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# BOOK REVIEW

ORIGINAL FOREIGN AFFAIRS FEDERALISM

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Two of the most doctrinally bewildering topics in American constitutional law are federalism and foreign affairs. Put the two together and it requires the patience of Job and the wisdom of Solomon to navigate, never mind make sense of, the judicial and political accommodations that have arisen over the course of more than two centuries concerning the relative roles of the national, state, and local governments in matters that implicate American involvement with foreign countries and citizens. I will not go so far as to say that Mike Glennon and Rob Sloane's new book, *Foreign Affairs Federalism: The Myth of National Exclusivity*,<sup>1</sup> is biblical in either ambition or execution. But it is a very, very good book. It is close to indispensable for anyone who is trying to parse the interstices of such underanalyzed topics as foreign affairs preemption, the Compact Clause, and federal common law. It contains powerful and useful analyses of the law governing the federal treaty power. The book even has concise but sophisticated discussions of ancillary topics ranging from Founding-era conceptions of federalism to modern modes of constitutional interpretation. The book's breadth and erudition are truly remarkable. I am delighted for the opportunity to provide this brief review.

It is tempting simply to offer congratulations to the authors and move on. That may even be the wise course of action, given the rather large gap between the authors' knowledge of foreign affairs federalism and my own; in that field, I am at best an interested observer and at worst a dilettante. But I will try to find something critical—or at least analytical—to say, if only to try to draw forth further discussion from the authors.

The authors' self-identified aims in the book are fourfold: (1) "to describe what states and cities in fact do in the realm of foreign affairs," (2) "to explain the basic principles of the Constitution that authorize or limit those activities," (3) "to assess how well those principles reflect and conform to actual practice,"

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<sup>1</sup> MICHAEL J. GLENNON & ROBERT D. SLOANE, *FOREIGN AFFAIRS FEDERALISM: THE MYTH OF NATIONAL EXCLUSIVITY* (2016).

and (4) “to suggest how, if at all, those principles might usefully be modified.”<sup>2</sup> That really amounts to five aims because the third aim requires both identification of actual practices, which is in fact the book’s primary focus, and a comparison of those practices with specified constitutional principles.

I have nothing useful, beyond effusive praise, to say about the authors’ execution of their first aim. They have painstakingly catalogued an enormous spread of activities of state and local governments that, in one sense or another, involve foreign affairs, ranging from congressionally approved compacts, to local “buy only” policies, to the establishment of foreign trade offices, to what Bill O’Reilly would term “bloviating”<sup>3</sup> resolutions of approval or disapproval of various federal policies. Perhaps the authors missed something important along the way, but I can’t think of it. The book is worth the price of admission for Chapters 2 and 10 alone, which set out in great detail the range of relevant state and local activities. I also have nothing useful to say about their last, prescriptive aim, because suggesting modifications to real-world practices is a normative enterprise, and I have a generally firm policy of trying to stay away from normative enterprises in scholarship. I will try, however, to say something useful, or at the very least provocative, about the authors’ other aims.

I. “TO EXPLAIN THE BASIC PRINCIPLES OF THE CONSTITUTION THAT AUTHORIZE OR LIMIT THOSE [STATE AND LOCAL] ACTIVITIES”: WHICH CONSTITUTION?

The opening pages of *Foreign Affairs Federalism* contain a great many references to “the Framers.”<sup>4</sup> Fans of the eighteenth century will find considerable discussion in Chapter 1 of theories of federalism and republicanism that influenced the Founding<sup>5</sup> and a catalogue of original constitutional provisions that seem to address federalism, foreign affairs, or both.<sup>6</sup> Yet, after this seemingly Framer-friendly beginning, the book’s subsequent 300-plus pages contain very little discussion of anything that someone like me would call, or recognize as, the Constitution’s original meaning.

That omission is hardly an accident. Glennon and Sloane are not originalists; the book’s brief but admirably lucid explanation of the authors’ functionalist/pragmatist constitutional methodology makes that abundantly

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<sup>2</sup> *Id.* at 351; see also *id.* at 77 (setting out much of the book’s descriptive and normative agenda).

<sup>3</sup> *Factor Words of the Day: Bloviate*, BILLO’REILLY.COM (Sept. 6, 2006), <http://www.billoreilly.com/b/bloviate/46515669028.html> [<https://perma.cc/EYE8-X3D7>] (defining “bloviate” as “to speak pompously”).

<sup>4</sup> See, e.g., GLENNON & SLOANE, *supra* note 1, at 1 (“Some of the Framers of the Constitution and their countrymen apparently believed that they were the first free agents to design a new government.”).

<sup>5</sup> *Id.* at 2-15.

<sup>6</sup> *Id.* at 16-21.

clear.<sup>7</sup> That stance does not afford valid grounds for criticism of the authors, even if one thinks (as I do) that originalism is the uniquely correct way to ascertain the Constitution's meaning.<sup>8</sup> Glennon and Sloane correctly note that there is no way that a book of this sort could possibly include a detailed treatment of constitutional methodology, even if the authors were inclined (as they are not) to lay out a systematic, foundationally grounded methodological approach.<sup>9</sup> They have done here as much as they reasonably could do—and more than many authors choose to do—by articulating and identifying their methodology so that readers can openly appraise the book's analytical and normative enterprises. A straight-on critique of the authors' interpretative methodology would thus be neither fair nor relevant, and I offer nothing of the sort here.

I do point out, however, that the authors' eclectic and pragmatic approach gives rise to a potential ambiguity that calls out for clarification. When the authors discuss eclectic functionalist principles drawn from “[h]istory . . . [,] practice, precedent, tradition, political theory, structure, and other methodological tools,”<sup>10</sup> are they really discussing something that can meaningfully be labeled *constitutional* principles?

The answer, as a former president might say, depends on what the meaning of “constitutional” is. If by “constitutional principles” one means those principles that, for more than 200 years, have driven actual decisions by real-world political actors, including but not limited to Supreme Court Justices, then of course all of the considerations just listed are part of that set of principles. The authors are indisputably correct to note that “[n]o one method describes the uniform preference of the Court as a whole, or even that of a particular Supreme Court justice,”<sup>11</sup> and a broad list of considerations is an apt description of real-world legal practice. But if “constitutional principles” instead just are the principles contained in the Constitution itself rather than principles contained in the practices of people whose actions are only contingently related to the document, it is far from clear that anything other than the text, informed by background principles that are appropriate for discerning the communicative signals of that particular kind of text, is relevant for ascertaining those principles.<sup>12</sup>

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<sup>7</sup> *Id.* at 78-81; *see also id.* at 21 (“[J]udges and commentators, no less than the Framers, have recognized the need to identify the *functions* that institutions created or presupposed by the Constitution, including the several states, were intended to serve—and to consider whether and how particular interpretations of the text either advance or undermine those functions.”).

<sup>8</sup> *See* Gary Lawson, *Reflections of an Empirical Reader (Or: Could Fleming Be Right This Time?)*, 96 B.U. L. REV. 1457, 1459-60 (2016) (“[S]ome form of originalism just has to be the right method for ascertaining the meaning of the Constitution.”).

<sup>9</sup> *See* GLENNON & SLOANE, *supra* note 1, at 77.

<sup>10</sup> *Id.* at 21.

<sup>11</sup> *Id.* at 80.

<sup>12</sup> Could practice, tradition, precedent, and the like in theory be among the background principles for discerning the communicative signals of a particular kind of document? Of

I do not claim that there is a uniquely appropriate referent for the term “constitutional principles.” People can use “constitutional principles” to mean anything that they would like, provided that the term is clearly defined. The risk is equivocation. Some meanings of the term carry implications or connotations—either communicative or rhetorical—that may not apply to other meanings. For example, by starting off the book with an extensive discussion of Founding-era ideas, Glennon and Sloane might (even if incorrectly) be thought to be conveying the notion that they are linking, however remotely or indirectly, the term “constitutional principles” to something resembling original meaning. That is reinforced by their suggestion that “no one regards the original meaning of the text as irrelevant to constitutional interpretation and adjudication.”<sup>13</sup> On further reading and reflection, of course, the dearth of subsequent discussion of original meaning and the book’s strong focus on history and consequences make clear that original meaning is at best a bit player in the authors’ story. The initial impression of concern for the Founding era, though, never quite goes away entirely. Accordingly, it might be useful for the authors to clarify just how relevant they consider original meaning (however the authors understand that term) to be to their various enterprises,<sup>14</sup> and to spell out more clearly what they consider to be the referent of the term “the Constitution.” Is “the Constitution” a historically situated document? A set of practices? A normative construct? That kind of clarification is especially pertinent, as I will now show, to the authors’ third aim and its implicit fourth accompanying aim.

II. “TO ASSESS HOW WELL THOSE PRINCIPLES REFLECT AND CONFORM TO ACTUAL PRACTICE”: WHICH PRINCIPLES ARE “THOSE”?

In order to compare any set of principles, constitutional or otherwise, to actual practice, one must first describe that practice. The bulk of *Foreign Affairs Federalism* is accordingly devoted to describing the actual practice of political actors, including judicial actors within that category, with respect to the relative roles of national, state, and local governments in foreign affairs. This is really the book’s central mission, and it is the book’s greatest achievement. In addition to the catalogue of state and local activity in Chapters 2 and 10, one can find

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course they could in theory. Are they in fact among the background principles for discerning the communicative signals of the Constitution? That is an empirical question. I think not, but it is a topic for another time.

<sup>13</sup> *Id.* at 79. I am not at all sure about the “no one” part. See, e.g., LOUIS MICHAEL SEIDMAN, ON CONSTITUTIONAL DISOBEDIENCE 15-22 (2012) (presenting ten arguments in favor of constitutional obedience, arguing that all of them fail, and concluding that there is “a problem with constitutional obedience”). But many, and perhaps even most, people give at least lip service to the idea of original meaning.

<sup>14</sup> It might have very different relevance to different enterprises. For example, one might consider original meaning highly relevant to an interpretative project but minimally relevant, or even not relevant at all, to a normative project—or vice versa. See Gary Lawson, *Originalism Without Obligation*, 93 B.U. L. REV. 1309, 1312 (2013).

throughout the book extensive discussions of federal case law and (in a welcome display of breadth) presidential and congressional practice regarding national-state relations in regard to foreign affairs. Those discussions are, independently of Chapters 2 and 10, well worth the price of admission, and they more than amply justify the book on their own. Indeed, they appear to be the book's main *raison d'être*. Accordingly, any criticisms in the rest of this review of the book's analytical elements are somewhat beside the point.

The authors, however, seek to go a bit further than description of practices to assess the extent to which those real-world practices regarding foreign affairs federalism are consistent with constitutional principles, whatever those turn out to be. It is therefore fair to ask whether the book, on its own terms, successfully compares principles to practice.

Again, it depends very much on which principles and which practices one has in mind. Here is where the book's eclectic methodology makes analysis, and understanding, very difficult. How does one know in any given circumstances which of a wide range of principles to compare to actual practice? What is the baseline against which practice is to be judged in any given context? A nonfoundationalist methodology, by its nature, has no real way to answer this kind of question. And a critical analyst has no way to determine the book's success or failure in this regard without conducting an exhaustive analysis that runs through every possible principle and every existing practice and/or by imposing the analyst's own favored principles on the authors. I would be curious to know if the authors can offer any clarification that will make assessment of their comparisons of practice to principles easier. More specifically: How do they themselves evaluate the success or failure of particular arguments in this vein? Inquiring minds want to know, and the book does not really provide a clear answer.

It is also at this point that the book's relative neglect of original meaning has its biggest impact. One possible analytical comparison, after all, is between practice and original meaning (with no implication intended here either that this is the most important comparison or about which of those elements is to prevail in the event of conflict). If it is really true, or at least mostly true, that "no one regards the original meaning of the text as irrelevant to constitutional interpretation and adjudication,"<sup>15</sup> it might be valuable to see the extent to which current practices conform to that particular principle. The authors spend relatively little energy on that exercise. That might make a good measure of sense in light of their own methodological commitments, but those who think that original meaning contributes at all to legal meaning<sup>16</sup> might have found it helpful to hear a bit more about how original meaning and contemporary practice relate (or do not relate) to each other. Accordingly, I will briefly highlight here two issues of major contemporary importance involving federalism and foreign

<sup>15</sup> GLENNON & SLOANE, *supra* note 1, at 79; *see also supra* note 13 and accompanying text.

<sup>16</sup> *See* Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 Nw. U. L. REV. 923, 953-54 (2009) (describing the "contribution thesis").

affairs in which original meaning and practice diverge dramatically in a way that *Foreign Affairs Federalism* does not convey.

The book's longest chapter (albeit by only a few pages) is Chapter 6, in which the authors set forth their conception of the federal treaty power and the restraints—or, in their view, the lack thereof—on that power imposed by constitutional principles of federalism.<sup>17</sup> They offer a functionalist/consequentialist defense<sup>18</sup> of *Missouri v. Holland*,<sup>19</sup> and lament its implicit overruling<sup>20</sup> by *Bond v. United States*.<sup>21</sup> They do not, however, tell the reader just how far removed is *Holland* from the original meaning of the treaty power—even if only to dismiss the originalist conception as, in their view, unworkable or undesirable. From an originalist standpoint, *Holland* ranks among the most bizarre decisions in the Court's long and sordid history.

*Holland*, one will recall, involved congressional legislation regulating migratory birds pursuant to the terms of a treaty with the United Kingdom.<sup>22</sup> It was settled law at that time that, absent a treaty, Congress had no enumerated power, under the Commerce Clause or anything else, to regulate migratory birds.<sup>23</sup> The question was whether Congress could gain a legislative power that it did not otherwise possess by virtue of presidential and senatorial enactment of a federal treaty.<sup>24</sup> The Court famously said yes, in an opinion by Justice Holmes.<sup>25</sup>

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<sup>17</sup> GLENNON & SLOANE, *supra* note 1, at 185-246.

<sup>18</sup> *Id.* at 193-205.

<sup>19</sup> 252 U.S. 416 (1920).

<sup>20</sup> GLENNON & SLOANE, *supra* note 1, at 186, 205-21.

<sup>21</sup> 134 S. Ct. 2077 (2014).

<sup>22</sup> *Holland*, 252 U.S. at 430-32.

<sup>23</sup> See *Geer v. Connecticut*, 161 U.S. 519, 522-31 (1896) (holding Congress could not constitutionally regulate migratory birds under the Commerce Clause and upholding a Connecticut statute prohibiting the sale of migratory birds outside the state); *United States v. McCullagh*, 221 F. 288, 294-96 (D. Kan. 1915) (finding a provision of the Weeks-McLean Act, through which Congress regulated the killing of migratory birds, unconstitutional); *United States v. Shauver*, 214 F. 154, 160 (E.D. Ark. 1914) (same).

<sup>24</sup> *Holland*, 252 U.S. at 432 (describing the argument the Court faced as asserting “that a treaty cannot be valid if it infringes the Constitution, that there are limits, therefore, to the treaty-making power, and that one such limit is that what an act of Congress could not do unaided, in derogation of the powers reserved to the States, a treaty cannot do”).

<sup>25</sup> *Id.* at 435. Justice Holmes is widely admired in American legal circles. See, e.g., ALBERT W. ALSCHULER, *LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES* 14-15 (2000) (noting praise for Justice Holmes among jurists, legal scholars, law schools, law reviews, as well as in popular culture); Morton J. Horwitz, *The Place of Justice Holmes in American Legal Thought*, in *THE LEGACY OF OLIVER WENDELL HOLMES, JR.* 31, 31 (Robert W. Gordon ed., 1992) (“There has been only one great American legal thinker and it was Holmes.”); Richard A. Posner, *Introduction* to *OLIVER WENDELL HOLMES, JR., THE ESSENTIAL HOLMES*, at ix (Richard A. Posner ed., 1992) (referring to Justice Holmes as “the most illustrious figure in the history of American law”); Benjamin N. Cardozo, *Tribute, Mr.*

There are two crucial respects in which *Holland* undercuts or ignores original constitutional meaning. The most blatant respect is the casual assumption in the decision that Congress has any enumerated power to implement or execute the substantive terms of a treaty. As a general matter, it rather plainly does not.

Congress has a set of enumerated powers. If a treaty can be implemented through use of those otherwise enumerated powers, there is no problem; the enumerated powers are sufficient to support the implementing legislation without regard to the treaty. Treaties involving foreign trade, for example, can surely be implemented through the congressional power to regulate commerce with foreign nations.<sup>26</sup> The question is what happens when, as in the case of *Holland*, those powers are insufficient by themselves to allow congressional action.<sup>27</sup> The standard answer, which was assumed but not argued by the Court in *Holland*,<sup>28</sup> is that the Necessary and Proper Clause authorizes Congress to implement the terms of federal treaties once they are ratified. The standard answer has a surface plausibility. The Necessary and Proper Clause gives Congress power “[t]o 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.”<sup>29</sup> The treaty power, identified in Article II,<sup>30</sup> is among the “other Powers vested by this Constitution,” so doesn’t Congress clearly have the power to carry the treaty power into execution? Yes, of course it does. The trick, however, is to understand what it means to carry a power, such as the treaty power, into execution.

As Nick Rosenkranz has elegantly demonstrated at length, it *does not* mean to make the *results* of the exercise of that power as effective or efficient as they might be.<sup>31</sup> It means to make possible or to facilitate the exercise of the power in the first place. In the case of treaties, it would “carry[] into Execution” the treaty power to authorize the hiring of personnel to help draft and negotiate the

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*Justice Holmes*, 44 HARV. L. REV. 682, 684 (1931) (describing Justice Holmes as “the greatest of our age in the domain of jurisprudence”). For a revisionist look at Justice Holmes that seriously questions this legacy, see generally Steven G. Calabresi & Hannah M. Begley, *Justice Oliver Wendell Holmes and Chief Justice John Roberts’s Dissent in Obergefell v. Hodges*, 8 ELON L. REV. 1 (2016).

<sup>26</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>27</sup> Modern Commerce Clause jurisprudence would sustain the legislation at issue in *Holland*, but as of 1920 the Court had not yet abandoned the Constitution wholesale.

<sup>28</sup> *See Holland*, 252 U.S. at 432 (“If the treaty is valid there can be no dispute about the validity of the statute under Article 1, Section 8, as a necessary and proper means to execute the powers of the Government.”).

<sup>29</sup> U.S. CONST. art. I, § 8, cl. 18.

<sup>30</sup> *Id.* art. II, § 2, cl. 2 (providing 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”).

<sup>31</sup> Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867, 1937-38 (2005).

treaty, to appropriate funds to transport officials to and fro, to create a government printing office to ready the necessary documents, and so forth. But once the treaty exists, the treaty power—the power to “make Treaties”—has been fully exercised, and there is nothing more for the Necessary and Proper Clause to do with respect to that power. As Justice Scalia put it: “Once a treaty has been made, Congress’s power to do what is ‘necessary and proper’ to assist the making of treaties drops out of the picture.”<sup>32</sup> The Necessary and Proper Clause by its terms gives Congress power to execute the treaty power, not power to execute treaties.<sup>33</sup> To be sure, the treaty at that point (assuming that the treaty is valid, and more on that in a moment) creates law, and the President’s “executive Power”<sup>34</sup> permits him to execute the treaty, and the Take Care Clause<sup>35</sup> actually obligates him to do so. It would therefore be appropriate for Congress to pass laws to help the President execute the terms of the treaty. Again, however, that power would only extend as far as the terms of the treaty extend of their own force. Put another way, the long-debated distinction between self-executing and non-self-executing treaties is, from a constitutional standpoint, no debate at all. All treaties are and must be self-executing because there is no general constitutional power on the part of Congress to execute their terms once the treaty is enacted as law.

The only possible end-run around this is to argue that a power to implement the terms of a treaty through legislation is somehow an incident to the power to make treaties, and thus is carried by the treaty power even without textual specification. That is simply not going to work as an argument, however, because the power to legislate beyond enumerated powers by virtue of a treaty is the quintessential “great substantive and independent power” that cannot be an incident.<sup>36</sup>

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<sup>32</sup> *Bond v. United States*, 134 S. Ct. 2077, 2099 (2014) (Scalia, J., concurring).

<sup>33</sup> See *id.* at 2098-99; Nick Rosenkranz, *There Is No Textual Foundation for the Claim that Treaties Can Increase the Power of Congress*, VOLOKH CONSPIRACY (Jan. 16, 2013, 3:31 PM), <http://volokh.com/2013/01/16/there-is-no-textual-foundation-for-the-claim-that-treaties-can-increase-the-power-of-congress/> [https://perma.cc/JQQ7-BP2G].

<sup>34</sup> U.S. CONST. art. II, § 1 (“The executive Power shall be vested in a President of the United States of America.”).

<sup>35</sup> *Id.* § 3 (providing that the President “shall take Care that the Laws be faithfully executed”).

<sup>36</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 411 (1819). For a detailed discussion of the doctrine of principal and incidental powers in the context of the Constitution, see GARY LAWSON & GUY SEIDMAN, “A GREAT POWER OF ATTORNEY”: UNDERSTANDING THE FIDUCIARY CONSTITUTION (forthcoming 2017). An even more attenuated (desperate?) argument might try to say that congressional implementation of a treaty could make it easier to negotiate treaties in the future and, in that respect, would be “carrying into Execution” the treaty power. That kind of argument immediately founders on the requirement that any such laws be “necessary and proper.” As an original matter, Rube Goldberg chains of causation are neither.

But what to do with a treaty that promises, as part of its terms, that the United States will pass laws of a certain kind that go beyond the enumerated powers of Congress absent the treaty? The answer is the same as in the case of a treaty that promises, as part of its terms, that certain states will be denied their equal voice in the Senate or that the United States government will nationalize all media sources. It is entirely possible for the President and Senate to ratify a treaty that has no domestic legal force. That may be a spectacularly dumb move, given the international ramifications of treaty violations, but there is nothing in the Constitution that forbids the President and Senate from making spectacularly dumb moves that generate international crises. Their dumb moves, however, do not confer powers on Congress that it does not have.<sup>37</sup> That may well mean, as I suspect Glennon and Sloane will maintain, that a great many treaties that many people think would be good policy are therefore beyond the power of the national government to enact.<sup>38</sup> From the standpoint of original meaning, the simple answer is: “que sera, sera.”<sup>39</sup> (Or, if one prefers poker to Hitchcock: “read ‘em and weep.”) A great many statutes that many people think might be good policy crumble as well on the walls of bicameralism or presentment.<sup>40</sup> That possibility does not make Article I, Section 7 disappear.

It would have been eminently possible to enumerate a freestanding congressional power to implement the substantive terms of treaties. It might even have been a wise power to enumerate. However, the Constitution simply does not enumerate such a power. The absence, as a matter of original meaning, of congressional power to execute treaties, as opposed to the power to execute the treaty power, is the biggest gap between the Constitution and *Holland*, and it receives no sustained attention in *Foreign Affairs Federalism*.

There is a second constitutional problem with *Holland* from the standpoint of original meaning. Glennon and Sloane correctly point out that the long line of attempts, repeated most recently by Justice Thomas in *Bond*,<sup>41</sup> to find some kind of subject matter limitation on treaties is textually quite difficult to support.<sup>42</sup>

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<sup>37</sup> See Rosenkranz, *supra* note 33.

<sup>38</sup> GLENNON & SLOANE, *supra* note 1, at 244 (“To have found a Tenth Amendment impediment to a treaty regulating migratory waterfowl would have denied the federal government the authority to make that agreement. It would have required would-be treaty partners to negotiate with the forty-eight states of the Union instead—forty-eight different negotiations, state by state. That cannot be the system established by the Framers under the Constitution.”).

<sup>39</sup> DORIS DAY, *Whatever Will Be, Will Be (Que Sera, Sera)*, on [Catalog Number 40704] (Columbia Records 1956) (appearing originally in Alfred Hitchcock’s *The Man Who Knew Too Much*).

<sup>40</sup> See U.S. CONST. art. I, § 7 (“Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a law, be presented to the President of the United States . . .”).

<sup>41</sup> See *Bond v. United States*, 134 S. Ct. 2077, 2103-08 (2014) (Thomas, J., concurring).

<sup>42</sup> See GLENNON & SLOANE, *supra* note 1, at 195, 197.

But there is another kind of limitation on treaties that is implicit both in the Treaty Clause and in the entire structure of Article II of the Constitution: treaties may only carry into execution other federal powers. The treaty power is not a freestanding authorization to the President and Congress to extend federal influence into areas not enumerated by the Constitution. Instead, it is a vehicle for allowing those already existing powers to be leveraged into binding international agreements. Guy Seidman and I have made the (somewhat hesitant, deeply qualified, and considerably weaker than knock-down-drag-out) case for this proposition at execrable length elsewhere,<sup>43</sup> and I will not repeat the argument here. Nor can I reasonably fault Glennon and Sloane for not addressing that argument in their book; it is sufficiently out of the mainstream, even within originalist circles,<sup>44</sup> so that it can safely be ignored in a work focused on doctrine and real-world governance. But an originalist account of the treaty power must acknowledge it as yet another (at least potential) gap between *Holland* and the Constitution. *Holland* may or may not be good constitutional policy; that is well beyond my pay grade. Following it may or may not make for good constitutional adjudication; see the previous sentence. But it is very bad constitutional interpretation.

There is a second topic on which Glennon and Sloane actually note, and then largely pass over, the enormous gap between modern practice and original constitutional meaning: federal regulation of immigration. The Constitution actually gives Congress no significant power over immigration. Virtually every modern federal law on the subject is very likely wildly unconstitutional. Glennon and Sloane are right on top of this. They observe that “[t]he Constitution says almost nothing about immigration. Article I authorizes Congress ‘[t]o establish a uniform rule of naturalization.’ That’s all. Like many other foreign affairs powers, the federal immigration power has consequently developed over time on the basis of multiple sources beyond the text of the Constitution.”<sup>45</sup> In other words, the Court simply made up a federal immigration power, in an era (the late nineteenth and early twentieth centuries) when it was making up a whole raft of powers,<sup>46</sup> ranging from eminent domain to conscription, based on “inferences from America’s status as an independent nation and alleged incidents of sovereignty under international law.”<sup>47</sup> If Montenegro, Russia, and

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<sup>43</sup> See generally Gary Lawson & Guy Seidman, *The Jeffersonian Treaty Clause*, 2006 U. ILL. L. REV. 1.

<sup>44</sup> See, e.g., Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 DENV. U. L. REV. 201, 208 n.50 (2007); Michael D. Ramsey, *Missouri v. Holland and Historical Textualism*, 73 MO. L. REV. 969, 1001-04 (2008).

<sup>45</sup> GLENNON & SLOANE, *supra* note 1, at 301-02 (quoting U.S. CONST. art. 1, §8, cl. 4).

<sup>46</sup> For an exhaustive treatment of the subject, see generally Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1 (2002).

<sup>47</sup> GLENNON & SLOANE, *supra* note 1, at 89 (citing *Arizona v. United States*, 132 S. Ct. 2492, 2498 (2012)). For perhaps the most egregious example of this kind of reasoning, see

South Africa do it, then surely, so goes this argument, the Constitution must let Congress do it as well. This was a wretchedly bad interpretation of the Constitution at the time, especially in the context of immigration; “[t]here is . . . little reason to believe that the Framers contemplated creating a federal immigration power.”<sup>48</sup>

The interpretation has not improved with age. Ilya Somin has recently reached the same conclusion in a much longer and more detailed analysis of the issue.<sup>49</sup> Along the way, Somin considers and trenchantly rejects a bevy of possible sources of a federal constitutional power over immigration, ranging from the Commerce Clause to the Define and Punish Clause.<sup>50</sup> It is quite clear, as it was clear to the nineteenth-century Supreme Court that invented a congressional immigration power out of whole cloth, that the Constitution says nothing about immigration. And if the Constitution says nothing about immigration, then Congress, which relies upon the Constitution for its enumerated powers, can do nothing about immigration.

So what is the actual constitutional scheme for immigration regulation? It quite plainly puts principal authority with the states—as Albert Gallatin noted at a quite early date.<sup>51</sup> Each state can choose who it does and does not allow across its borders, subject only to the constraints of international law, the Article IV Privileges and Immunities Clause,<sup>52</sup> and, at least after 1868, of generalized norms found in Section 1 of the Fourteenth Amendment.<sup>53</sup> The states, however, cannot unilaterally confer United States citizenship on aliens. That power belongs to Congress under the Naturalization Clause.<sup>54</sup> States can control the

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Selective Draft Law Cases, 245 U.S. 366, 378-79 (1918).

<sup>48</sup> Cleveland, *supra* note 46, at 81.

<sup>49</sup> See Ilya Somin, Immigration and the Constitution 2 (Aug. 2016) (unpublished manuscript) (on file with author).

<sup>50</sup> See *id.* at 4-22 (discussing, and ultimately rejecting, the Commerce Clause, the Naturalization Clause, the Necessary and Proper Clause, the Migration or Importation Clause, and the Define and Punish Clause as bases for immigration restrictions).

<sup>51</sup> See Cleveland, *supra* note 46, at 88-89 (discussing Congressman Gallatin’s objections to the Alien Act of 1798 as unconstitutional).

<sup>52</sup> U.S. CONST. art. IV, § 2 (“The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”).

<sup>53</sup> *Id.* amend. XIV, § 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”). Somin sees substantially more potential limitations on state action in this area stemming from the Fourteenth Amendment than do I, but that is a tale for another time. See Somin, *supra* note 49, at 26-31.

<sup>54</sup> U.S. CONST. art. I, § 8, cl. 4 (“The Congress shall have Power . . . To establish an uniform Rule of Naturalization . . .”).

flow of persons across their borders, but power over the consequences of that flow is partly vested in the national government.

Does that mean that a President and Congress committed to enforcing border security could not constitutionally build “an impenetrable physical wall on the southern border,” even if that would be sensible and desirable policy?<sup>55</sup> That is actually a much more interesting question than it might at first seem.

The answer begins with the intramural debate between Justice Scalia and Justice Thomas in *Zivotofsky v. Kerry*<sup>56</sup> over the federal power to issue and control passports: Justice Scalia maintained that Congress easily had power under the Necessary and Proper Clause to implement its authority over naturalization through the use of passports to establish the identity of United States nationals.<sup>57</sup> Justice Thomas, by contrast, expressed grave doubts about the existence of that congressional power.<sup>58</sup> In part, those doubts stem from Justice Thomas’s belief that the President’s “executive Power”<sup>59</sup> gives him power over passports,<sup>60</sup> so that any claimed inferential congressional authority in the area would be flying in the face of a constitutional grant of power to the President.<sup>61</sup> Justice Scalia, in turn, expressed doubts about such a presidential power.<sup>62</sup>

Assume for the moment that Justice Thomas is correct that the “executive Power” is a grant of power broad enough to include a presidential power over passports.<sup>63</sup> Might such an “executive Power” also extend to control over the flow of persons into the United States? I am dubious about the grounding of any such general power as a matter of original meaning, but it is at least a theoretical possibility. Much more plausible, however, is the idea that such a power exists, but only exists, during wartime.<sup>64</sup> The “executive Power” is significantly more expansive during wartime than during peacetime;<sup>65</sup> among other things, the

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<sup>55</sup> Full Text: Donald Trump Immigration Speech in Arizona, POLITICO (Aug. 31, 2016, 10:54 PM), <http://www.politico.com/story/2016/08/donald-trump-immigration-address-transcript-227614> [https://perma.cc/WH3V-XBZC].

<sup>56</sup> 135 S. Ct. 2076 (2015).

<sup>57</sup> *Id.* at 2117, 2123-24 (Scalia, J., dissenting).

<sup>58</sup> *Id.* at 2108-09 (Thomas, J., concurring in part and dissenting in part).

<sup>59</sup> U.S. CONST. art. II, § 1.

<sup>60</sup> *Zivotofsky*, 135 S. Ct. at 2101-03 (Thomas, J., concurring in part and dissenting in part).

<sup>61</sup> *See id.* at 2103-07.

<sup>62</sup> *See id.* at 2124-26 (Scalia, J., dissenting).

<sup>63</sup> Justice Thomas is clearly (I think) correct that, at the very least, Article II’s Vesting Clause is a grant of power to the President. *See* Lawson & Seidman, *supra* note 43, at 22-43. The scope of the granted power is another matter altogether. I have no considered view here about whether that grant of power extends as far as Justice Thomas thinks it extends.

<sup>64</sup> *See* Somin, *supra* note 49, at 26 (“As with Congress, the president can use his powers to restrict the entry of some subset of foreigners. Most obviously, his power as commander-in-chief of the armed forces gives him the authority to block the movement of enemy armies, spies, and similar threats to national security, particularly in wartime.”).

<sup>65</sup> *See* Gary Lawson, *Ordinary Powers in Extraordinary Times: Common Sense in Times*

President during wartime has the power, and even duty, to govern foreign territory occupied by United States forces, while any such claim of power during peacetime would be impeachable.<sup>66</sup> Does the President's wartime "executive Power" include the power to exclude aliens in the interests of national security? And would Congress therefore have power under the Necessary and Proper Clause to pass appropriate implementing legislation to help execute that presidential power?

Those are questions that would require a separate article, and more likely a separate book, even to begin to address. But if such a presidential power is at all plausible, then perhaps one needs to ask as well whether the United States is presently at war. Certainly, there has been no formal declaration of war, but one school of thought holds that states of war exist or do not exist independently of congressional recognition of them through declarations.<sup>67</sup> On that reasoning, it is quite possible for the United States to be at war, and for the President therefore to have wartime "executive Power," even in the absence of a congressional declaration.

If all of the relevant premises—(1) the Constitution contains a grant of "executive Power," (2) "executive Power" includes some foreign affairs powers, (3) those foreign affairs powers include some control over borders, (4) "executive Power" is broader in wartime, and (5) the United States is at war—are true, then perhaps the President, and the President with Congress—assuming that any such legislation is "necessary and proper" for carrying that presidential power into execution—can take action to control America's borders. In that case, one would have to reconcile such presidential power with the undoubted residual power of the states to control their own borders. Could Texas admit a foreign national that the President wanted to exclude?

These are the sorts of questions that would have to be addressed if one were actually trying to figure out what the Constitution says about immigration. They bear no resemblance to the sorts of questions that are asked under current doctrine. To be clear: I do not at all fault Glennon and Sloane for not asking them. That is simply not the book that they set out to write. I seek here only to highlight a dimension of the inquiry that lies outside the scope of the book. After all, if I stayed entirely within the scope of the book, this review likely would have ended with the first sentence of the second paragraph.

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*of Crisis*, 87 B.U. L. REV. 289, 304, 306-09 (2007).

<sup>66</sup> See GARY LAWSON & GUY SEIDMAN, *THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION AND AMERICAN LEGAL HISTORY* 151-52 (2004).

<sup>67</sup> See, e.g., John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167, 242 (1996).