

## BOND'S BREACHES

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*Bond v. United States*<sup>1</sup> illustrates a new maxim for today's Supreme Court: hard cases make no law at all. To be sure, *Bond's* bottom line was not particularly difficult. Few outside the Eastern District of Pennsylvania had great enthusiasm for using the Chemical Weapons Convention Implementation Act<sup>2</sup> (Chemical Weapons Convention or Convention) as a basis for prosecuting Carol Bond, who had used chemicals (some stolen from work, some purchased on Amazon.com) in an attempted revenge on her husband's lover.<sup>3</sup> And there was evident reluctance in the judiciary about turning this tabloid-ready case—which the Chief Justice, dubiously, called “unremarkable”<sup>4</sup>—into a precedent-setting referendum on the scope of the treaty power. Initially, the Third Circuit held, unconvincingly, that Bond lacked standing to raise a constitutional challenge.<sup>5</sup> After the Supreme Court reversed,<sup>6</sup> the Third Circuit held against Bond on the merits,<sup>7</sup> and the Supreme Court agonized as to whether it should take up the case again.<sup>8</sup>

But the Supreme Court ultimately did take the case, and once it did, it became hard to decide—at least in terms of the rationale. Although the Justices all favored reversal and dismissal of the indictment, they wound up providing little clarity on the larger questions the case raised. Chief Justice Roberts, for the majority, attempted to avoid any constitutional issue by hold-

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1 134 S. Ct. 2077 (2014).

2 18 U.S.C. § 229 (2012).

3 *Bond*, 134 S. Ct. at 2085. The revenge was limited in its ambitions. As the Court reported, “It is undisputed . . . that Bond did not intend to kill Haynes [her husband's lover]. She instead hoped that Haynes would touch the chemicals and develop an uncomfortable rash.” *Id.*

4 *Id.* at 2083.

5 *United States v. Bond*, 581 F.3d 128 (3d Cir. 2009).

6 *Bond v. United States*, 131 S. Ct. 2355 (2011).

7 *United States v. Bond*, 681 F.3d 149 (3d Cir. 2012).

8 The case was reportedly relisted seven times before certiorari was granted. *Supreme Court Grants Certiorari in Case Implicating Missouri v. Holland*, 107 AM. J. INT'L L. 432, 432 (2013); see also *Bond v. United States*, 133 S. Ct. 978 (2013) (granting certiorari).

ing that Congress did not intend for the Act to apply.<sup>9</sup> Justices Scalia<sup>10</sup> and Thomas,<sup>11</sup> writing separately, would instead have endorsed two significant constitutional objections to the Act. But only Justice Thomas's objection attracted the support of a third Justice (Justice Alito, who wrote briefly in support).<sup>12</sup>

If, as the more time-honored homily goes, hard cases otherwise make bad law, making *little* bad law was hardly the worst outcome. Nevertheless, what the Justices proffered was pretty bad. As explained in Part II, *Bond's* opinions mused about what they considered a potential constitutional breach: the gap between the national government's typical authority over domestic matters, on the one hand, and the domestic authority it might assert while implementing treaties, on the other. If tolerated, the basic argument went, such a gap would breach the constitutional commitment to a national government of limited authority. Justice Scalia and Justice Thomas, moreover, voiced concern that the federal government would actively exploit that gap. The problem, on their view, was not merely that treaties, like statutes, might occasionally breach a reserve of state authority; rather, treaties would be differentially exploited by the national government precisely for that reason. Each of the Court's opinions tried to establish a means by which the judiciary could prevent that from happening.

The real problem was that none of the nine Justices offered any counter-narrative. The majority did say that the statute in question was not a sufficiently *overt* attempt to trench on state prerogatives, but that was cold comfort: Chief Justice Roberts's exertions at statutory construction had little broader appeal (Justice Scalia, who did nothing to hide his distaste, reasonably doubted that other statutes would be subjected to such "gruesome surgery"),<sup>13</sup> and also offered little hope of aligning the international and domestic authority of the United States. As Part III indicates, the Court should have acknowledged the other forms of breach it was ratifying. The most obvious is the risk of jeopardizing U.S. compliance with its international obligations, contrary to constitutional principles designed to reduce that risk. By focusing on the prospect that the national government will exploit international opportunities to expand its authority—or at best, per the Chief Justice, that Congress legislates with the same attitude toward state and local authority that it always does—the opinions failed to provide the kind of comprehensive account that could guide the political branches and future courts.

## I. THE POST-*HOLLAND* TERRAIN

The grant of certiorari in *Bond* followed resurgent anxiety over the perceived gap between the national government's authority over domestic mat-

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9 *Bond*, 134 S. Ct. at 2093–94.

10 *Id.* at 2094–102 (Scalia, J., concurring in the judgment).

11 *Id.* at 2102–11 (Thomas, J., concurring in the judgment).

12 *Id.* at 2111 (Alito, J., concurring in the judgment).

13 *Id.* at 2097 (Scalia, J., concurring in the judgment).

ters and its potential authority over such matters in the wake of an Article II treaty. *Missouri v. Holland*<sup>14</sup> had long ago established two propositions: first, that the United States has constitutional authority to enter into treaties relating to matters not falling within Congress's enumerated powers;<sup>15</sup> and second, that in the event such a treaty is non-self-executing and requires statutory implementation, Congress can—if it would not otherwise possess the authority to adopt such a statute—rely on the Necessary and Proper Clause.<sup>16</sup>

The salience of *Holland's* holdings depends, naturally, on the number and nature of U.S. treaty obligations. But it also depends on the breadth of Congress's purely domestic authority. As the Supreme Court has acknowledged, its case law on this latter question has ebbed and flowed.<sup>17</sup> Its most recent drift—after the Court overruled *National League of Cities* and in turn stopped relying on the political safeguards of federalism<sup>18</sup>—has been to reinvigorate the judicial role in policing Congress's domestic authority. Most recently, opinions in *National Federation of Independent Business v. Sebelius (NFIB)*<sup>19</sup> suggested without clearly deciding that further inroads might be made.<sup>20</sup> These jurisprudential shifts, rather than any treaty-making boom, revived the relevance of *Holland*.<sup>21</sup>

*Bond* was an obvious, yet obviously flawed, vehicle for assessing this situation. The case involved an attenuated use of a treaty-implementing statute in an area of traditional state competence; because the United States had decided in the lower courts not to invoke the Commerce Clause as a basis for the Act,<sup>22</sup> everything was made to rest on the treaty power and the Necessary and Proper Clause. It was like a law school exam hypothetical, drafted—replete with absurd facts—to focus on an infrequently isolated issue. It certainly had all the liabilities of that form. The government's concession below did not appear to be based on any genuine conviction that the Commerce

14 252 U.S. 416 (1920).

15 *Id.* at 432–35.

16 *Id.* at 432.

17 See *United States v. Lopez*, 514 U.S. 549, 552–59 (1995).

18 See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 530–31 (1985) (overruling *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976) (overruling *Maryland v. Wirtz*, 392 U.S. 183 (1968))).

19 *Nat'l Fed'n of Indep. Bus. v. Sebelius (NFIB)*, 132 S. Ct. 2566 (2012).

20 In that case, five Justices appeared to agree that the Commerce Clause failed to authorize the Affordable Care Act. See *id.* at 2585–93 (opinion of Roberts, C.J.); *id.* at 2644–50 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting). Lower courts have expressed uncertainty about whether the Court's fractured decisions established binding precedent, and how that might be read, and generally distinguished any precedent that might have been established. See, e.g., *United States v. Robbins*, 729 F.3d 131, 135–36 (2d Cir. 2013); *United States v. Henry*, 688 F.3d 637, 641 n.5 (9th Cir. 2012).

21 See generally Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 COLUM. L. REV. 403, 415–23 (2003) (noting contemporary bases for reviving challenges to *Missouri v. Holland*); *id.* at 415 (“[H]istory suggests that it may be vulnerable whenever it proves relevant.”).

22 *Bond v. United States*, 134 S. Ct. 2077, 2087 (2014).

Clause was irrelevant,<sup>23</sup> which meant that the relative scope of unassisted domestic authority and treaty-based authority—whether and to what extent the treaty took advantage of some gap—could not be fairly tested or fully understood. Nor (unlike *Holland* itself) was the treaty even arguably designed to circumvent the limits of domestic authority, such as might have created a cautionary tale for future undertakings.

Perhaps mindful of these limitations, the majority failed even to attempt a recalibration in the case law, disappointing those who hoped for something more revolutionary. Chief Justice Roberts, writing for himself and five others, invoked the principle that constitutional holdings should be avoided if other grounds for decision are available.<sup>24</sup> The majority then held that the Act did not cover Bond's assault, because Congress failed to provide a sufficiently clear indication that it intended to encroach on the police power of the states.<sup>25</sup>

Justice Scalia, joined in his statutory analysis by Justices Thomas and Alito, rejected the majority's redemptive reading of the Act, necessitating consideration of its constitutional basis.<sup>26</sup> There a slight schism emerged. Justice Scalia, writing for himself and for Justice Thomas, opined that the Act was unconstitutional because even if the Convention was valid, Congress lacked the authority under the Necessary and Proper Clause to implement it.<sup>27</sup> Justice Thomas, joined by Justice Scalia, but also by Justice Alito, would have limited the treaty power itself, on the basis that it was restricted to agreements that stuck to legitimate international matters and avoided purely domestic matters like Bond's.<sup>28</sup> Justice Alito summarized his view separately.<sup>29</sup>

## II. BREACHING DOMESTIC RESTRAINTS

### A. *The Phantom Menace*

By and large, the majority treated any divide between treaty-enabled and domestic authority as hypothetical. Chief Justice Roberts expressed doubt that the Convention actually required prosecution of someone like Bond,

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23 As suggested by the government's unsuccessful attempt to revive the argument in the Supreme Court, during which it explained that the prior strategy had been based on the mistaken assumption that the statute could only be defended on grounds expressly invoked by Congress. See Brief for the United States at 18–26, *Bond*, 134 S. Ct. 2077 (No. 12-158). Another possible explanation was that the Commerce Clause jurisprudence was equally unsettled, and the government would not have wanted *Bond* to generate adverse precedent that might haunt the Affordable Care Act. One might doubt the wisdom of that decision, given that the Commerce Clause came to naught in *NFIB*, but might have mooted the petition in *Bond*.

24 *Bond*, 134 S. Ct. at 2087.

25 *Id.* at 2087–94.

26 *Id.* at 2094–97 (Scalia, J., concurring in the judgment).

27 *Id.* at 2098–102.

28 *Id.* at 2102–11 (Thomas, J., concurring in the judgment).

29 *Id.* at 2111 (Alito, J., concurring in the judgment).

though he did not rest on that basis.<sup>30</sup> Instead, he reasoned, “the statute—unlike the Convention—must be read consistent with principles of federalism inherent in our constitutional structure.”<sup>31</sup> Those principles required avoiding anything that would “dramatically intrude[ ] upon traditional state criminal jurisdiction,” or “affect[ ] the federal balance,” “[a]ffect a significant change in the sensitive relation between federal and state criminal jurisdiction,” or “render[ ] traditionally local criminal conduct a matter for federal enforcement and . . . also involve a substantial extension of federal police resources.”<sup>32</sup> In *Bond*'s own gloss, these principles fueled not just the reaction to statutory ambiguity, but also its detection in the first place. Each, it seemed, being motivated by “the improbably broad reach” of the statutory definition, “the deeply serious consequences of adopting such a boundless reading,” and “the lack of any apparent need to do so in light of the context from the statute arose—a treaty about chemical warfare and terrorism.”<sup>33</sup>

Justice Scalia critiqued this approach with trademark vigor, but its merits are less important than its consequences. By the majority's lights, the question presented by the petition—whether the Act parlayed a treaty obligation into an unconstitutional extension of Congress's legislative authority—did not need to be answered. At some points, the Court seemed interested in what Congress actually intended to regulate.<sup>34</sup> At other times, it looked like a clear statement rule, asking instead that Congress overcome the intent established for it by virtue of the rule itself.<sup>35</sup> The point in either event was that the statutory meaning attributed to Congress by the Court provided no support for the prosecution.

The majority's approach was conspicuously—and deliberately—provincial. The problem Congress was trying to solve was portrayed, by and large, just like any domestic question of criminal law. The Chemical Weapons Convention may have been the catalyst, but to the majority, it was much as if Congress had come up with the regulation all by itself. Either way, the Act should be assessed in light of the intended scope of domestic regulation—which was not so broad as to implicate every kitchen cupboard or goldfish bowl. It also had to be understood in light of its potential to touch on state powers, as with any other federal criminal legislation.<sup>36</sup>

At some points, to be sure, the international flavor could be detected, and not just in the Court's contrast between mustard gas in World War I and

30 *Id.* at 2087 (majority opinion).

31 *Id.* at 2088.

32 *Id.* at 2088–89 (internal quotation marks omitted). Variations on these phrasings are sprinkled throughout the opinion. *See, e.g., id.* at 2092 (contrasting crimes “not traditionally . . . left predominantly to the States”).

33 *Id.* at 2090.

34 *Id.* at 2091; *see also id.* at 2093 (reporting that “Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States’” (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971))).

35 *Id.* at 2090, 2092.

36 *Id.* at 2091, 2093.

the minor thumb burn inflicted by Bond.<sup>37</sup> The Court claimed to “have no need to interpret the scope of the Convention in this case,”<sup>38</sup> but it verged on doing so indirectly. It alluded several times to the Convention’s objectives in attempting to determine the range of chemical weapons concerned,<sup>39</sup> albeit while invoking some dictionary definitions unlikely to have been considered by negotiators<sup>40</sup> and supposing that the words in question were really ones that Congress wrote.<sup>41</sup> It also noted that the Convention was supposed to be implemented in accordance with each state party’s constitutional processes, as if that indicated deference to U.S. federalism limitations as opposed to a generic expectation for implementation.<sup>42</sup>

The majority’s general indifference toward the Convention, however, necessarily undermined its appreciation of the treaty power. Because it supposed that the Act, even when narrowly construed, fulfilled the Convention, there was no gap in application—and keeping the Act aligned with Congress’s usual terrain meant that there was no need explore any constitutional gap between treaty-enabled and routine authority. That result was driven, however, by a statutory presumption that seemed intent on forgetting that a treaty existed. Thus the concern for preserving “the Constitution’s balance between national and local power”<sup>43</sup> was reckoned in terms of traditional federal authority over criminal law; the notion that the nature or quantum of national power might be affected by a treaty commitment was notably missing. But not, at least not entirely, from the concurrences.

### B. *The Great Divide*

The *Bond* concurrences, in contrast, were premised on the potential divide between treaty-enabled and routine authority. Justice Scalia began by accusing the majority of timidity. It erred, he argued, not only by laboring heroically to misconstrue the implementing statute, but also in failing to “welcome[ ] and eagerly grasp[ ] the opportunity—nay, the obligation—to

37 *Id.* at 2083.

38 *Id.* at 2088.

39 *Id.* at 2090, 2093.

40 *Id.* at 2090 (quoting Webster’s and American Heritage dictionaries).

41 *Id.* at 2091. The words Congress used, the Court elsewhere acknowledged, “closely track[ed]” those of the Convention. *Id.* at 2085. Compare 18 U.S.C. § 229F(1) (defining “chemical weapon”), § 229F(8)(A) (defining “toxic chemical”), and § 229F(7) (defining “purposes not prohibited by this chapter”), with Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, art. II(1)(a), *opened for signature* Jan. 13, 1993, S. TREATY DOC. NO. 103-21, 1974 U.N.T.S. 317 (entered into force Apr. 29, 1997) (defining “Chemical Weapons”), *id.* art. II(2) (defining “Toxic Chemical”), and *id.* art. II(9)(a)–(d) (defining “Purposes Not Prohibited Under this Convention”).

42 *Bond*, 134 S. Ct. at 2093. *But see id.* at 2087 (noting that the Convention was “agnostic between enforcement at the state versus federal level”); *cf. id.* at 2093 (stating, of the prosecutorial discretion accorded state officials, that “nothing in the Convention shows a clear intent to abrogate that feature”).

43 *Id.* at 2093.

consider and repudiate” the part of *Missouri v. Holland* that enabled “the fundamental constitutional principle of limited federal powers to be set aside by the President and Senate’s exercise of the treaty power.”<sup>44</sup>

Justice Scalia divided his constitutional argument into “text” and “structure,” more or less a depiction of *Missouri v. Holland*’s mistake followed by a description of its consequences. The supposed mistake involved how the Necessary and Proper Clause syncs with the Treaty Clause. As Justice Scalia recounted, the former gives Congress the 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>45</sup> the latter (one of the “other Powers”) states 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>46</sup> These give Congress the power to pass laws “necessary and proper for carrying into Execution . . . [the] Power . . . to make Treaties,” but this is only a power to “make” laws that help “make” treaties—like appropriating money for negotiations, authorizing the hire of negotiators, or even paying for “a bevy of spies” to spy on other potential signatories—not to implement a treaty that “has been *made* and is not susceptible of any more making.”<sup>47</sup>

This argument was cribbed from Nicholas Rosenkranz,<sup>48</sup> who tends to parse constitutional text with a jeweler’s loupe.<sup>49</sup> Whatever its general merits, this approach works poorly for catch-all authority designed for diverse purposes: asking how the Necessary and Proper Clause was meant to function with a particular power is like asking how all-purpose flour was intended to be used for ladyfingers.<sup>50</sup> Certainly we can speculate about various combinations of the Necessary and Proper Clause and the treaty power: perhaps the former has zero relevance to the latter, if the power to “make” a treaty is just the formal act alone, like the power “[t]o make all [necessary and proper] Laws” itself;<sup>51</sup> perhaps necessary and proper authority can precede and facili-

44 *Id.* at 2102 (Scalia, J., concurring in the judgment).

45 U.S. CONST. art. I, § 8, cl. 18.

46 *Id.* art. II, § 2, cl. 2.

47 *Bond*, 134 S. Ct. at 2098–99 (Scalia, J., concurring in the judgment) (quoting U.S. CONST. art. I, § 8, cl. 18).

48 Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867 (2005).

49 For other examples, see Nicholas Quinn Rosenkranz, *The Objects of the Constitution*, 63 STAN. L. REV. 1005 (2011); Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209 (2010).

50 See Edward T. Swaine, *Putting Missouri v. Holland on the Map*, 73 MO. L. REV. 1007, 1012–18 (2008) (arguing against Rosenkranz’s approach).

51 Or the President’s power to “make temporary Appointments” (formerly part of Art. I, § 3), or Congress’s power to “make . . . Regulations” for elections (Art. I, § 4), “make Rules” regarding captures or for the government and regulation of the military (Art. I, § 8), “make” regulations and exceptions concerning jurisdiction (Art. III, § 2), or “make” needful rules or regulations for U.S. territory and properties (Art. IV, § 3). It is less clear

tate the formal act of making treaties, as Professor Rosenkranz and Justice Scalia would indicate; or perhaps it permits a more generous execution of the power to make treaties, including their formal conclusion, facilitation, and implementation.<sup>52</sup> Regardless, the question of how the Necessary and Proper Clause was expected to relate to non-self-executing treaties was unlikely to have been broadly contemplated at the time of the Constitution's adoption, given contemporary expectations that the Supremacy Clause enables treaties to automatically override state law.<sup>53</sup> The resulting conundrum—how two clauses of the Constitution were supposed to deal with a problem that a third clause generally eliminated—is hard to resolve by cutting and pasting text. Finally, even a diehard textualist has to consider the other powers “vested by this Constitution in the Government of the United States” that Congress might carry into execution, such as the power to ensure that “all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.”<sup>54</sup> It would remain to be determined whether the legislation was necessary and proper toward that end, naturally, but less could be categorically excluded.

Justice Scalia was not content, in any case, with a textual argument, but progressed to concerns about constitutional structure—basically, claims about consequences. Congress's powers were discrete and enumerated. Through a superficially minor “change to the Constitution's text,”<sup>55</sup> however,

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that the power of electors to “make a List” of persons voted for (formerly part of Art. II, § 1) would be considered, since such power is not genuinely vested in the U.S. government or one of its departments or offices.

52 Professor Rosenkranz's answer is that this would imply “that the President, not Congress, has power to give non-self-executing treaties domestic legal effect, for it is he who has the ‘Power . . . to make Treaties,’” and thus could not support Congress's power to implement. Rosenkranz, *supra* note 48, at 1884. As I have suggested, this is not a radical notion, since the President is the one who ratifies self-executing treaties, and it is hardly absurd to imagine that Congress would be vested with a parallel authority for those circumstances when the President's authority does not suffice. See Swaine, *supra* note 50, at 1015. Nor is it a powerful rejoinder to suggest that the idea of making treaties was entirely disassociated from implementation under British practice, see Rosenkranz, *supra* note 48, at 1884, since the point of the Supremacy Clause was to change this. None of this proves, of course, that the Necessary and Proper Clause was definitely understood to have this broader significance.

53 It is plausible, certainly, that some might have anticipated a category of treaties that lacked a private right of action, or that were non-self-executing in the sense that they raised federal separation-of-powers issues. See DAVID SLOSS, TREATY SUPREMACY AND HUMAN RIGHTS: THE STORY OF AN UNKNOWN CONSTITUTIONAL TRANSFORMATION (forthcoming 2016) (on file with author). In any event, the category of non-self-executing treaties, such as might require separate legislative implementation, was first recognized in *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829).

54 That argument might not satisfy a purist, because the implementing legislation is then what becomes judicially enforceable—but not, according to many, to the exclusion of the treaty as some form of supreme law.

55 *Bond v. United States*, 134 S. Ct. 2077, 2099 (2014) (Scalia, J., concurring in the judgment).

*Missouri v. Holland* had effected a “seismic”<sup>56</sup> change to its structure: with multilateral treaties touching nearly every subject matter, and at least arguably lacking any subject-matter limitation, “the possibilities of what the Federal Government may accomplish, with the right treaty in hand, are endless and hardly farfetched.”<sup>57</sup> It might begin with abrogating the Court’s constitutional rulings concerning the limits of the Commerce Clause, as some had suggested. Or Congress might be encouraged to interfere with state laws regarding inheritance. Despite his disavowal, the particular examples did seem a little “farfetched”—the Antipolygamy Convention he hypothesized could just as well have been followed by a Trilateral Fluoridation Charter.<sup>58</sup> On a grander scale, he speculated, “*Holland* places Congress only one treaty away from acquiring a general police power.”<sup>59</sup>

The allegation, in any case, was straightforward: the federal government could, and would, exploit the opportunity to use treaties to enhance its domestic authority, using international law to bootstrap additional domestic authority. This could be avoided by understanding the Necessary and Proper Clause as irrelevant once a treaty is actually made. This would, in turn, force Congress to rely on its Article I, Section 8 powers,<sup>60</sup> thereby ensuring an equivalence for treaty-enabled and routine domestic authority.<sup>61</sup>

Justice Thomas shared Justice Scalia’s concerns, but wrote separately—joined by Justices Scalia and Alito—to indicate a separate solution: besides narrowing the Necessary and Proper Clause, the treaty power itself should be confined to international matters and excluded from use “to regulate purely domestic affairs.”<sup>62</sup> Preconstitutional practice, echoed in preratification discourse, suggested that the constitutional generation understood treaties to cover matters of international intercourse (including the rights of foreigners), even if subject-matter limitations were not adopted in the new Constitution. Early practice, he explained, was largely in accord, and the Court’s precedents alluded to the treaty power as reaching proper subjects of negotiation—even *Missouri v. Holland* itself.<sup>63</sup> Like Justice Scalia, Justice Thomas also invoked concerns about an unconstrained treaty power, including its potential for establishing a general federal police power and “destroy[ing] the basic constitutional distinction between domestic and foreign powers.”<sup>64</sup> A narrowed Necessary and Proper Clause, he reckoned, would not be a suffi-

56 *Id.*

57 *Id.* at 2100.

58 To be clear, though, it was not. *Id.* at 2100–01.

59 *Id.* at 2101.

60 For the sake of convenience, I will refer to the full panoply of congressional authority—which may not be limited to Article I, Section 8, or even to Article I—as Article I authority.

61 Subject nonetheless to the possible abuse of self-executing treaties. See *infra* subsection III.B.2.

62 *Bond*, 134 S. Ct. at 2103 (Thomas, J., concurring in the judgment).

63 *Id.* at 2103–09; e.g., *id.* at 2109 (arguing that “the holding in *Holland* is consistent with the understanding that treaties are limited to matters of international intercourse”).

64 *Id.* at 2103.

cient safeguard, particularly given the damage that might be done by self-executing treaties not involving Congress at all.

The precise implications, though, were less clear, perhaps because (as Justice Thomas noted) the parties had not briefed the question.<sup>65</sup> He acknowledged difficulty in drawing a line “between matters of international intercourse and matters of purely domestic regulation,”<sup>66</sup> and was unclear even about the nature of some future challenge to a treaty’s constitutionality.<sup>67</sup> His discussion was oriented toward as-applied claims, given the evidently international character of the Chemical Weapons Convention as a whole. And it seems likely that Justice Thomas intended such a challenge to run solely to the treaty’s domestic legal significance rather than against the constitutional capacity of the United States to enter into the treaty in the first place, though both may be implicated in the treaty power. Unlike Justice Scalia, who seemed vexed at the missed opportunity to address the Necessary and Proper Clause issue, Justice Thomas opined that “[g]iven the increasing frequency with which treaties have begun to test the limits of the Treaty Power,” the chance to grapple with the issue “will come soon enough.”<sup>68</sup>

Justice Alito, finally, agreed with Justice Scalia that Bond had violated the Act, and that it was therefore necessary to examine the statute’s constitutionality on the basis of the treaty power. Distinctly, though, he endorsed only the proposition that “the treaty power is limited to agreements that address matters of legitimate international concern,” and he sought to apply that test in the case at hand.<sup>69</sup> Justice Alito conceded that in the main, the Convention addressed a matter of international concern, and suggested no objection to the treaty’s ratification. However, he distinguished any treaty obligation (assumed *arguendo*) to “enact domestic legislation criminalizing conduct . . . regulated by the States,” which he said would exceed the treaty power; that meant, he reasoned, that the Act could not be deemed necessary and proper to carry into execution the treaty power.<sup>70</sup> By reading the treaty power narrowly, it seemed, he wound up in nearly the same place as would Justice Scalia’s approach: disabling the capacity of U.S. treaties to upset routine expectations about the domestic capacity of Congress.

### C. *The Actual Divide*

Reasonable minds differ about the compatibility of modern treaties with our constitutional tradition, a question beyond the scope of this Article—in part, because it was only superficially addressed in *Bond*. Given the concurring claims about the threats treaties pose to constitutional structure, however, it is worth sketching the competing considerations.

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65 *Id.* at 2103, 2110.

66 *Id.* at 2110.

67 *See id.* at 2103 (simply noting interest in addressing the scope of the treaty power “in an appropriate case”).

68 *Id.* at 2111.

69 *Id.* (Alito, J., concurring in the judgment).

70 *Id.*

In fairness, *Missouri v. Holland* did its best to sound threatening. Justice Holmes declared that treaties could reach subjects beyond Congress's enumerated powers, and with little show of effort reported that "[i]f the treaty is valid there can be no dispute about the validity of the statute" under the Necessary and Proper Clause<sup>71</sup>—although he might have been confining himself to the treaty and statute in question, or treating the matter as settled by dicta in prior case law.<sup>72</sup> It escaped no one, in any event, that the treaty at issue had been negotiated and ratified in the wake of lower court decisions holding that pretreaty legislation exceeded Congress's authority under the Commerce Clause.<sup>73</sup> Those concerned about the opportunistic use of treaties might be forgiven for ignoring the nature of the Chemical Weapons Convention and, stealing a glance in the rearview mirror, seeing the once receding image of *Missouri v. Holland*.

All the same, there was surprisingly little attention in any of the *Bond* opinions—despite claims about the structural risks of abusive treaty-making—to the structural *checks* on federal aggrandizement. Unlike other forms of federal power, treaties require a counterparty; it is not a given, for example, that other states would choose to bind themselves to an Antipolygamy Convention, even if the United States asked nicely.<sup>74</sup> Nor are the impediments limited to what Justice Scalia would call the "making" of a treaty. For the federal government to pursue the treaty route, it must not only find an international co-conspirator, but it must also be willing to accept international accountability for any breaches, including for transgressions by federal (or other) actors that can occur even with the right federal legislation on the books.

Putting these international hurdles to one side, there are domestic ones to contemplate. Per Article II, treaties will often be harder to enact than statutes: the requirement of two-thirds approval by the Senate was a burden imposed largely in order to safeguard state and local interests.<sup>75</sup> And there

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71 *Missouri v. Holland*, 252 U.S. 416, 432 (1920).

72 See *Keller v. United States*, 213 U.S. 138, 147 (1909); *Neely v. Henkel*, 180 U.S. 109, 121 (1901); *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 619 (1842).

73 See Swaine, *supra* note 50, at 1009.

74 One assumes they would have the good taste to make such a convention bilateral only.

75 See, e.g., Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1342 (2001). For a survey of other objectives (or, at least, values) it served, see John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703, 760–69 (2002). Whether or not this degree of caution was appropriate is, for immediate purposes, beside the point; rather, it means simply that the treaty power was deliberately structured so as to diminish the structural risks now attributed to them. It is often observed that the protection afforded state interests may have eroded over time, including due to the Seventeenth Amendment, which provided for the direct election of senators. See *id.* at 767. A countervailing development, less often noted, is that the substantial growth in the size of the Senate has meant that it is easier for treaties to fall prey to the supermajority rule. See Rosalind Dixon, *Updating Constitutional Rules*, 2009 SUP. CT. REV. 319, 324–30.

are additional, nonconstitutional obstacles derived from the doctrine of non-self-execution. It has become accepted that the President and the Senate may agree to reservations, understandings, and declarations on behalf of the United States. These often temper the scope of international obligations, but they also frequently declare that the treaty will be regarded as non-self-executing, including when U.S. courts would otherwise deem the treaty to establish judicially enforceable obligations.<sup>76</sup> The practice of non-self-execution declarations does suggest—if unaccompanied by substantive reservations or other means of truncating the international obligation, *and* if the contemplated form of implementation is new federal legislation, as opposed to the enforcement of existing law—that some combination of enumerated Article I authorities, including the Necessary and Proper Clause, is likely to be invoked. But that necessarily involves separate legislation, subject to bicameralism and presentment, above and beyond consent to the treaty itself. Viewed one way, legislation implementing a non-self-executing treaty takes constitutional liberties unlike other legislation; viewed another way, the route envisions a two-step process that the Founding generation, who consciously permitted treaties to function as supreme law from the get-go, might consider an additional and burdensome check on federal ambition.

Finally, nothing in enabling necessary and proper authority requires—one hopes this is obvious—the conclusion that all legislation adopted by Congress is, in fact, necessary and proper. The idea that such authority opens the floodgates depends to an embarrassing (and counterfactual) degree on the supposition that the courts will disregard its potential limits. Justice Scalia’s account of an ever-aggrandizing national government must ultimately suppose that the judiciary is a part of this conspiracy, and construction of the Necessary and Proper Clause their federalizing tool, which seems far too modest about the Court’s contrarian potential.<sup>77</sup>

On the whole, the best caution about Justice Scalia’s diagnosis was the last authority he cited: Henry St. George Tucker, who, Justice Scalia reported, “saw clearly the danger of *Holland’s ipse dixit* five years before it was written.”<sup>78</sup> Tucker wrote, as Justice Scalia recounted, that:

[The statement is made that] if the treaty-making power, composed of the President and Senate, in discharging its functions under the government, finds that it needs certain legislative powers which Congress does not possess to carry out its desires, it may . . . infuse into Congress such powers, although the Framers of the Constitution omitted to grant them to Congress. . . . Every reputable commentator upon the Constitution from Story

76 As well as when the result may be overdetermined. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 735 (2004).

77 *But see, e.g., Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2591–93 (2012) (opinion of Roberts, C.J.) (indicating that the Affordable Care Act was not justified under the Necessary and Proper Clause); *id.* at 2644–47 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) (same).

78 *Bond v. United States*, 134 S. Ct. 2077, 2102 (2014) (Scalia, J., concurring in the judgment).

down to the present day, has held that the legislative powers of Congress lie in grant and are limited by such grant. . . . [S]hould such a construction as that asserted in the above statement obtain through judicial endorsement, our system of government would soon topple and fall.<sup>79</sup>

Invoking Tucker was unsurprising—his work is routinely trotted out to suggest the radicalism of *Missouri v. Holland*, so often as to suggest that Tucker's own views are singular.<sup>80</sup> Still, it was regrettable. Substantively, the weaknesses in Tucker's analysis are obvious. His contemporary opponents were clear that their point was *not* that treaties could infuse Congress with powers that the Constitution did not provide, as though rewriting Article I, but rather that the Framers *had given* the asserted powers to Congress (in the form of the Necessary and Proper Clause);<sup>81</sup> these critics included “reputable commentators” who addressed directly application of the Necessary and Proper Clause to the treaty power.<sup>82</sup> (His opponents also left to Tucker's supporters, mostly, the dirty work of anointing him as a standout defender of states' rights and segregation.<sup>83</sup>) But Justice Scalia did not cite Tucker's

79 *Id.* (alterations in original) (quoting HENRY ST. GEORGE TUCKER, LIMITATIONS ON THE TREATY-MAKING POWER § 113, at 129–30 (1915)).

80 See, e.g., Nick Rosenkranz, *The Conventional Wisdom Before Missouri v. Holland: Was It “Close to Universally Accepted” that a Treaty Could Increase the Legislative Powers of Congress?*, VOLOKH CONSPIRACY (Jan. 22, 2013, 12:09 AM), <http://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/> (citing Henry St. George Tucker's treatise as the sole example of treatises belying the supposed conventional wisdom preceding *Missouri v. Holland*).

81 See, e.g., EDWARD S. CORWIN, NATIONAL SUPREMACY: TREATY POWER V. STATE POWER 290–92 (1913).

82 See, e.g., CHARLES H. BURR, THE TREATY MAKING POWER OF THE UNITED STATES, AND THE METHODS OF ITS ENFORCEMENT AS AFFECTING THE POLICE POWERS OF THE STATES 386–87 (1912); 2 CHARLES HENRY BUTLER, THE TREATY-MAKING POWER OF THE UNITED STATES § 390, at 139–44 (1902); CORWIN, *supra* note 81, at 276–95; SAMUEL B. CRANDALL, TREATIES: THEIR MAKING AND ENFORCEMENT 241 (2d ed. 1916); SAMUEL T. SPEAR, THE LAW OF EXTRADITION 7, 69 (3d ed. 1885); GEORGE SUTHERLAND, CONSTITUTIONAL POWER AND WORLD AFFAIRS 153–55 (1919); WILLIAM H. TAFT, THE UNITED STATES AND PEACE 67–68, 74, 75–83 (1914); 1 WESTEL WOODBURY WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES § 217, at 506–07 (1910); Chandler P. Anderson, *The Extent and Limitations of the Treaty-Making Power Under the Constitution*, 1 AM. J. INT'L L. 636, 657, 662–63 (1907); see also Lindsay Rogers, Book Review, 9 AM. POL. SCI. REV. 595 (1915) (reviewing TUCKER, *supra* note 79).

83 Book Review, 49 AM. L. REV. 470, 474–75 (1915) (reviewing TUCKER, *supra* note 79) (stating that “Dean Tucker displays on every page his attachment to the older doctrines of states' rights and strict construction,” and that “[t]here is a distinct *ante bellum* flavor to the work,” but commending his book); Jos. R. Long, *Tucker on the Treaty-Making Power*, 1 VA. L. REG. 97, 101 (1915) (reviewing TUCKER, *supra* note 79) (stating, with appreciation, that “Mr. Tucker's book is written frankly from the standpoint of a zealous advocate of states' rights”). The basic emphasis on states' rights and “racial considerations” implicated by the treaty power was quite evident in Tucker's work. See Henry St. George Tucker, *The Treaty-Making Power Under the Constitution of the United States*, 199 N. AM. REV. 560, 568 (1914); *id.* at 563–64 (contrasting limited rights of a “negro citizen of New York” under the laws of

views as much for their substance as for their supposed prescience.<sup>84</sup> On that score, they were laughably inaccurate. The “judicial endorsement” Tucker feared had, in fact, arrived with *Missouri v. Holland*. To all appearances, the system of government is taking its time in toppling and falling. The more serious threat, arguably, is what the *Bond* concurrences endorsed.

### III. BREACHING INTERNATIONAL OBLIGATIONS (AND THEIR CONSTITUTIONAL FOUNDATIONS)

The structural concerns highlighted in the *Bond* opinions—the risk that absent judicial intervention, the President and the Senate might make treaties beyond those contemplated by the Treaty Clause, or at least occasion congressional attempts to adopt implementing legislation not legitimate under the Necessary and Proper Clause—surely warranted the Court’s consideration. The Founding generation was indeed concerned with the injudicious use of treaties, including as might encroach on the states.<sup>85</sup> A fair reading of constitutional history, however, suggests additional considerations. One of the most prominent reasons for amending treaty authority as it stood under the Articles of Confederation was the need to ensure that the United States could and would fulfill its international obligations—not merely by making treaties hard to achieve, but also by guaranteeing their fulfillment, including by the several states. Beyond that, and mitigating somewhat the desire to retard treaty-making, there was the goal of endowing

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Texas with the rights potentially secured under treaty by “the negro from Hayti or the Congo,” and concluding that if the rights of aliens might be superior, “we may indeed repent in sackcloth and ashes that we have sold our birthright for a mess of pottage”).

84 As Professor Galbraith has indicated, Tucker did not actually share Justice Scalia’s understanding of the Necessary and Proper Clause’s function with respect to treaties, instead believing (for reasons that need not be elaborated here) that it authorized treaty-implementing legislation and perhaps even required that some treaties be non-self-executing. Jean Galbraith, *Congress’s Treaty-Implementing Power in Historical Practice*, 56 WM. & MARY L. REV. 59, 105–07 (2014) (citing TUCKER, *supra* note 79, at 17, 129–30, 353). I am not certain, however, that Tucker’s resistance to the *Missouri v. Holland* approach is wholly attributable to his narrow view of the kinds of treaties authorized by the treaty power. See *id.* at 107. Rather, Tucker seemed to employ the panoply of arguments against national authority—including limits on the scope of the treaty power, *and* limits in terms of what would be deemed necessary and proper to implement treaties given the reserved authority of states—in a fashion not unlike Justice Scalia, once Scalia’s subscription to Justice Thomas’s concurrence is considered (the principal difference being Justice Scalia’s yet narrower view of the Necessary and Proper Clause). Tucker did say that if an unlimited view of the Treaty Clause were accepted, the “additional concession” that Congress could pass legislation beyond its enumerated powers “might well be admitted.” See *id.* at 107 (quoting TUCKER, *supra* note 79, at 132). I read him as being sarcastic—given that it required, in his view, the sense that it would be “appropriate, in order to make the destruction of the Constitution complete, that Congress should be made its efficient ally in the process of demolition and have full power to carry out its unlimited demands.” TUCKER, *supra* note 79, at 132.

85 See Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 409–17 (1998).

the United States with a power to make international agreements comparable to that enjoyed by other civilized nations.<sup>86</sup>

In the *Bond* opinions, these other concerns were plumb forgotten, and the treaty power made to appear as little more than an attractive nuisance for federal aggrandizers. This Part will explore the implications of the opinions for the other values.

#### A. *Thomas-Scalia-Alito Position: Non-“International” International Agreements*

As recounted above, three Justices took the position that the treaty power does not extend to matters of purely domestic regulation, as opposed to matters of international intercourse. The other six Justices may or may not agree, having elected to focus on a statutory rather than constitutional basis for the decision. Although the full implications of this view are uncertain, at least in part due to Justice Alito’s implicit disagreement about related matters, they are unsettling all the same.

This position anticipates the possibility that the United States may become party to an agreement that exceeds a subject-matter limit imposed by the Constitution. Such an agreement may well be genuine and not a sham; that is, the international concern requirement is distinguishable from a requirement that the agreement be bona fide, or at least the *Restatement (Third)*—in rejecting the former restraint, but acquiescing in the latter—so supposed.<sup>87</sup> One may further assume that the trespass may be innocent or at most negligent, given that the lines are not discernible. Justice Thomas appeared to concede as much, noting that “the distinction between matters of international intercourse and matters of purely domestic regulation”<sup>88</sup> was not self-evident and that it was unclear whether a treaty could permissibly reach “some” local matters so long as it related to “intercourse with other nations.”<sup>89</sup> There were other ambiguities, too, that he did not address, such as whether the proper topics for treaties might evolve or would instead be frozen as of the Founding (one might make an educated guess as to which way he leans). While Justice Thomas held out hope that these issues could be resolved, perhaps in the case that he predicted would “come soon enough,”<sup>90</sup> treaty negotiators might lack guideposts for quite some time. Justice Scalia, as noted previously, seemed less optimistic that a suitable case would come

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86 For general comment on these objectives, see CURTIS A. BRADLEY, *INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM* 39–40 (2013); LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 175–76 (2d ed. 1996); David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1089–100, 1102–49 (2000); Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 DUKE L.J. 1127, 1198–210 (2000).

87 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 302 reporter’s note 2 (1987).

88 *Bond v. United States*, 134 S. Ct. 2077, 2110 (Thomas, J., concurring in the judgment).

89 *Id.* at 2108.

90 *Id.* at 2111.

along soon; Justice Thomas's own conduct might also be cited, seeing how he hastened to write about the issue in a case when it was not raised.

To this particular prospect—the innocent breach of the Treaty Clause by U.S. officials genuinely intent on serving the nation's foreign policy interests—the Thomas-Scalia-Alito position does not much address itself. Implicitly, the answer is that U.S. officials must, here as elsewhere, respect the constitutional limits established by the original understanding of the Constitution. The behavior from which they are supposed to refrain, however, is obscure, and not just in terms of distinguishing domestic and international matters. After noting the Constitution's "flexibility," insofar as it (ostensibly) eliminated the subject-matter limits imposed on treaties by the Articles of Confederation, Justice Thomas cautioned that "[t]hat understanding of the Treaty Power did not permit the President and the Senate to exercise domestic authority commensurate with their substantial power over external affairs."<sup>91</sup> This cryptic passage suggests that the treaty-makers may be authorized, either by the Constitution or by the nature of sovereignty, to forge treaties *not* of international concern, so long as it is recognized that such treaties lack domestic legal effect.

Regardless, there is no evidence that Justice Thomas considered whether any version of his domestic law views would affect the *international* validity of the treaty. The short answer is that it could not. Under Article 46 of the Vienna Convention on the Law of Treaties, a violation of domestic law must be manifest and relate to a rule of fundamental importance; the former, at least, seems impossible to sustain at any point in the foreseeable future. An additional, more important limitation is that the violation must also concern rules relating to the conclusion of international agreements, as distinct from rules—however fundamental in character—that merely limit the capacity of a state to implement an agreement within its domestic system.<sup>92</sup>

The result of applying the Thomas-Scalia-Alito position and invalidating domestic implementation, therefore, may put the United States in breach of internationally (and possibly even constitutionally) valid treaties, despite the best of intentions of the U.S. treaty-makers. Those negotiating the Chemical Weapons Convention probably had no idea. Even negotiators paying heed to the "international concern" standard during the *Restatement (Second)*'s heyday would likely have expected that this was a question for the President and Senate, rather than the Supreme Court; Justice Thomas's discussion of prece-

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91 *Id.* at 2106.

92 Reps. of the Comm'n to the Gen. Assembly, Jan. 3, 1966–Jan. 28, 1966, U.N. Doc. A/6309/Rev.1, *reprinted in* 2 Y.B. INT'L L. COMM'N 202, 240 (1966). Although the United States is not a party to the Convention, it recognizes that much of it coincides with customary international law. In particular, the standard described in Article 46 has occasionally been referenced by U.S. courts and officials. *See, e.g.,* *Made in the USA Found. v. United States*, 242 F.3d 1300, 1310 n.23 (11th Cir. 2001) (citing Article 46 of the Vienna Convention on the Law of Treaties); Vienna Convention on the Law of Treaties: Senate Hearings, 1986, 1981–1988 DIGEST § 42, at 1229, 1238 (statement by Assistant Secretary of State for Legislative and Intergovernmental Affairs endorsing the rule expressed in Article 46).

dent revealed no case in which the Court had struck down a statute or treaty on that basis.<sup>93</sup> Reviewing the evidence he cited of the original understanding and early practice, one could more easily gather the impression that this question was not one for which judicial review was ever contemplated.

*B. Scalia-Thomas Position: International (but Not Interstate) Agreements*

At first blush, the position established by the concurring opinions by Justice Scalia and Justice Thomas, once synthesized, is pleasingly symmetrical: treaties may lack (some form of) validity because they exceed the treaty power, per Justice Thomas, and they may likewise exceed Congress's power to implement, per Justice Scalia. This seems sounder than if the capacity to reliably enter treaties exceeded the power to implement them—if, for instance, Justice Scalia's concurrence alone had been published.<sup>94</sup> Even so, the Scalia-Thomas position creates some substantial hazards that have received no attention.

1. Non-Self-Executing Agreements

The symmetry of the Scalia-Thomas position begins to erode when the implementation and validity tests are compared. As concerns implementation, recall that Congress has legislative authority only to the extent of Article I. Validity's contours are somewhat more elastic. It likewise seeks to prevent the national government from assuming boundless authority. But Justice Thomas did not suggest—and could not have maintained—that the treaty power *goes only so far as Article I does*. Long-settled debates about the House of Representatives' role in treaties touching on Article I would have taken on a different complexion, for example, had it been clear that this amounted to the entirety of the treaty power. And Justice Thomas said with conviction that *Missouri v. Holland* itself would have satisfied his test—despite his likely sympathy for the lower court's holding that similar pretreaty legislation was beyond congressional authority.<sup>95</sup> There is daylight, in short, between the minimum required for a treaty to be “international,” on the one hand, and the maximum authority permitted under Justice Scalia's conception of implementing authority, on the other.

How should treaty-makers anticipate and adjust to this gap? The risk-averse approach would be to refrain from any treaty requiring implementing legislation that potentially exceeds the Scalia-Thomas bar—on the possibility that their view, which has never been enforced by a U.S. court, might some-

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<sup>93</sup> *Bond*, 134 S. Ct. at 2108–10 (Thomas, J., concurring in the judgment).

<sup>94</sup> None in fact endorsed Scalia's position without favoring the Thomas position as well, and one might imagine that the desire to avoid such a discrepancy drove Justice Thomas to reach out to address the treaty power. But he may instead have taken the view that state and local implementation of treaties—unburdened by a federal obligation—was perfectly satisfactory. *See infra*.

<sup>95</sup> *See supra* text accompanying note 63 (citing *Bond*, 134 S. Ct. at 2109 (Thomas, J., concurring in the judgment)).

day become the law. Of course, the treaty-makers might go ahead, adopting federal legislation and ratifying the treaty, if they had a good faith belief that the treaty satisfied the international concern test and that implementing legislation were constitutional. The risk that a court may later find a political decision unconstitutional might not seem particularly substantial or unusual. But the distinctive risk, again, is that the United States would remain party, at least for a time, to an international obligation that it may be breaching.<sup>96</sup>

Justice Thomas and Justice Scalia might stress a third option, in which treaty-makers could depend on states and localities to discharge U.S. treaty obligations, either through existing laws or through new laws tailored to the treaty. Contemporary jurisprudence illustrates the unavoidable risks: whatever the general application of anticommandeering principles to the treaty power, the national government must lack the capacity to direct state legislatures or officials when it lacks implementing authority itself; whatever the prospects that a state already has or may adopt implementing law on its own initiative, there is limited recourse against it if those laws are repealed.<sup>97</sup>

Voluntary compliance by states with treaty obligations was one thing the Constitution was supposed to avoid, so it seems doubtful that the Founding generation expected the treaty-makers to proceed on such contingencies. Nor have the treaty-makers done so. The period between *Missouri v. Holland* and *Bond* has been among the most fertile for international agreements in human history—though doubtless more will enter into force before the views expressed in the concurrences become governing law—and U.S. treaty-makers established obligations predicated upon a much wider range of options for fulfilling them. There will be greater caution, one hopes, before such a gap is actually, and retroactively, imposed in relation to treaties undertaken on a different premise.

## 2. Self-Executing Agreements

Consider, on the other hand, self-executing treaties, ones that in principle are directly enforceable by the judiciary.<sup>98</sup> Because these do not require implementing legislation, they do not directly implicate Article I limits on congressional action. But do they automatically establish binding domestic law, irrespective of whether they fail an international concern test?

Here it is useful to disaggregate the Scalia-Thomas position. Justice Thomas cut self-executing treaties no slack. On his view, their exclusion of

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96 The Court has never clarified whether the President has plenary or exclusive power to terminate a treaty commitment—particularly in the event there is no termination provision in the agreement itself—but it is clear that this is not a judicial power and that courts likely have no capacity to order such redress. See generally *Goldwater v. Carter*, 444 U.S. 996 (1979).

97 See generally Swaine, *supra* note 21.

98 The nature of self-execution and its consequences are complex, controversial, and changing. The account here is broadly consistent with that in current drafts of the Restatement (Fourth) on Foreign Relations. See RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 106 (Preliminary Draft No. 3, 2014).

any role for the House makes the political and constitutional hazards of a “treaty-based police power” more profound, if anything.<sup>99</sup> What this meant for their legal force, in the event they run afoul of the international concern test, was not spelled out, but it did not appear especially favorable.

Justice Scalia’s position was more difficult to pin down. In solidarity with Justice Thomas, he did not concede that “the power to make self-executing treaties is limitless.”<sup>100</sup> At the same time—perhaps in solidarity with Professor Rosenkranz, whose denatured Necessary and Proper Clause naturally had no bearing on self-executing treaties<sup>101</sup>—Justice Scalia said that confining his constitutional objection to non-self-executing treaties might make “a great deal of sense.”<sup>102</sup> His idea was that self-executing treaties were less tempting and feasible, insofar as they required the President and a Senate supermajority to agree on a set of extremely specific stipulations such as would require no legislation, whereas a non-self-executing treaty was both easier to agree on and could license later modification and even repeal.<sup>103</sup>

This argument was sketched only briefly, and its difficulties can be stated equally briefly. There are, to be sure, reasons why the United States may prefer other means of domestic aggrandizement—not simply due to the relative difficulty of achieving domestic consensus on a detailed and prescriptive treaty, but also due to concerns about agreeing to a detailed code that other states may invoke against it. At the same time, equating self-execution with a treaty’s detail, let alone the preferences of U.S. actors for that detail, is simplistic. The premise that “the President and the Senate [can] find in some foreign state a ready accomplice”<sup>104</sup> to their preferences assumes an extraordinary degree of control over matters in which other parties will take an acute interest, and seems particularly dubious for any multilateral instrument. Beyond that, the supposition that the self-executing or non-self-executing character of a treaty provision is dictated internationally, by negotiated text, is highly contestable. Traditionally, courts have exercised considerable judgment in the matter, based on tests in which text is an important but nonexclusive consideration, applied in ways—and with conse-

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99 *Bond*, 134 S. Ct. at 2103 (Thomas, J., concurring in the judgment). The premise was that self-executing treaties “would circumvent the role of the House of Representatives in the legislative process.” *Id.* But circumvention is an odd way of putting it, given that self-executing treaties were contemplated by the Constitution; non-self-executing treaties may be better understood as affording the lagniappe of an additional, extraconstitutional check on lawmaking rather than as establishing a constitutional floor.

100 *Id.* at 2101 (Scalia, J., concurring in the judgment). It is not clear that anyone said they were limitless.

101 See Rosenkranz, *supra* note 48, at 1928 (stressing that “a treaty that goes beyond enumerated powers may always be self-executing”).

102 *Bond*, 134 S. Ct. at 2101 (Scalia, J., concurring in the judgment).

103 *Id.* at 2102.

104 *Id.*

quences—that other actors have found difficult to predict.<sup>105</sup> Any control by the President and Senate over this inquiry is more likely to follow negotiations and express itself through declarations and other unilateral pronouncements rather than text, and remains subject to judicial evaluation.<sup>106</sup>

To the extent one *does* envision control over this question by the President and Senate, the path remains unclear. It is unclear as of now whether—even if one were to accept the Scalia-Thomas position *en toto*—self-executing treaties would equally be subject to Article I limits relating to their domestic force, like non-self-executing treaties once the Necessary and Proper Clause is shackled. Inquiring minds will find it difficult to determine via independent study; because the textual argument for limiting non-self-executing treaties is unavailable for self-executing treaties, the question turns on what Justice Thomas and Justice Scalia regard as “structural” considerations—which have not, as of yet, been comprehensively developed. The treaty-makers may or may not pay close attention to the characterization of a treaty as self-executing, at least not as it relates to the constitutional capacity to implement the treaty domestically, and they may be unable to identify the treaty’s nature prior to signature even if they wished. The structural objective of establishing a treaty power permitting the United States to enter into treaties that it *knows* it can discharge is largely undermined.

### C. *Alito Position*

Justice Alito focused exclusively on the limitation of treaties to matters of international concern. If a provision of a non-self-executing treaty proves to exceed the treaty power, implementing legislation is *ipso facto* not necessary and proper. If, on the other hand, legislation implements a provision of international concern, legislation *may* be necessary and proper—or so he implies, in withholding his approval from Justice Scalia’s more restrictive view.<sup>107</sup> As a result, Justice Alito’s position admits of no necessary gap between a valid treaty of international concern and domestic constitutional authority, since a valid treaty might enable authority not stipulated as an enumerated power.

This synchronized view—in which the selfsame reasons that inhibit the international authority of the United States inhibit its domestic implementing authority, rendering it not necessary and proper—is relatively appealing, but not without complications. The principal, familiar one involves the test for international concern, which Justice Alito depicts as taking an as-applied, provision-by-provision form; he also makes domestic constitutionality depend completely upon that inquiry. Someone considering the Scalia-Thomas posi-

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105 See *Medellín v. Texas*, 552 U.S. 491, 508–23 (2008). For prior attention to even more factors, see *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 373–76 (7th Cir. 1985), and *People of Saipan v. U.S. Dep’t of Interior*, 502 F.2d 90, 97 (9th Cir. 1974).

106 See *supra* note 76 and accompanying text (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692, 735 (2004)).

107 *Bond*, 134 S. Ct. at 2111 (Alito, J., concurring in the judgment).

tion might, in theory, be able to predict whether a non-self-executing obligation is domestically enforceable by looking at domestic jurisprudence on the scope of Article I. If the statutory provision falls within Article I authority, it is enforceable without regard to the treaty; if it does not, it is unenforceable without regard to the international concern inquiry.

Those instead limited to the objection described in Justice Thomas's concurrence, like Justice Alito, will excuse an additional class of agreements lying beyond Article I. For their pains, however, they will be forced to concentrate on whether a treaty provision and its implementing legislation is nonetheless sufficiently devoted to international intercourse—a question never resolved by the Supreme Court. Justice Thomas himself did not even hazard an answer, ultimately deciding to await an appropriate case to settle his thoughts.<sup>108</sup> Only Justice Alito seemed to apply the inquiry in *Bond* itself, stating simply that the indicted behavior was “typically . . . the sort of conduct regulated by the States” and thus neither a matter of legitimate international concern nor within the Necessary and Proper Clause.<sup>109</sup> Unlike Justice Scalia's inquiry, moreover, the “international concern” test is *sui generis*, and dependent entirely on developing a treaty-specific jurisprudence. Considering Justice Scalia's impatience with the majority's decision to postpone resolution of his constitutional question, the wait for clarity on Justice Alito's position—whether it will be adopted, and how it will evolve in reaction to particular facts—will be longer yet.

#### D. Majority Position

As recounted previously, Chief Justice Roberts (and five others) took the view that the statute implementing the Chemical Weapons Convention could be narrowly read, thus avoiding resolution of the constitutional objection. Generalized, the majority envisioned the possibility that treaty-implementing statutes will be narrowly construed (theoretically, only if they are ambiguous) and decoupled from an international commitment—both as the obligation is recognized under international law *and* as may be valid according to the Treaty Clause. It did so not in order to remedy a concrete constitutional deficiency, but rather due to something more like a colorable concern.

Nominally, such an approach avoids entangling the Court unnecessarily in constitutional questions. But this decoupling directly challenges some of the foundational values motivating the Constitution's redesigned treaty power, including the importance of ensuring state compliance and reinforcing the United States' capacity to make credible international commitments. It is also a curious result as a matter of legislative intent. It was not especially hard to imagine that Congress was behaving unconventionally with regard to the allocation of federal and state power, given the United States' obligations under the Convention. And if it matters whether Congress genuinely appreciates the interpretive approaches courts will take to its statutes—the better

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108 *Id.* at 2110–11 (Thomas, J., concurring in the judgment).

109 *Id.* at 2111 (Alito, J., concurring in the judgment).

to gauge its druthers in construing unclear language—surely it should matter that Congress legislated, as it has for some time, with an appreciation of *Missouri v. Holland*. After *Bond*, however, its expectations will be harder to reckon, as to both the anticipated limits of national authority and the spirit in which its legislation will be read.

#### CONCLUSION

In a recent case, facing the argument that a Supreme Court decision upholding a statute touching on the status of Jerusalem might cause serious international controversy, Justice Scalia suggested that if it was within Congress's power, it should make no difference whether a statute antagonized foreign countries. As he saw the matter, it fell to Congress, rather than to the Court, to worry about the consequences.<sup>110</sup> This put the cart before the horse: the question was precisely whether the problem *was* one for Congress in the first place, or fell to the President instead, and the Court will be assuming some responsibility for the consequences when it decides which is the appropriate decisionmaker.

*Bond* suggested that Justice Scalia and his colleagues are much more overt in assuming responsibility for evaluating what they regard as structural, constitutional consequences of other foreign relations assignments—while also, more as Justice Scalia indicated, avoiding reflection on other constitutional implications of their preferences. At least when it comes to the treaty power, such distinctions are artificial and counterproductive. Regarding the validity of treaties, and the validity of implementing legislation, those writing in *Bond*—and, equally, those remaining silent—should have reflected much more carefully on why the Constitution's clearest direction to the judiciary on treaties was that it should enforce them.

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110 Transcript of Oral Argument at 27, *Zivotofsky v. Kerry*, No. 13-628 (U.S. Nov. 3, 2014).