x		0.6		0.5	x					x	x	x	x	x	x			
	72	Univ. of Washington [www.law.washington.edu]	x	x		x	x	x	x	x	0.2	0.25	0.5	x					x			x	x	x	x		
	72	Villanova Univ. [www.law.villanova.edu]	x	x				x	0.75	x	0.2		0.5						x	x	x		x	x	x		
	72	Yeshiva Univ. [www.cardozo.yu.edu]	x	x				x	0.75	0.5		0.5	0.5						x	x	x	x	x		x		
	71	Northern Kentucky Univ. [chaselaw.nku.edu]	x					x	x			x	0.5						x	x	x	x	x	x	x		
	71	Oklahoma City Univ. [law.okcu.edu]	x	x	x			x	0.25		0.6	0.25	0.5	x					x	x	x	x					f,g,z
138	71	South Texas Coll. of Law [www.stcl.edu]	x	x				0.5	x		0.8			x					x	x	x	x	x	x	x		
	71	Univ. of Michigan [www.law.umich.edu]	x	x					0.75	x		0.5		x					x	x	x	x	x	x	x		
	71	Willamette Univ. [www.willamette.edu/wucl]	x	x		x		x		x	0.2	0.25	0.5	x	-1	x			x	x	x		x	x	x		
	70.5	Case Western Reserve Univ. [law.case.edu]	x	x	x			0.5	0.75			0.25		x	x				x	x	x	x	x	x	x	z	
143	70.5	Suffolk Univ. [www.law.suffolk.edu]	x	x				0.5	0.5	x					x				x	x	x	x	x	x	x	z	
	70.5	Univ. of Minnesota [www.law.umn.edu]	x	x	x				0.75	x		x	0.5		x				x	x	x		x	x	x		
	70	Boston Univ. [www.bu.edu/law]	x	x				0.5	0.75	x	0.8	0.25		x					x	x		x	x	x	x		
	70	Emory Univ. [www.law.emory.edu]	x	x	x		x	x	x	0.5	0.6	0.75	0.5	x	x		x		x	x				x	x		
146	70	Penn State Univ. Dickinson Sch. of Law [www.dsl.psu.edu]	x	x	x			0.5	0.75		0.4			x	x	x			x	x	x	x	x	x	x		
	70	Univ. of San Francisco [www.usfca.edu/law]	x	x		x		x	0.25		0.2		0.5	x					x	x	x	x	x	x	x		
	69	Florida State Univ. [www.law.fsu.edu]	x					0.5	0.75		0.8	x		x					x	x	x	x	x	x	x		
150	69	Syracuse Univ. [www.law.syr.edu]	x					0.5	x	x	x		0.5	x					x	x		x	x	x	x		
	69	Texas Southern Univ. [www.tsulaw.edu]	x						x		x	x	0.5	x					x	x	x	x	x	x	x		
	69	Univ. of Arizona [www.law.arizona.edu]	x	x				x	x		x	0.75	0.5	x					x	x		x		x	x	k	
	68.5	New York Univ. [www.law.nyu.edu]	x	x		x		x	0.75			0.25	x	x	x				x	x	x		x	x	x		
154	68.5	The Judge Advocate General's Sch. [www.jagcnet.army.mil]	x	x				0.5	x	x	0.4	x		x			x		x		x	x			x	x	
	68.5	Univ. of Toledo [www.law.utoledo.edu]	x					x	x		x	0.75	x				x		x	x	x	x			x		
	68	Duquesne Univ. [www.law.duq.edu]	x	x			x	x		x		0.25		x					x	x	x	x			x		
157	68	Univ. of Louisville [www.law.louisville.edu]	x	x				x	0.75	x	0.6	0.75	x	x	x		x		x			x	x	x	x		
	68	Univ. of Memphis [www.memphis.edu/law]	x			x			x		x	0.25		x					x	x	x	x	x	x	x		
	68	Florida International Sch. of Law [law.fiu.edu]		x	x			x	x	x	0.8		0.5	x					x			x	x	x	x	f,i	

161	67.5	Brigham Young Univ. [www.law2.byu.edu]	x	x	x			x	0.75		0.2	x	0.5	x		x			x		x	x	x	x		
	67.5	Golden Gate Univ. [www.ggu.edu/school_of_law]	x					x	x	x	0.4	0.75	0.5	x	x					x	x	x	x	x		
163	67	St. Louis Univ. [law.slu.edu]	x	x				0.5	x				0.5						x	x	x	x	x	x	x	
	67	Univ. of Montana [www.umt.edu/law]	x	x				x	x	x	x	0.25	0.5	x					x			x	x	x		
165	66	North Carolina Central Univ. [law.nccu.edu]	x	x		x		x			0.2		x	x					x	x	x	x		x	x	z
	66	William And Mary Sch. of Law [law.wm.edu]	x					x	x	x	0.8	0.25	x						x			x	x	x	x	i
167	65	Catholic Univ. of America [www.law.edu]	x	x			x	0.5	0.75	0.5	0.2	0.25		x	x		x		x	x		x	x	x	x	
	65	Cleveland-Marshall Coll. of Law [www.law.csuohio.edu]	x	x	x			x	0.25		0.2	0.75	0.5						x	x		x	x	x	x	
	65	Fordham Univ. [law.fordham.edu]	x		x			0.5	x		0.2		0.5	x	x	x			x	x	x	x	x	x		
	65	Loyola Univ.-Chicago [www.luc.edu/law]	x	x				x	x		0.6		0.5	x					x	x	x			x	x	
171	64	Faulkner Univ. [www.faulkner.edu/jsl/]	x	x					x			0.75	0.5	x					x	x	x	x	x		x	
	64	Phoenix Sch. of Law [www.phoenixlaw.edu]	x	x				x					0.5	x					x	x	x	x	x	x	x	
	64	Rutgers Univ.-Camden [camlaw.rutgers.edu]	x					0.5	x	0.5	0.4		0.5	x					x	x	x		x	x	x	
174	63	Boston Coll. [www.bc.edu/schools/law]	x	x				x	x	x	0.6		0.5	x					x			x		x	x	
	63	Louisiana State Univ. [www.law.lsu.edu]	x					0.5	0.25		0.2	x	0.5	x					x	x	x	x	x	x	x	
	63	St. Mary's Univ. [www.stmarytx.edu/law]	x	x				x		0.5			0.5	x					x	x	x		x	x	x	z
177	62.5	California Western Sch. of Law [www.cwsl.edu]	x	x				0.5	0.25			x	0.5	x	x				x	x	x	x	x		x	
	62.5	Loyola Law Sch. Los Angeles [www.lls.edu]	x					0.5	x			0.75	x	x	x				x	x	x		x	x	x	i
179	61.5	Texas Wesleyan Univ. [www.law.txwes.edu]						0.5	x		0.6	x		x			x		x	x	x	x	x	x	x	
	61.5	Univ. of Kentucky [www.law.uky.edu]	x	x						x					x				x	x	x	x	x	x	x	
181	61	Mercer Univ. [www.law.mercer.edu]	x	x				x	0.75		x	0.25	0.5						x	x			x	x	x	
	61	Samford Univ. [cumberland.samford.edu]	x					x	x		x	0.25	x						x	x	x			x		
	61	Seattle Univ. [www.law.seattleu.edu]	x					x	x	0.5	x		0.5	x					x			x	x	x	x	
	61	Tulane Univ. [www.law.tulane.edu]	x	x			x	0.5			0.4	0.25		x					x	x	x	x		x	x	
185	60.5	Western State Sch. of Law [www.wsulaw.edu]	x			x		x	0.75	x			0.5	x	x				x			x	x	x	x	
186	60	Texas Tech Univ. [www.law.ttu.edu]	x	x				0.5	x	x		0.25	x	x					x			x	x	x		i
187	59.5	Southern Univ. [www.sulc.edu]	x					x	0.75		0.2	0.25	0.5	x	x				x	x		x	x		x	f
188	58	Baylor Univ. [www.baylor.edu/law]	x	x								0.75	0.5	x	x	x			x	x	x	x	x	x	x	
189	57	Creighton Univ. [www.creighton.edu/law]	x					0.5					0.5	x					x	x	x	x	x	x	x	z
190	56.5	Campbell Univ. [law.campbell.edu]		x	x			0.5			0.4	0.5	0.5	x			x		x	x	x	x	x		x	
191	55.5	Univ. of California at Los Angeles [www.law.ucla.edu]	x	x				0.5					0.5	x	x				x	x	x	x		x	x	
192	55	Ave Maria Univ. Sch. of Law [www.avemarialaw.edu]		x				0.5	0.25		0.4		0.5	x	x	x			x	x	x	x	x	x	x	
193	54.5	Mississippi Coll. [law.mc.edu]	x	x				0.5		0.5	0.4		0.5		x				x	x	x	x				
194	53.5	Cornell Univ. [www.lawschool.cornell.edu]	x	x				0.5	0.75	0.5	0.2		0.5		x				x			x	x	x	x	
	53.5	Touro Coll. [www.tourolaw.edu]	x	x				0.5			0.2	0.25		x	x	x		x	x	x	x		x	x	x	
196	51	St. Thomas Univ. [www.stu.edu/law]	x					0.5					0.5	x	x		x		x	x	x	x		x	x	
197	49	Stanford Univ. [www.law.stanford.edu]	x	x				x	0.5		0.2		0.5						x			x		x	x	z
198	47.5	Univ. of Puerto Rico [www.law.upr.edu]							x		x	x	x				x		x	x	x				x	
199	45	St. John's Univ. [www.stjohns.edu/academics/graduate/law]	x	x				x	0.5	x	x		0.5	x										x	x	
200	42	District of Columbia [www.law.udc.edu]		x				0.5				0.5	x	x					x	x	x				x	
201	33	Pontifical Catholic Univ. of P.R. [www.pucpr.edu]				x			x		0.6		0.5	x	x		x		x		x					

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SUPREME COURT SLUGGERS

SAMUEL A. ALITO OF THE PHILADELPHIA PHILLIES AND MARVIN MILLER OF THE MLBPA

Ross E. Davies[†]

The *Green Bag*'s Justice Samuel Alito trading card displays two of the established features of a *Supreme Court Sluggers* card: (1) imagery on the front, in the form of a portrait of the Justice in a sporting environment dotted with entertaining details, and (2) facts on the back, in the form of numbers – and a few words, if there is enough space – relating to the Justice's work. The Alito card has a couple of additional features that will, I hope, appear from time to time on future cards as well: (1) facts on the front, in the form of numbers relating to the Justice's own involvement in sports, and (2) imagery on the back, in the form of graphics that make it easier to make sense of some of the judicial statistics. I review all four of these features below, and then conclude with a note about a special-edition Marvin Miller *Sluggers* card we put out last year.

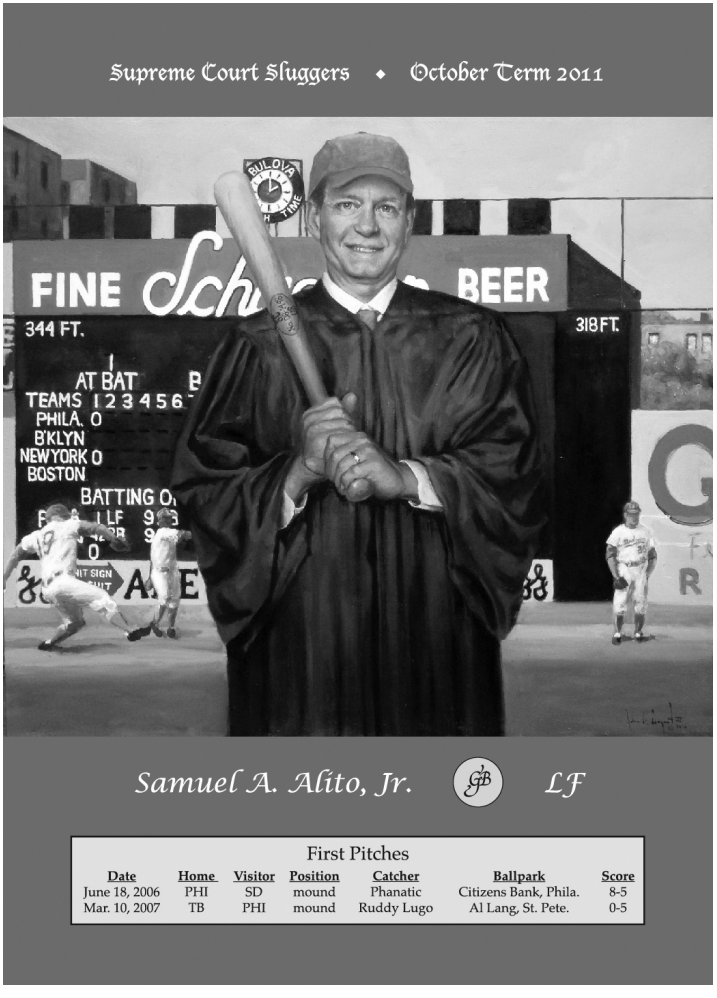
I.
JUSTICE SAMUEL ALITO, ILLUSTRATED

John Sargent painted the full-color portrait that graces the front of the Alito card and is reproduced in black-and-white on the next page.[1] It is inspired by a classic 1954 Don Richard "Richie" Ashburn trading card.[2] (The Ashburn card is not pictured here because we could not get permission from all possible copyright holders.) Why Ashburn? Because:

[†] Professor of law, George Mason University; editor-in-chief, the *Green Bag*.

[1] John A. Sargent III, *Supreme Court Justice Sam Alito* (2012) (oil on canvas). *See John A. Sargent III*, www.johnasargent.com (vis. Apr. 17, 2013); *Sluggers Home*, GREEN BAG, www.greenbag.org/sluggers/sluggers_home.html (vis. Apr. 17, 2013).

[2] *Richie Ashburn, Philadelphia Phillies*, No. 15 (Bowman 1954).



- Most importantly, he played for the Philadelphia Phillies. Alito is a big Phillies fan. Indeed, it is Alito's enthusiasm for the Phillies that is behind the statistics on the front of his *Sluggers* card. Alito has twice thrown the ceremonial first pitch at a Phillies game – a regular season game against the Tampa Bay Devil Rays in 2006 and a spring training game against the Rays in 2007 – and his team has won both games.[3]

[3] Ken Mandel, *Alito lives out a lifelong 'dream': Supreme Court Associate Justice throws out first pitch*, PHILLIES (June 18, 2006), philadelphia.phillies.mlb.com/news/article.jsp?ymd=200

- Ashburn was a great player in the outfield and in the batter's box for the Phillies from 1948 to 1959, and he remains in the team's all-time top ten in almost every major non-pitching statistical category. (He finished his career with short stints on the Chicago Cubs and New York Mets.)[4] He was the second player (after pitcher Robin Roberts) honored with a plaque on the Phillies Wall of Fame, his uniform (#1) is one of nine retired by the team, and he was elected to the National Baseball Hall of Fame in 1995.[5]
- In addition, Ashburn's status as the long-serving and much-loved voice of the Phillies for many fans – he was a Philadelphia baseball radio and television commentator from shortly after his 1962 retirement from playing until the day before his death in September 1997 – makes him a natural choice for a human symbol of Alito's team of choice.[6]

With Ashburn in place as the model for Alito the Supreme Court Slugger, the best choice for the setting is Ebbets Field in Brooklyn, New York on April 23, 1948, the best day of Ashburn's outstanding rookie season (after which he was named the *Sporting News* Rookie of the Year).[7] That day, the Phillies played the first game of a three-game series against the Brooklyn Dodgers. Thus, warming up from left to right on the *Sluggers* card behind Alito-as-Ashburn are Dodgers starters for the April 23 game: pitcher Joe Hatten, second baseman Jackie Robinson, and first baseman Dick Sisler. The famous

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60618&content_id=1512055&fext=.jsp&c_id=phi; Ben Walker, *Supreme Court Justice Trades Robe for Jersey*, [Mobile, Ala.] PRESS-REGISTER, Mar. 11, 2007, at B6. Note that the *Sluggers* card misidentifies the 2006 opposing team as the San Diego Padres. We will correct that error in the next edition of the card, and the error will surely make the first edition even more of a collector's item than it would otherwise be.

[4] *Richie Ashburn*, RETROSHEET, www.retrosheet.org/boxesetc/A/Pashbr101.htm (vis. Apr. 12, 2013).

[5] *Wall of Famers*, PHILLIES, mlb.mlb.com/phi/history/wall_of_fame.jsp; *Philadelphia Phillies Team History & Encyclopedia*, BASEBALL-REFERENCE.COM, www.baseball-reference.com/teams/PHI/; *Ashburn, Richie*, NATIONAL BASEBALL HALL OF FAME AND MUSEUM, baseballhall.org/hof/ashburn-richie (all vis. Apr. 12, 2013).

[6] *See* Frank Fitzpatrick, *A Phillie for the Ages, Richie Ashburn Dies*, PHILA. INQUIRER, Sept. 10, 1997, at A1; *see generally* FRAN ZIMNIUCH, RICHIE ASHBURN REMEMBERED (2005).

[7] *Richie Ashburn*, RETROSHEET, www.retrosheet.org/boxesetc/A/Pashbr101.htm (vis. Apr. 12, 2013).

Bulova clock above the Ebbets Field scoreboard behind right-center field[8] shows that the 2 p.m. game is about to start, and so leadoff hitter Alito-as-Ashburn is ready to go. He is standing with his bat on his shoulder in the on-deck circle in front of the visitors' dugout on the third base side. In the game as it was actually played, Ashburn hit a leadoff single in the top of the first inning, and then advanced to second on a bunt by Emil Verban and to third on a single by Bert Haas. Ashburn then stole home, in his fourth game as a major-leaguer – the first of his 32 stolen bases that season and 234 in his career. He had two more hits in that game, two more scores, and a run batted in. The Phillies won, 10 to 2.[9]

The bat Alito-as-Ashburn is holding is, however, unlike the one Ashburn swung in 1948. If you look closely you might be able to make out the details of its unique logo:

And that logo might prompt you to re-read Alito's concurring opinion in *Brown v. Entertainment Merchants Association*, in which he observes that

> Persons who play video games also have an unprecedented ability to participate in the events that take place in the virtual worlds that these games create. . . . [T]he means by which players control the action in video games now bear a closer relationship to the means by which people control action in the real world. While the action in older games was often directed with buttons or a joystick, players dictate the action in newer

[8] *See* BOB MCGEE, THE GREATEST BALLPARK EVER: EBBETS FIELD AND THE STORY OF THE BROOKLYN DODGERS 184-85 (2005).

[9] *Philadelphia Phillies 10, Brooklyn Dodgers 2: Game Played on Friday, April 23, 1948 (D) at Ebbets Field*, RETROSHEET, www.retrosheet.org/boxesetc/1948/B04230BRO1948.htm (vis. Apr. 12, 2013).

> games by engaging in the same motions that they desire a character in the game to perform. For example, a player who wants a video-game character to swing a baseball bat – either to hit a ball or smash a skull – could bring that about by simulating the motion of actually swinging a bat.[10]

Finally, to anticipate the obvious question about an obvious absence from such a Phillies-friendly baseball card: Yes, we attempted to ask the Phillies for permission to portray Alito in a cap with the Phillies "P" on it, but Major League Baseball said no.

II.
JUSTICE SAMUEL ALITO, QUANTIFIED

In one sense the biggest news about the numbers on the back of the Alito *Sluggers* card is no news at all. The sophisticated and comprehensive processes for gathering and sorting judicial statistics that *Sluggers* editors Adam Aft and Craig Rust have developed (and which they describe in earlier articles about the *Sluggers*[11]) ran quite smoothly for the Alito card. Aft and Rust – with assistance from Justin Du Mouchel, Jeremy Greenberg, Tashina Harris, Daniel Rodriguez, and Sarah Snider – have put together what appears to be (subject to correction by attentive readers) a complete statistical profile of Alito's judicial opinion-writing and opinion-joining production. The results of their research are summarized on the back of the Alito card (which is reproduced on the next page), and are available in their entirety on the *Supreme Court Sluggers* website.[12]

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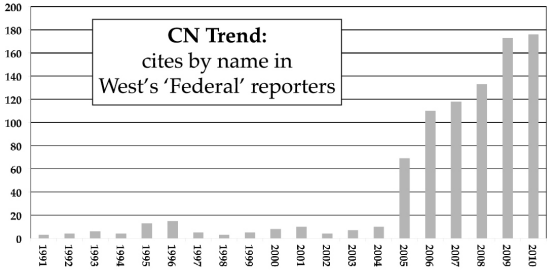
[10] 131 S.Ct. 2729, 2749 (2011) (Alito, J., concurring in the judgment) (footnote omitted).

[11] *See, e.g.*, Ross E. Davies, Craig D. Rust and Adam Aft, *Supreme Court Sluggers: Introducing the Scalia, Fortas, and Goldberg/Miller Trading Cards*, 2 J.L.: PERIODICAL LABORATORY OF LEG. SCHOLARSHIP (1 J. LEGAL METRICS) 155, 166-70 (2012); Ross E. Davies, Craig D. Rust and Adam Aft, *Justices at Work, or Not: New Supreme Court Statistics and Old Impediments to Making Them Accurate*, 14 GREEN BAG 2D 217, 226-28 (2011); Ross E. Davies, Craig D. Rust and Adam Aft, *Supreme Court Sluggers: John Paul Stevens is No Stephen J. Field*, 13 GREEN BAG 2D 463, 475-80 (2010); Ross E. Davies and Craig D. Rust, *Supreme Court Sluggers: Behind the Numbers*, 13 GREEN BAG 2D 213, 219-26 (2010).

[12] *See Sluggers Home*, GREEN BAG, www.greenbag.org/sluggers/sluggers_home.html (vis. Apr. 17, 2013).

[1]The Numbers (as of June 28, 2011)

Court	Term	TO	MO	UO	PO	CO	DO	PC	JN	OO	IC	CN
[2]3d Cir.	1989	1	1	1	0	0	0	0	3	0	0	0
3d Cir.	1990	25	17	15	0	1	7	0	32	0	0	0
3d Cir.	1991	28	18	15	0	3	7	1	39	0	0	3
3d Cir.	1992	20	12	11	0	4	4	0	32	0	0	4
3d Cir.	1993	32	22	20	0	1	9	0	45	0	0	6
3d Cir.	1994	14	10	7	0	2	2	2	33	0	0	4
3d Cir.	1995	20	12	10	0	2	5	0	24	1	0	13
3d Cir.	1996	26	13	11	0	1	12	0	29	0	0	15
3d Cir.	1997	17	13	9	0	2	2	1	26	0	0	5
3d Cir.	1998	30	23	20	0	4	3	0	38	0	0	3
3d Cir.	1999	27	18	15	0	3	6	2	25	0	0	5
3d Cir.	2000	23	19	15	0	3	1	0	29	0	0	8
3d Cir.	2001	27	23	17	0	1	3	5	84	0	0	10
3d Cir.	2002	24	22	21	0	2	0	0	117	0	0	4
3d Cir.	2003	33	25	24	0	5	3	0	147	0	0	7
3d Cir.	2004	15	9	9	0	2	4	0	112	0	0	10
[2]3d Cir.	2005	2	2	2	0	0	0	0	37	0	0	0
Tot.		**364**	**259**	**222**	**0**	**36**	**68**	**11**	**852**	**1**	**0**	**97**
Avg.		**24**	**17**	**15**	**0**	**2**	**5**	**1**	**54**	**0**	**0**	**6**
[2]S. Ct.	2005	9	3	1	0	3	2	9	26	1	0	69
S. Ct.	2006	16	6	3	1	5	4	7	52	0	0	110
S. Ct.	2007	18	7	1	0	4	7	6	48	0	0	118
S. Ct.	2008	24	7	3	0	9	6	9	52	2	0	133
S. Ct.	2009	24	6	1	0	10	6	17	52	1	0	173
S. Ct.	2010	20	7	1	0	6	5	6	61	2	0	176
Tot.		**111**	**36**	**10**	**1**	**37**	**30**	**54**	**291**	**6**	**0**	**779**
Avg.		**20**	**7**	**2**	**0**	**7**	**6**	**9**	**53**	**1**	**0**	**142**



[1]Full acronym definitions and backup for **The Numbers** are at www.greenbag.org. [2]These are partial Terms, thus the low numbers and therefore we did not use them when calculating averages.

Made by the Green Bag, with GMU Sch. of Law support. Portrait by John A. Sargent. Numbers by Justin Du Mouchel, Jeremy Greenberg, Tashina Harris, Daniel Rodriguez, Sarah Snider, Craig Rust, Adam Aft.

Samuel A. Alito, Jr.
Associate Justice
Oath: Jan. 31, 2006

Term=yr. starting 1st Mon. in Oct.; **TO**=MO+PO+CO+DO+OO+IC; **MO**=majority opinions; **UO**=MOs w/no other opinions; **PO**=plurality opinions; **CO**=concurrences; **DO**=dissents; **PC**=per curiams joined; **JN**=non-PCs joined when not writing (max. 1/case); **OO**=opinions relating to orders; **IC**=in-chambers opinions; **CN**=cites by name in West's 'Federal' reporters

To the extent there is big news on the back of the Alito card it has to do not with new data but with the graphical presentation of another kind of data – citations by name – that Aft, Rust, and company have been gathering about every Justice for every *Sluggers* card. The "CN" statistic – the number of citations by name to a Justice per

year in West's "Federal" reporters (the *Federal Appendix*, *Federal Reporter*, and *Federal Supplement* series) is an "attempt[] to quantify how influential or popular [a Justice] has been, by recording . . . the number of times he [or she] was cited by name in a federal court opinion (which could, of course, include jabs as well as lauds)."[13]

The Alito card is the first to feature a year-by-year "CN Trend" graph for a sitting Justice.

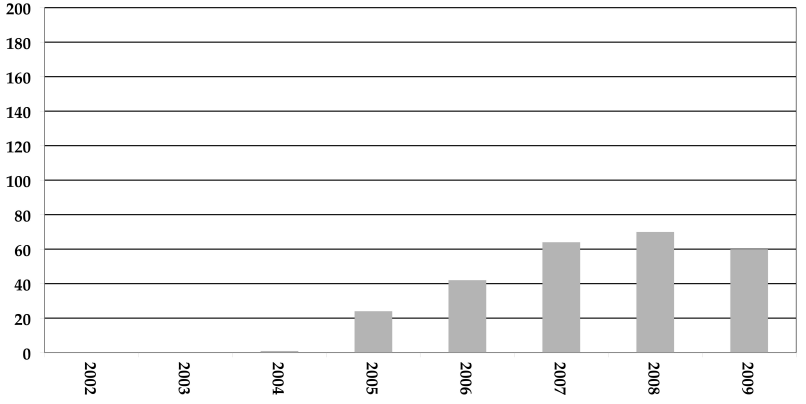
The Abe Fortas *Sluggers* card was the first to feature a decade-by-decade "CN Trend" graph for a historical figure. The main idea behind that kind of presentation is to give the viewer a quick-look sense of the ups and downs of the long-term legacy of the individual Justice.

The main idea behind the year-by-year presentation on the Alito card – and, I hope, on future cards of active and recent Justices (including updates to old cards) – is to give viewers a quick-look sense of the extent to which individual Justices are in the sights of their judicial colleagues. Graphs of this sort will probably inspire a lot more questions than answers, but they may be the kind of questions that will inspire additional research or at least reflection.

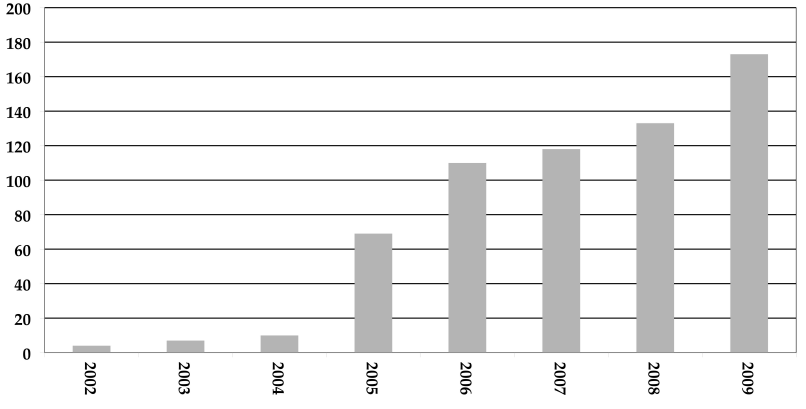
Consider, for example, the CN Trends from 2002 to 2009 for Alito and his colleague Chief Justice John Roberts. Before you turn to the next page, consult your intuition: How will their CN numbers compare? Bear in mind that these two had a lot in common at the start of their careers on the Court. They joined at close to the same time (Roberts in September 2005, Alito in January 2006), they were appointed by the same president (George H.W. Bush) and confirmed by the same Senate (the 109th), they were elevated from seats on eastern federal appeallate courts, they had served lengthy tours of duty as government lawyers, and so on. If we had included a CN Trend graph in our 2010 update to the back of Chief Justice Roberts's *Sluggers* card, it would have given reader-collectors a chance to easily (if only summarily) compare the extent to which, since the fall and winter of 2005-06, their colleagues on the federal bench have mentioned them by name in their reported opinions:

[13] Davis & Rust, *supra* note 11, at 223.

CHIEF JUSTICE JOHN G. ROBERTS, JR.
CN TREND, OT2002-2009

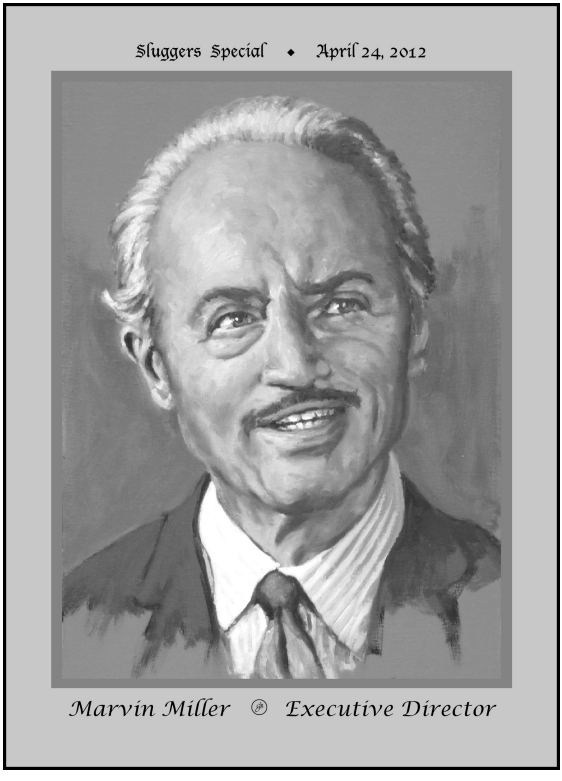


JUSTICE SAMUEL A. ALITO, JR.
CN TREND, OT2002-2009



I do not know why these graphs are so different. But I do know that I am not the only person who sometimes misses puzzlers like this unless there are pictures for me to read and wonder about. Perhaps some Bill James of judicial behavior will figure it out.[14]

[14] *Cf.* BILL JAMES, THE POLITICS OF GLORY: HOW BASEBALL'S HALL OF FAME REALLY WORKS (1994); Cass R. Sunstein, *Moneyball for Judges: The statistics of judicial behavior*, NEW REPUBLIC, Apr. 10, 2013 (reviewing LEE EPSTEIN, WILLIAM M. LANDES, AND RICHARD A. POSNER, THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE (2012)).



III.
UNEXPECTED IN MEMORIAM: MARVIN MILLER, 1917-2012

Last April, the *Green Bag* produced a special edition of the Marvin Miller portion of the Arthur Goldberg/Marvin Miller *Sluggers* card. It was for a law-and-baseball event at which Miller was the featured speaker, sponsored by the Center for Labor and Employment Law at New York University.[15] (Miller, the longtime baseball labor leader whose work led to his involvement with various interesting legal figures, institutions, and events, is featured on a *Sluggers*

[15] *A Celebration of Marvin Miller & Baseball Unionism: The Rise and Role of the Major League Baseball Players Association*, NEW YORK UNIVERSITY LAW SCHOOL, www.law.nyu.edu/centers/labor/scheduleofevents/BaseballUnionism/index.htm (vis. Apr. 13, 2013).

card with Justice Goldberg because of their long off-and-on working relationship – it began when both were employed by the United Steelworkers in the 1950s – that culminated in collaboration on the baseball, antitrust, and labor case of *Flood v. Kuhn* in the early 1970s.[16])

It was to the proceedings at New York University that Aft, Rust, and I were referring when we wrote in these pages last year that, "[W]e expect that in the not-too-distant future there will be another, better forum in which to describe the Goldberg-Miller card in full."[17] And the forthcoming volume 16 of the *New York University Journal of Legislation and Public Policy* – in which transcripts of Miller's NYU speech and the associated proceedings will be published – is that forum.

What we did not know at the time of the NYU event, but that Miller himself forecast, was that it would be his "last hurrah."[18] He delivered his speech on April 24, fell ill several weeks later, and died on November 27, 2012 at the age of 95. Which makes the Marvin Miller *Sluggers* card something of a commemorative token. Not that Miller needs our help. He left behind some footprints that are fairly firmly pressed on the sandlots of time.[19]

# # #

[16] 407 U.S. 258 (1972); MARVIN MILLER, A WHOLE DIFFERENT BALL GAME: THE INSIDE STORY OF THE BASEBALL REVOLUTION 187-201, 366-67 (2d ed. 2004).

[17] Davies, Rust and Aft, *supra* note 11, 2 J.L.: PERIODICAL LABORATORY OF LEG. SCHOLARSHIP (1 J. LEGAL METRICS) at 176.

[18] Email from Peter Miller to Ross Davies, Nov. 27, 2012 ("This year's April symposium . . . at NYU proved to be exactly what my father, with his usual realism, said it would be: his 'last hurrah'.").

[19] Richard Goldstein, *The Bargainer Who Remade the Old Ball Game*, N.Y. TIMES, Nov. 28, 2012, at A1; *see also Hundreds turn out to celebrate the life and achievements of Marvin Miller*, MLBPA Press Release, Jan. 22, 2012, mlb.mlb.com/pa/releases/releases.jsp?content=012213.

The Post

GOOD SCHOLARSHIP FROM THE INTERNET

VOLUME 3 • NUMBER 1 • SPRING 2013

The Post

VOLUME 3 • NUMBER 1 • SPRING 2013

The Post operates on the same terms as the *Journal of Law*. In the interests of fidelity, and to preserve the real-time spirit of blogging, *The Post* does not correct typos in the original blog posts, and also refrains from sprinkling [sic]'s throughout. Please write to *The Post* at post@annaivey.com, and visit us at www.journaloflaw.us. ISSN 2157-9067 (print) and 2157-9075 (online).

INTRODUCTION

Anna Ivey[†]

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

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

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[†] President, Ivey Consulting, Inc.

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

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

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

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

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

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

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

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

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

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

FROM: THE VOLOKH CONSPIRACY

THE SECRET "KILL LIST" AND THE PRESIDENT

Kenneth Anderson[†]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FROM: THE FACULTY LOUNGE

ARE YOU READY FOR SOME . . . RESEARCH?

UNCERTAIN DIAGNOSES, RESEARCH DATA PRIVACY, & PREFERENCE HETEROGENEITY

Michelle N. Meyer[†]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

UNCERTAIN DIAGNOSES & RISK-BENEFIT HETEROGENEITY

On his blog, Neurocritic asks[10]:

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

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

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

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

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

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

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

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

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

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

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

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

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

[15] papers.ssrn.com/sol3/papers.cfm?abstract_id=2182619.
[16] en.wikipedia.org/wiki/Wayne_Clark_(American_football).
[17] www.nflevolution.com/article/Scans-show-CTE-in-living-ex-players-could-be-breakthrough?ref=4026.
[18] www.cbssports.com/nfl/blog/eye-on-football/21599368/researchers-find-cte-in-living-former-nfl-players.
[19] www.ctvnews.ca/health/scientists-discover-holy-grail-of-concussion-linked-cte-research-1.1125840.
[20] www.theblend.ie/lifestyle-2/health-fitness/holy-grail-breakthrough-in-cte-brain-damag

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

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

e-research/.

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

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

[23] www.1000genomes.org.

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

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

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

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

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

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

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

Cross-posted at *Bill of Health*.

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

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

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

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

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

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

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

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

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

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

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

FROM: THE VOLOKH CONSPIRACY

DEBATE ON THE TREATY POWER

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

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

Nick Rosenkranz

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

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

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[†] Professor of Law, Georgetown University Law Center. Links to originals at www.volokh.com/2013/02/03/final-post-of-the-treaty-debate/ (Jan. 13-Feb. 3; vis. Apr. 15, 2013).

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[°] Professor of Law, George Mason University School of Law.

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

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

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

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

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

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

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

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

TREATIES, THE LAW OF NATIONS, AND FOREIGN COMMERCE

Eugene Kontorovich

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

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

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

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

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

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

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

UPDATED with minor edits.

DOES CONGRESS HAVE THE POWER TO ENFORCE TREATIES? PART I

Rick Pildes

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Nick Rosenkranz

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

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

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

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

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

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

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

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

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

DOES CONGRESS HAVE THE POWER TO ENFORCE TREATIES? PART II

Rick Pildes

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

* * *

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

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

Nick Rosenkranz

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

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

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

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

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

The conventional view (bolstered by a celebrated bit of purported drafting history, which proved to be false; see Executing the Treaty Power[20] at 1912-18) is that this mechanism derives from a combination of the Necessary and Proper Clause and the Treaty Clause. (I believe that Rick acceded to this conventional view at our debate two weeks ago in New Orleans.[21]) The Necessary and Proper Clause provides: "The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." The Treaty Power is certainly an "other Power[] vested by th[e] Constitution." The Treaty Clause provides that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur."

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

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

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

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

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

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

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

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

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

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

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

THE SUPREME COURT CERT. GRANT IN BOND

Rick Pildes

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

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

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

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

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

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

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

BOND V. UNITED STATES AND THE TREATY POWER

Ilya Somin

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

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

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

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

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

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

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

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

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

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

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

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

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

Nick Rosenkranz

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

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

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

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

And the absence of textual support is unsurprising, because the proposition itself is in such deep tension with the basic structural axioms of the Constitution. The Constitution goes to great pains to limit and enumerate the powers of Congress. It emphasizes that the powers of Congress (unlike the powers of the President and the courts) are only those "herein granted." It creates an elaborate mechanism, really four mechanisms, for its own amendment, by which the legislative power can be – and repeatedly has been – augmented. And for good measure, it underscores that "[t]he Powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

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

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

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

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

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

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

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

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

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

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

SOMIN ON BOND

Nick Rosenkranz

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

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

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

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

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

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

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

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

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

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

[46] www.law.cornell.edu/supct/html/historics/USSC_CR_0354_0001_ZO.html.
[47] papers.ssrn.com/sol3/papers.cfm?abstract_id=747724.

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

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

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

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

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

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

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

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

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

THE LEGAL STATUS OF TREATIES THAT REQUIRE VIOLATIONS OF THE CONSTITUTION

Ilya Somin

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

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

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

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

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

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

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

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

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

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

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

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

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

DOES CONGRESS HAVE THE POWER TO ENFORCE TREATIES: PART III

Rick Pildes

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

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

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

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

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

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

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

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

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

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

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

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

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

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

REASONS TO WORRY ABOUT OVERREACHING ON THE TREATY POWER

Ilya Somin

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

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

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

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

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

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

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

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

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

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

Eugene Kontorovich

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

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

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

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

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

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

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

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

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

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

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[59] www.law.northwestern.edu/lawreview/v106/n4/1675/LR106n4Kontorovich.pdf.
[60] papers.ssrn.com/sol3/papers.cfm?abstract_id=1340645.

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

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

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

Nick Rosenkranz

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

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

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

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

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

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

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

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

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

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

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

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

DOES CONGRESS HAVE THE POWER TO ENFORCE TREATIES: PART IV

Rick Pildes

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE CONSTITUTION AND THE ENFORCEMENT OF PEACE TREATIES

Ilya Somin

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

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

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

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

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

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[70] www.volokh.com/2013/01/21/reasons-to-worry-about-overreaching-on-the-treaty-power/.
[71] www.volokh.com/2013/01/19/bond-v-united-states-and-the-treaty-power/.
[72] www.volokh.com/2013/01/20/the-validity-of-treaties-that-violate-the-constitution/.
[73] www.volokh.com/2013/01/27/does-congress-have-the-power-to-enforce-treaties-part-iv/.
[74] www.volokh.com/2013/01/21/does-congress-have-the-power-to-enforce-treaties-part-iii/.

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

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

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

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

PEACE TREATIES & THE WAR POWER

Eugene Kontorovich

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

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

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

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

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

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

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

Nick Rosenkranz

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[87] www.volokh.com/2013/01/16/the-framers-gave-congress-a-robust-list-of-powers-they-did-not-provide-that-these-legislative-powers-can-be-increased-by-treaty/.
[88] www.lawfareblog.com/2013/01/bond-v-united-states-and-the-treaty-power-debate/.
[89] papers.ssrn.com/sol3/papers.cfm?abstract_id=747724.
[90] www.scotusblog.com/case-files/cases/bond-v-united-states-2/.
[91] www.scotusblog.com/case-files/cases/bond-v-united-states-2/.

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

Nick Rosenkranz

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

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

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

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

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

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

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

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

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

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

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

MISSOURI V. HOLLAND VS. REID V. COVERT

Nick Rosenkranz

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

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

[94] papers.ssrn.com/sol3/papers.cfm?abstract_id=747724.
[95] www.volokh.com/2013/01/16/there-is-no-textual-foundation-for-the-claim-that-treaties-can-increase-the-power-of-congress/.
[96] www.scotusblog.com/case-files/cases/bond-v-united-states-2/.
[97] www.scotusblog.com/case-files/cases/bond-v-united-states-2/.

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

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

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

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

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

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

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

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

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

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

THE LIMITS ON THE TREATY POWER

Rick Pildes

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

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

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

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

[100] www.volokh.com/2013/01/21/except-the-bill-of-rights-the-selective-strong-treaty-position/.
[101] joshblackman.com/blog/2013/01/07/could-a-treaty-give-congress-the-power-to-enact-a-law-that-violates-constitutionally-protected-liberties/.
[102] papers.ssrn.com/sol3/papers.cfm?abstract_id=747724.
[103] www.lawfareblog.com/2013/01/bond-v-united-states-and-the-treaty-power-debate/.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

pending on how the treaty is written).

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

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

MORE ON FEDERALISM AND THE LIMITS OF THE TREATY POWER

Ilya Somin

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. Rosenkranz v. Somin?

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

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

[113] www.volokh.com/2013/01/21/does-congress-have-the-power-to-enforce-treaties-part-iii/.
[114] www.volokh.com/2013/01/20/the-validity-of-treaties-that-violate-the-constitution/.
[115] www.volokh.com/2013/01/20/somin-on-bond/.
[116] www.volokh.com/2013/01/20/the-validity-of-treaties-that-violate-the-constitution/.

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

FINAL POST OF THE TREATY DEBATE

Nick Rosenkranz

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

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

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

[117] www.volokh.com/2013/01/20/somin-on-bond/.
[118] papers.ssrn.com/sol3/papers.cfm?abstract_id=747724.
[119] www.scotusblog.com/case-files/cases/bond-v-united-states-2/.
[120] www.volokh.com/2013/01/22/the-conventional-wisdom-before-missouri-v-holland-was-it-close-to-universally-accepted-that-a-treaty-could-increase-the-legislative-powers-of-congress/.
[121] www.volokh.com/2013/01/30/missouri-v-holland-vs-reid-v-covert/.
[122] www.volokh.com/2013/02/02/the-limits-on-the-treaty-power/.

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

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

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

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

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

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

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

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

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

1/13 Rosenkranz[128]
1/13 Kontorovich[129]
1/14 Pildes[130]
1/16 Rosenkranz[131]
1/16 Pildes[132]

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

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

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

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

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

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

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

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

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

1/16 Rosenkranz[133]
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1/30 Rosenkranz[148]

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

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

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

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

FROM: LEGAL THEORY BLOG

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

Lawrence Solum[†]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FROM: THE VOLOKH CONSPIRACY

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

Ilya Somin[†]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FROM: BALKINIZATION

LAW SCHOOLS SUFFER LOSS IN LAWSUITS

Brian Tamanaha[†]

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

Judge Schweitzer dismissing the suit against New York Law School:

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

Judge Cohen dismissing the suit against DePaul Law School:

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

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

Judge Quist dismissing the suit against Cooley Law School:

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

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

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