

CONGRESS'S LIMITED POWER TO ENFORCE TREATIES

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This Article focuses on Justice Scalia's concurrence in the judgment in *Bond v. United States*.¹ It makes three main points. First, Scalia's claim that Congress lacks a general power to enforce treaties is unpersuasive as a matter of the Constitution's original meaning. Congress's power to enact laws necessary and proper to carry into execution the treaty-making power can be read to include the power to enforce treaties because treaty-making and treaty enforcement are inevitably intertwined. As the Framers understood from experience, a nation with a reputation for unreliable treaty enforcement would be impaired in its ability to make future treaties, as potential partners would regard it as untrustworthy. Further, Scalia's claim rests strongly on the structural point that giving Congress treaty enforcement power would expand the federal government's power without limit. But this structural point is overstated, both because treaty-making itself is constrained by the need for supermajority Senate consent and because federal power can be exercised through self-executing treaties regardless of limits on Congress. Indeed, structural considerations cut at least as strongly the other way, for it seems unlikely after the experiences of the Articles of Confederation that the Framers would have accepted a category of treaties whose enforcement could not be assured at the national level.

Second, Scalia's structural concerns about effectively unlimited congressional power are nonetheless partly justified to the extent that courts substantially defer to Congress's claims about what action is necessary and proper to enforce a treaty. If Congress alone can decide what a treaty means and what its enforcement requires, Congress may use the treaty to claim powers not

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1 134 S. Ct. 2077, 2094–102 (2014) (Scalia, J., concurring in the judgment).

contemplated by the treaty-makers. Congress could thus invoke the treaty while circumventing the supermajority constraint on treaty-making.

Third, therefore, courts should not defer fully to Congress in this matter; instead, they should assure that Congress's actions do not exceed what is justified by the treaty. Although Congress has power to pass laws necessary and proper to preserve the United States' reputation for treaty compliance, Congress must use this power in ways that do not unduly infringe federalism. In particular, this Article suggests two types of judicial limitations. Courts can make an independent assessment of the meaning of the treaty, including employing a presumption that treaties do not affect purely domestic matters. Courts can also review the necessity and propriety of Congress's enforcement legislation, prominently including in this assessment whether enforcement of the treaty is appropriately done at the federal rather than the state level. As a result, Congress's power to enforce treaties, while broad, need not be unlimited.

As an illustration, application of this approach in *Bond v. United States* would find the federal legislation (as applied to Bond) beyond Congress's power, both because the Chemical Weapons Convention did not reach Bond's conduct and because even if it did, state regulation was adequate to assure U.S. compliance with the Convention. As a result, although Congress has power to enforce treaties (contrary to Justice Scalia's view), its power is sufficiently limited so that it does not pose an undue threat to federalism.

I. CONGRESS'S POWER TO ENFORCE TREATIES

Concurring in the judgment in *Bond v. United States*, Justice Scalia (joined by Justice Thomas) argued that a federal statute implementing a treaty, if not otherwise within the powers of Congress, is unconstitutional:

Since the Act is clear, the *real* question this case presents is whether the Act is constitutional as applied to petitioner. An unreasoned and citationless sentence from our opinion in *Missouri v. Holland* purported to furnish the answer: "If the treaty is valid"—and no one argues that the Convention is not—"there can be no dispute about the validity of the statute under Article I, § 8, as a necessary and proper means to execute the powers of the Government." Petitioner and her *amici* press us to consider whether there is anything to this *ipse dixit*. The Constitution's text and structure show that there is not.²

As Scalia's assessment makes clear, the core question is whether Congress's "necessary and proper" power extends to statutes that enforce treaties. The Court's assumption in *Missouri v. Holland* (and Scalia is right that it is just an assumption) was that (a) the treaty power is a power of the federal government; (b) Congress has the power to "carry into execution" the powers of the federal government; and (c) legislation that enforces a treaty provi-

2 *Id.* at 2098 (footnote omitted) (citations omitted) (quoting *Missouri v. Holland*, 252 U.S. 416, 432 (1920)).

sion carries into execution the treaty power.³ Scalia makes a twofold counterargument, based on text and structure. In this Part, I argue that he is unpersuasive on both counts.

A. Text

Following Nicholas Quinn Rosenkranz's pathbreaking article,⁴ Scalia argues that the Constitution's text—the combination of the treaty-making clause and the Necessary and Proper Clause—does not give blanket treaty enforcement power to Congress. As Scalia puts it:

Under Article I, § 8, cl. 18, Congress has 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.” One such “other Powe[r]” appears in Article II, § 2, cl. 2: “[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.” Read together, the two Clauses empower Congress to pass laws “necessary and proper for carrying into Execution . . . [the] Power . . . to make Treaties.”⁵

This power, he continues, is only to assist in *making* treaties, not to assist in the very different enterprise of enforcing them:

3 See *Holland*, 252 U.S. at 432. *Holland* concerned the validity of a statute regulating hunting of migratory birds, enacted on the authority of a treaty protecting migratory birds. *Id.* at 431. The sentence Scalia quotes from *Holland* is the only discussion in the opinion of the validity of the statute; the balance of the opinion addresses the validity of the treaty.

4 Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867, 1879 (2005) [hereinafter Rosenkranz, *Executing the Treaty Power*]; see also Nicholas Quinn Rosenkranz, *Bond v. United States: Can the President Increase Congress's Legislative Power by Entering into a Treaty?*, 8 N.Y.U. J.L. & LIBERTY 228, 235 (2013) [hereinafter Rosenkranz, *Bond v. United States*] (discussing the article's application to *Bond*); Nicholas Quinn Rosenkranz, *Bond v. United States: Concurring in the Judgment*, 2014 CATO SUP. CT. REV. 285, 295 [hereinafter Rosenkranz, *Concurring in the Judgment*] (same). For related commentary, see generally Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390 (1998) (expressing concern for federalism implications of the treaty power); John C. Eastman, *Will Mrs. Bond Topple Missouri v. Holland?*, 2011 CATO SUP. CT. REV. 185 (endorsing federalism limits on Congress's treaty enforcement power). For counterarguments, see David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1278–313 (2000) (criticizing Professor Bradley's approach); Edward T. Swaine, *Putting Missouri v. Holland on the Map*, 73 MO. L. REV. 1007 (2008) (criticizing Professor Rosenkranz's approach); Carlos Manuel Vázquez, *Missouri v. Holland's Second Holding*, 73 MO. L. REV. 939, 942–64 (2008) (considering and rejecting both the Rosenkranz and Bradley approaches); see also Michael Stokes Paulsen, *The Constitutional Power to Interpret International Law*, 118 YALE L.J. 1762, 1810 (2009) (concluding that “Congress may enact by statute, pursuant to the Necessary and Proper Clause, whatever domestic legal rules the President, acting together with the Senate, could have enacted by self-executing treaty”). This Article directly addresses Justice Scalia's concurrence and does not assess all of the arguments advanced by Professor Rosenkranz and other academic commentators.

5 *Bond*, 134 S. Ct. at 2098 (Scalia, J., concurring in the judgment).

A treaty is a contract with a foreign nation *made*, the Constitution states, by the President with the concurrence of “two thirds of the Senators present.” . . . So, because the President and the Senate can enter into a non-self-executing compact with a foreign nation but can never by themselves (without the House) give that compact domestic effect through legislation, the power of the President and the Senate “to make” a Treaty cannot possibly mean to “enter into a compact with a foreign nation and then give that compact domestic legal effect.” . . . Upon the President’s agreement and the Senate’s ratification, a treaty—no matter what kind—has been *made* and is not susceptible of any more making.⁶

As a result, the power to carry into execution the treaty-making power includes things such as appropriating money and appointing officers to carry out negotiations. But “[o]nce 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. To legislate compliance with the United States’ treaty obligations, Congress must rely upon its independent (though quite robust) Article I, § 8, powers.”⁷

While this is a possible reading of the text, it does not appear to be the only one. Instead, treaty-making and treaty compliance might be seen as intertwined rather than (as Scalia sees them) entirely distinct. Treaties, as reciprocal agreements among nations, depend upon the willingness and ability of their signatories to abide by their provisions. If a nation is unable or unwilling to satisfy its obligations, and this is generally known by other nations, its treaty-making power will be greatly impaired. Other nations will be reluctant to contract with an unreliable partner.

This connection may be most easily seen by analogy to private contracts. In business relationships, a firm’s reputation for honoring its contracts is essential to continued business. A firm that gains a reputation for breaching its existing contracts will have few opportunities to make new ones. As a result, the firm’s willingness and ability to uphold existing contractual obligations is closely related to its opportunities to enter into new contractual relationships. In the treaty context, this effect is even more powerful, because there is no external enforcement mechanism comparable to courts’ enforcement of private contracts. At least a firm entering into a contract with an unreliable partner has some hope that a court will enforce the contract (albeit after considerable time and expense). Treaty parties, in contrast, have no equivalent enforcement mechanism and so must place even greater value upon the reliability of their prospective treaty partner.⁸

As a result, it seems plausible to say that Congress’s treaty enforcement carries into effect the President’s treaty-making power, because absent reliable methods of enforcement, the power to make treaties as a practical matter

6 *Id.* at 2098–99.

7 *Id.* at 2099; *see also* Rosenkranz, *Executing the Treaty Power*, *supra* note 4, at 1880–92 (making the same argument).

8 *See generally* ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS* (2010) (stressing the importance of reputation in international law compliance).

would be greatly impaired. Scalia's opinion, although it describes Congress's power as "a power to help the President make treaties,"⁹ does not discuss this reading of the text.

Scalia offers no direct evidence that the Founding generation read the text as he does.¹⁰ Context suggests that they would have embraced the broader view.

For the Framers, the need to establish trust among potential treaty partners was an immediate concern. Under the Articles of Confederation, the national Congress could enter into treaties but had little power to enact laws to enforce treaties;¹¹ for enforcement requiring domestic legislation, action by the states was needed. The states proved unreliable, repeatedly failing to take action to enforce treaties.¹² The most notorious of these difficulties involved the 1783 peace treaty with Britain, which provided that British creditors would not be prevented from enforcing and collecting prewar debts.¹³ The states, of course, did interfere with British enforcement and collection, ignoring the treaty, and the Congress was powerless to rectify the situation.¹⁴

Although the issue of the British debts is well known, it was only part of a more pervasive problem. The United States undertook substantial treaty commitments soon after independence, entering into treaties with France, the Netherlands, Sweden, Prussia, and Morocco, as well as with Britain.¹⁵ As John Jay recounted in a report to the Congress, states frequently ignored treaty provisions, either violating them outright or failing to enforce them, leading to widespread protests by foreign nations.¹⁶ This was a problem in

9 *Bond*, 134 S. Ct. at 2099 (Scalia, J., concurring in the judgment) (emphasis omitted).

10 In addition to what he believes is the text's plain meaning, Scalia relies on inferences from structure and more general Founding-era commentary. These points are discussed below in Section I.B.

11 See ARTICLES OF CONFEDERATION OF 1781, art. IX (describing powers of the Continental Congress).

12 See FREDERICK W. MARKS III, INDEPENDENCE ON TRIAL: FOREIGN AFFAIRS AND THE MAKING OF THE CONSTITUTION 3–95 (1973) (describing difficulties with treaty enforcement under the Articles); David L. Sloss, Michael D. Ramsey & William S. Dodge, *International Law in the Supreme Court to 1860*, in INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE 7, 9–12 (David L. Sloss et al. eds., 2011) (same).

13 Definitive Treaty of Peace, U.S.–Gr. Brit., art. IV, Sept. 3, 1783, 8 Stat. 80.

14 See MARKS, *supra* note 12, at 5–15; Sarah H. Cleveland & William S. Dodge, *Defining and Punishing Offenses Under Treaties*, 124 YALE L.J. (forthcoming 2015) (manuscript at 17 n.69).

15 Cleveland & Dodge, *supra* note 14 (manuscript at 16–17).

16 See 31 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 781–874 (John C. Fitzpatrick ed., 1934) (report by Foreign Secretary Jay describing state violations of treaties and foreign countries' responses to those violations); 3 THE DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES OF AMERICA FROM THE SIGNING OF THE DEFINITIVE TREATY OF PEACE TO THE ADOPTION OF THE PRESENT CONSTITUTION, 1783–1789, at 437–42 (1837) (note from Dutch minister to Jay protesting violations of a United States–Netherlands treaty); see also MARKS, *supra* note 12, at 151 ("Congressional files contained legal complaints from every nation to which the country was bound by treaty."). Indeed, the Continental Congress

part because it contributed to bad relations with existing treaty partners (especially with Britain). Importantly for the present discussion, Jay also reported that foreign nations were reluctant to enter into further treaties with the United States because of the problem of treaty enforcement.¹⁷ The historical record bears this out—after an initial flurry of treaty-making following independence, the United States was unable to conclude additional treaties despite aggressive diplomatic efforts.¹⁸ As Hamilton explained:

No nation acquainted with the nature of our political association [under the Articles] would be unwise enough to enter into stipulations with the United States, conceding on their part privileges of importance, while they were apprised that the engagements on the part of the Union might at any moment be violated by its members.¹⁹

A central goal of the Constitutional Convention was to remedy this gap between treaty-making power and treaty enforcement power.²⁰

A possible response is that the Constitution solved the problem of treaty enforcement in another way—by making treaties the “supreme Law of the Land” in Article VI and granting federal courts jurisdiction over their enforcement in Article III (what we now call treaty self-execution).²¹ Thus prospective treaty partners could be assured of enforcement because treaties (like contracts) could be enforced directly in court.

expressed concerns about treaty violations as early as 1781 (before the peace with Britain) when it adopted a resolution calling on states to adopt laws “to provide expeditious, exemplary and adequate punishment” for (among other things) “infractions of treaties and conventions to which the United States are a party.” 21 JOURNALS OF THE CONTINENTAL CONGRESS, *supra*, at 1136–37; *see also* Cleveland & Dodge, *supra* note 14 (manuscript at 19–22) (discussing the 1781 Resolution).

17 31 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 16, at 781–874.

18 *See, e.g.*, MARKS, *supra* note 12, at 66–67 (recounting Adams’s inability to negotiate a new treaty with Britain in 1785, in part due to British belief that Congress could not enforce a treaty); *id.* at 67 n.28 (recounting a British diplomat’s observation in 1785 that “the apparent determination of the respective states to regulate their own separate interests renders it absolutely necessary . . . that my court should be informed how far the [U.S.] commissioners can be duly authorized to enter into any engagements with Great Britain which it may not be in the power of any one of the states to render totally fruitless and ineffectual”); 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 433 (Max Farrand ed., rev. ed. 1966) (statement of James Wilson) (“What is the reason that Great Britain does not enter into a commercial treaty with us? Because [C]ongress has not the power to enforce its observance.”); Vázquez, *supra* note 4, at 947 n.41 (collecting similar statements from the drafting and ratification period).

19 THE FEDERALIST NO. 22, at 144 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

20 *See* Cleveland & Dodge, *supra* note 14 (manuscript at 22–28); Sloss, Ramsey & Dodge, *supra* note 12, at 9–12. *See generally* David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932 (2010).

21 *See* THE FEDERALIST NO. 22, *supra* note 19, at 150 (Alexander Hamilton) (“The treaties of the United States, to have any force at all, must be considered as part of the law of the land. Their true import, as far as respects individuals, must, like all other laws, be ascertained by judicial determinations.”).

It seems clear that the inclusion of treaties in Article VI and Article III was designed to have that effect.²² However, the creation of self-executing treaties did not eliminate the need for treaty enforcement by statute. Some matters—such as providing criminal punishments—are difficult to do by treaty (among other things, because of differences in legal systems and the need to describe criminal offenses precisely).²³ Sometimes diplomatic realities require that treaties be somewhat open-ended and leave implementation to the parties.²⁴ As a result, Congress would still have an important role in treaty enforcement. To the extent that that role was constrained (by limiting it to Congress's otherwise enumerated powers) the U.S. treaty-making power would be constrained.²⁵

22 See Michael D. Ramsey, *Toward a Rule of Law in Foreign Affairs*, 106 COLUM. L. REV. 1450, 1470 (2006) (discussing the role of Article VI in treaty enforcement).

23 Indeed, modern law arguably holds (or at least assumes) that criminal punishments cannot be imposed directly by treaty. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. i (1987) (“[I]t has been assumed that an international agreement creating an international crime (e.g., genocide) or requiring states parties to punish certain actions (e.g., hijacking) could not itself become part of the criminal law of the United States, but would require Congress to enact an appropriate statute before an individual could be tried or punished for the offense.”); see also LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 203 (2d ed. 1996) (“A treaty, it is accepted, cannot itself enact criminal law”); Cleveland & Dodge, *supra* note 14 (manuscript at 40 n.187) (“Today it is accepted that a treaty generally cannot create a crime directly”). Regardless of the soundness of the modern view as an original matter, it is in any event true that treaties typically do not directly specify punishments.

24 Treaties very commonly provide in general terms that treaty parties shall prohibit certain conduct and leave the details of the prohibition to implementing legislation. For example, the treaty at issue in *Bond*, the Chemical Weapons Convention, provides only that parties “shall prohibit” certain individual conduct. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction art. VII(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) [hereinafter Chemical Weapons Convention]. The treaty in *Missouri v. Holland* provided only that the parties would enact regulations to protect migratory birds. *Missouri v. Holland*, 252 U.S. 416, 431 (1920) (discussing the Convention for the Protection of Migratory Birds, U.S.-Gr. Brit., Aug. 16, 1916, 39 Stat. 1702). Relatedly, a treaty might not specify any method of enforcement and thus implicitly leave to the parties the choice of enforcement methods. For example, the Vienna Convention on Consular Relations requires parties to allow a noncitizen who is arrested in their territory to contact that person’s consulate for assistance. See Vienna Convention on Consular Relations art. 36, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261. States have routinely violated that provision when arresting foreign nationals. The Supreme Court concluded that the Convention itself does not require a remedy akin to the exclusionary rule to enforce the Convention. *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 332 (2006). Instead the Court assumed that Congress has power to enforce the Convention in the manner it chooses. *Id.*

25 This argument is particularly powerful if one views Congress’s spending power as limited to its enumerated powers. Most people agree that a treaty cannot appropriate money to carry itself into effect. If Congress could not spend money in support of treaties, other than treaties within its enumerated powers, a considerable gap in implementation would exist.

In sum, the text on its face does not support Scalia's narrow reading. The power to make treaties requires more than simply money and personnel to negotiate their terms. It also requires ways to assure potential treaty partners that treaty obligations will be honored. To be sure, a central response to this concern was Article VI. But Article VI is not a complete response. As a result, when Congress passes laws to implement or enforce a treaty, it is acting in support of the treaty-making power.

This is not to say that Scalia's reading is an impossible reading of the text. But Scalia argues that the opposing position "makes no pretense of resting on text."²⁶ To the contrary, a textual argument for Congress's treaty enforcement power is possible and—particularly in light of the Founding generation's concerns about treaty enforcement—persuasive.²⁷

B. Structure

Justice Scalia's stronger argument against Congress's treaty enforcement power is structural—that if recognized, it will destroy the idea of enumerated powers:

"[T]he Constitutio[n] confer[s] upon Congress . . . not all governmental powers, but only discrete, enumerated ones." *Printz v. United States*, 521 U.S. 898, 919 (1997). And, of course, "enumeration presupposes something not enumerated." *Gibbons v. Ogden*, 9 Wheat 1, 195 (1824).

But in *Holland*, the proponents of unlimited congressional power found a loophole: "By negotiating a treaty and obtaining the requisite consent of the Senate, the President . . . may endow Congress with a source of legislative

26 *Bond v. United States*, 134 S. Ct. 2077, 2098 (2014) (Scalia, J., concurring in the judgment). Scalia's concurrence did not address a possible alternative textual argument that Congress's power to "define and punish . . . Offenses against the Law of Nations," U.S. CONST. art. I, § 8, cl. 10, includes the power to enforce treaties (which in the eighteenth century were sometimes described as a subset of the law of nations). See Cleveland & Dodge, *supra* note 14 (manuscript at 8–33) (making this argument); Vázquez, *supra* note 4, at 951–52 (same). Even if Congress's power under the Offenses Clause conveys some power over treaty enforcement (and Professors Cleveland and Dodge provide strong originalist arguments for this view), the power would likely not be sufficient to assure treaty compliance in all cases. While some treaties impose obligations directly on individuals, many treaties (especially non-self-executing treaties) address the political branches. For example, in the classic non-self-execution case *Foster v. Neilson*, 27 U.S. 253 (1829), Chief Justice Marshall concluded that a treaty obligation that certain land grants in formerly Spanish territory "shall be ratified and confirmed" imposed only an obligation on Congress to pass legislation confirming the grants. *Id.* at 313–15. No individual action could plausibly be said to constitute an "offense" against such an obligation, since it did not require individuals to take any action. Thus it is hard to see how the Offenses Clause could give Congress power to enforce the treaty; yet if Congress failed to confirm the titles, the United States would be in breach of the treaty.

27 There is also evidence that post-ratification practice reflects recognition of Congress's treaty enforcement power. See Jean Galbraith, *Congress's Treaty-Implementing Power in Historical Practice*, 56 WM. & MARY L. REV. 59, 64 (2014) (discussing congressional reliance on treaty enforcement power in enacting legislation).

authority independent of the powers enumerated in Article I.” L. Tribe, *American Constitutional Law* § 4–4, pp. 645–646 (3d ed. 2000).²⁸

It is true that recognizing a congressional treaty enforcement power would expand—perhaps dramatically—Congress’s enumerated powers. The question is whether this result is so problematic that we must conclude the Framers could not have designed it. Several considerations suggest the contrary.

First, as Justice Thomas argued in a separate concurrence, treaties are by the eighteenth-century definition agreements among nations on matters of international concern.²⁹ Thus, the treaty power, though broad, is not unlimited. The specter of a sham treaty—by which the U.S. government expands its domestic regulatory power via a pseudo-agreement with a nation having no interest in the matter—should not be given great weight.³⁰ While the scope of matters of international concern has broadened significantly since the eighteenth century,³¹ it is not all-encompassing.

Second, unless the treaty-making power is itself limited to Congress’s enumerated powers, the Constitution’s provision for self-executing treaties *already* permits the national government to invade the otherwise reserved powers of the states through treaty-making. Recognizing Congress’s enforce-

28 *Bond*, 134 S. Ct. at 2099 (Scalia, J., concurring in the judgment) (alterations in original); 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 4.4, at 645–46 (3d ed. 2000)); *see also* Rosenkranz, *Bond v. United States*, *supra* note 4, at 231 (“If a treaty could increase the legislative power of Congress, then the constitutional axiom of limited federal power would be a sham.”); Rosenkranz, *Executing the Treaty Power*, *supra* note 4, at 1893–94 (“Needless to say, th[e] proposition [that treaties can be used to expand legislative authority] is in deep tension with the basic constitutional scheme of enumerated legislative powers, and it stands contradicted by countless canonical statements that the powers of Congress are fixed and defined.”).

29 *Bond*, 134 S. Ct. at 2102 (Thomas, J., concurring in the judgment); *cf. id.* at 2098 (Scalia, J., concurring in the judgment) (suggesting that the U.S. government could overturn federalism precedents for example “by negotiating a treaty with Latvia providing that neither sovereign would permit the carrying of guns near schools”).

30 *See* Michael D. Ramsey, *Missouri v. Holland and Historical Textualism*, 73 *MO. L. REV.* 969, 978–79 (2008) (“Article II, Section 2 does seem to require that powers claimed under the treaty-making clause must be exercised through something that really is a ‘treaty,’ in the eighteenth-century meaning of the word. ‘Treaty’ meant (as it means today) an agreement among nations on matters of mutual interest. As a result, exercises of treaty-making power must actually involve an agreement, an international matter, and interest on the part of both nations. The clause thus would reject sham treaties, where the President and the Senate combined to end-run the legislative process for purely domestic reasons, convincing a foreign nation to sign the resulting document to achieve the look of a treaty without any of a treaty’s substance.” (footnotes omitted)); *see also* Alexander Hamilton, *The Defence No. XXXVI* (Jan. 2, 1796), in 20 *THE PAPERS OF ALEXANDER HAMILTON* 3, 6 (Harold C. Syrett ed., 1974) (acknowledging this limit in an essay otherwise devoted to arguing the broad scope of the treaty-making power).

31 Justice Thomas suggested in his concurrence in *Bond* that the scope of the treaty-making power should extend only to those matters that were of international concern in the eighteenth century. *See Bond*, 134 S. Ct. at 2110 (Thomas, J., concurring in the judgment). The argument here does not depend on that view, which I find unpersuasive.

ment power would be only a marginal addition to federal power, not (in Scalia's word) a "seismic"³² shift.

Some scholars have argued that the treaty-making power itself is limited to Congress's enumerated powers. That is, they contend that there is an implicit limit on Article II, Section 2, parallel to Article I, Section 8. The principal argument for this proposition is that any other result would destroy enumerated powers by allowing the President and Senate to create domestic legislation (in the form of a judicially enforceable treaty) on any topic.³³ However, as I have argued elsewhere,³⁴ neither text, history, nor structure supports this proposition. Nothing in the text suggests a subject matter limitation on treaty-making³⁵ and Founding-era history indicates a general (though not universal) understanding that treaty-making was not limited by subject matter.³⁶ It is plausible to believe that the Framers protected against overreaching treaties in another structural way—by requiring treaties to gain approval of two-thirds of the Senate, when the Senators were appointed by the state legislatures.³⁷

In any event, if treaties themselves cannot exceed Congress's enumerated powers, the question of Congress's treaty enforcement power is moot, because Congress will never be in a position to enforce a treaty beyond its enumerated powers. The structural question of Congress's treaty enforcement power is significant only if we assume (as I believe to be correct) that treaties can act upon subjects beyond Congress's enumerated powers.

If that is so, however, the grant of treaty enforcement power to Congress is not so great a threat to the constitutional structure as Scalia suggests. The federal government as a whole is not limited to lawmaking within Congress's enumerated powers. Congress's treaty enforcement power presupposes a valid treaty—that is, one approved under the federalism-protective regime of two-thirds Senate approval. In a sense, adding congressional enforcement is an *additional* protection for federalism. While a self-executing treaty creates law through the President and two-thirds of the Senate, a non-self-executing treaty enforced by Congress creates law through the President, two-thirds of the Senate, and a majority of the House.

Justice Scalia's rhetoric in *Bond* often ignores this point. He says, for example, that under the broad view of Congress's treaty enforcement power, "the possibilities of what the Federal Government may accomplish, with the

32 *Id.* at 2099 (Scalia, J., concurring in the judgment).

33 *See, e.g.*, HENRY ST. GEORGE TUCKER, LIMITATIONS ON THE TREATY-MAKING POWER UNDER THE CONSTITUTION OF THE UNITED STATES (1915); Gary Lawson & Guy Seidman, *The Jeffersonian Treaty Clause*, 2006 U. ILL. L. REV. 1, 14–15; *see also* Cato [Robert Livingston], *Observations on Mr. Jay's Treaty, No. XVI*, reprinted in 3 THE AMERICAN REMEMBRANCER 63, 63–67 (Matthew Carey ed., Philadelphia, Henry Tuckniss 1796) (making this argument in the immediate post-ratification period).

34 *See* Ramsey, *supra* note 30, at 977–1004; *see also* MICHAEL D. RAMSEY, THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS 300–17 (2007).

35 *See* Ramsey, *supra* note 30, at 977–83.

36 *See id.* at 983–96.

37 *See id.* at 996–1004.

right treaty in hand, are endless and hardly farfetched.”³⁸ As examples, he suggests that the Court’s federalism decisions such as *United States v. Lopez* could be “reversed by negotiating a treaty with Latvia providing that neither sovereign would permit the carrying of guns near schools,”³⁹ or that the federal government could regulate the laws of descent or prohibit state inheritance taxes.⁴⁰ But the *federal government* would lack power to do these things only if there was a subject matter limit on treaty-making power (because, if not, it could do them by self-executing treaty, so long as the treaty was not a sham). Once the power of a self-executing treaty to reach beyond enumerated powers is recognized, Congress’s power to enforce a non-self-executing treaty is of less significance.

Scalia responds that some things are easier to do by non-self-executing treaty and statute than by self-executing treaty, such as criminal prohibitions.⁴¹ That is surely true. But it does not seem decisive. Put this way, the argument is only over whether the federal government’s power to legislate beyond Congress’s enumerated powers should be somewhat further facilitated. That does not carry the structural force that Scalia needs to persuade in the absence of a clear textual limit. Third, it follows from the prior point that, to the Framers, a key limit on Congress’s treaty enforcement power was the difficulty of obtaining consent for federalism-infringing treaties in the first place. This was (we are assuming) the central consideration that made the Framers comfortable with self-executing treaty power without subject matter limitations.⁴² So long as Congress’s treaty enforcement power extends only to validly enacted treaty provisions, Congress would be empowered to infringe on federalism values only with (in effect) the consent of two-thirds of the representatives of the states. As with the treaty power itself, Congress’s treaty enforcement power could be limited by subject matter (via enumerated powers) or it could be limited by procedural protections (the supermajority of the Senate). While there could be reasonable disagreement whether the latter, standing alone, is sufficient, it is difficult to declare that the Framers *must* have wanted both.⁴³

38 *Bond v. United States*, 134 S. Ct. 2077, 2100 (2014) (Scalia, J., concurring in the judgment).

39 *Id.*

40 *Id.* at 2100–01.

41 *Id.*

42 See Ramsey, *supra* note 30, at 998 (“More important than the mere supermajority, though, was the protection arising from the Senate’s composition. Under Article I, Section 3, ‘[t]he Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six years’ As a result, Senators owed their jobs (and future re-election) to state legislatures, the entities most directly affected by federal overreaching. The consequence, in turn, was that Senators could be expected to be especially sensitive to the states’ sovereignty-based concerns.”); see also *id.* at 999–1000 (demonstrating that the Senate was deliberately designed to protect state interests).

43 See *id.* at 1001 (making this argument in the context of the scope of the Treaty-making Clause); Vázquez, *supra* note 4, at 941 (“The[] concern that the Treaty Power will be misused to circumvent the limitations the Constitution imposes on Congress’s legislative

Fourth, there are competing structural concerns. As discussed in the prior Section,⁴⁴ the Framers' experience under the Articles was that states could not be trusted to uphold national treaty commitments. Solving that problem was a central goal of the Constitution. Article VI solved it to some extent. But the Framers might not have believed that Article VI was a complete solution. For one thing, as Scalia himself argues, it may sometimes be easier to declare obligations in a somewhat open-ended way in a treaty and rely on legislation for detailed implementation. Scalia sees this as a structural argument against Congress's treaty enforcement power, but in fact it cuts both ways. The Constitution was designed in part to enhance the United States' ability to make and enforce treaties; locking the United States into a self-execution-or-nothing approach would frustrate that goal. Perhaps the Framers preferred more flexibility in treaty-making to an additional level of protection for federalism.⁴⁵

Further, as suggested above, non-self-execution-plus-implementation might actually offer greater protections of federalism. Under that structure, the United States can agree to open-ended treaty obligations and then take into account federalism concerns in implementation without needing its treaty partners' consent. Thus Congress can decide, after a treaty is approved, that implementation at the state level is sufficient and national legislation is not needed (and the treaty partner need not agree).⁴⁶ In contrast, under self-execution-or-nothing, the extent to which implementation would be done at the national, instead of state, level would have to be decided in the treaty itself. This might lead to fewer treaties, but it might also lead to more interference with the states. Again, the competing structural considerations are very difficult to assess.

In sum, structural considerations do not provide the compelling force that Justice Scalia suggests. While it is true that granting Congress power to enforce treaties would allow Congress to regulate matters beyond its other-

power is overstated given that such a ruse could succeed only if two-thirds of the Senate went along with it. Article II's supermajority requirement is a strong structural guarantee that treaties will be concluded only if they would truly advance the foreign relations goals of the nation." To be sure, the Framers' structural protection of the states via the Senate was substantially diluted by the adoption of the Seventeenth Amendment. See Ramsey, *supra* note 30, at 1000 n.108.

44 See *supra* Section I.A.

45 A possible counterargument is that the Framers did not realize that treaties might involve subject matter not within Congress's enumerated powers. This is unlikely, however, because Congress's powers probably did not extend generally to noncommercial activities of aliens, and treatment of aliens was a common subject of treaties. The principal early post-ratification debate over the scope of the treaty-making power concerned the Jay Treaty, which provided favorable treatment of aliens in ways thought beyond Congress's other Article I, Section 8 powers. See Ramsey, *supra* note 30, at 992-96 (discussing the Jay Treaty debates).

46 See Vázquez, *supra* note 4, at 956-57. For example, with regard to consular notification under the Vienna Convention, see *supra* note 24, Congress has not enacted enforcing legislation (despite calls to do so), and so enforcement has been left by default to the states, even in the face of foreign government protests.

wise enumerated powers,⁴⁷ it is not obvious that the Framers would have thought this unacceptable. Rather, the structural considerations seem at least evenly balanced.

II. LIMITING CONGRESS'S POWER TO ENFORCE TREATIES

The foregoing analysis suggests that while Congress does have a textual power to enforce treaties, its power is appropriately subject to judicial limits. In particular, Congress might misuse the treaty enforcement power by going beyond what the Senate supermajority intended to permit when the Senate approved the treaty. That is an especially worrisome concern because the Senate's power to protect federalism through its treaty approval power appears to be the Constitution's central check on overreaching both by treaties themselves and by congressional enforcement of treaties. In enforcing treaties, Congress is in effect exercising a power delegated to it by the Senate supermajority. If Congress goes beyond the treaty, it seizes power the Senate supermajority did not intend to allow and thus circumvents the senatorial check on its reach.

The most obvious conclusion is that the courts should look closely at the match between the treaty obligations and Congress's enforcement legislation; legislation that exceeds the scope of the treaty (and is not encompassed within Congress's other enumerated powers) should be found unconstitutional. Congress should not have independent power to interpret the treaty (or even be accorded material deference) because of the concern that Congress, judging its own powers, would exceed the scope granted to it by the Senate's supermajority.

Courts might appropriately go beyond this role in two respects, discussed in more detail below. First, treaties may be ambiguous as to their domestic reach. Because the Senate supermajority is a federalism-protecting check on treaty-making power, ambiguous treaty provisions should be construed not to invade traditional powers of the states. This assures that Congress, in implementing the treaty, does not go beyond what the Senate has approved. Second, even where the treaty is unambiguous and requires

47 Justice Scalia also implied—and some academic arguments claim more directly—that allowing expansion of Congress's enumerated powers by treaty is equivalent to allowing a treaty to authorize violations of the Constitution's individual rights protections. See *Bond v. United States*, 134 S. Ct. 2077, 2101 (Scalia, J., concurring in the judgment); Eastman, *supra* note 4, at 195–96; Rosenkranz, *Concurring in the Judgment*, *supra* note 4, at 297; cf. *Reid v. Covert*, 354 U.S. 1, 16 (1957) (finding that a treaty cannot contravene the Constitution's individual rights protections). The supposed equivalence seems misconceived. The principle of enumerated powers confirmed by the Tenth Amendment means only that Congress must base its action on a delegated power. If the Constitution expressly stated that Congress shall have power to implement treaties, that power would obviously constitute a delegated power, and Congress could exercise it consistently with the Tenth Amendment. Whether the power to implement treaties is a delegated power is the question to be decided. If it is a delegated power, there is no violation of the Tenth Amendment.

domestic implementation, it may be unclear whether the treaty can be implemented by the states or requires legislation at the national level. In this situation, the Constitution should favor the states. That is, we should not assume the federalism-protecting Senate supermajority intended to authorize Congress to implement a treaty if implementation at the state level would be sufficient to achieve the goals of the treaty. Put another way, in terms of the Constitution's text, congressional implementation is not "necessary and proper" if state implementation is adequate. The next Sections elaborate these limits with reference to the situation in *Bond*.

A. *Treaty Interpretation and the Federalism Presumption*

As discussed, the central structural check on Congress's treaty enforcement power is the Senate supermajority required to approve a treaty in the first place. It is this protection that allows comfort in the face of Scalia's complaint that Congress's treaty enforcement power would destroy the structure of enumerated powers. Congress can go no further than a supermajority of the Senate (under the original Constitution, appointed by the states themselves) will allow.⁴⁸

But this check is greatly diminished if the treaty is ambiguous. Congress might adopt an expansive reading of the treaty not shared by the supermajority that approved it. This concern suggests that an ambiguous treaty should not be read to authorize incursions into areas otherwise reserved for the states.

In *Bond*, Chief Justice Roberts, writing for the Court majority, applied a similar presumption to the statute (which he found, over Justice Scalia's objection, to be ambiguous).⁴⁹ He expressly declined to consider whether a similar presumption should be applied to the treaty (and if he was correct on the statutory point, he did not need to reach the treaty question).⁵⁰ But several considerations suggest that a federalism presumption is more appropriately applied to the treaty.

First, as discussed above, the Senate supermajority is the Constitution's central check on treaty-based encroachments on federalism.⁵¹ Under the original Constitution, the senators were selected by the state legislatures, so it would have been surprising if a supermajority of them approved a treaty substantially encroaching on the states; only if the treaty was unambiguous could an interpreter be confident that they did so. Put another way, if the treaty has two plausible meanings, one of which intrudes on state power while the other does not, it is most reasonable to conclude that the state-protecting Senate, in approving the treaty, embraced the narrower meaning. (In con-

48 See *supra* Section I.B; see also Ramsey, *supra* note 30, at 999–1000.

49 See *Bond*, 134 S. Ct. at 2086–94.

50 See *id.* at 2087–88 (observing that "[t]here is no reason to think the sovereign nations that ratified the Convention were interested in anything like Bond's common law assault," but ultimately finding that in light of the statutory conclusion "we have no need to interpret the scope of the Convention in this case").

51 See *supra* Section I.B.

trast, the federalism presumption is less well grounded for ordinary legislation, which requires only a majority of the state-focused Senate and a majority of the House, which owes no obvious allegiance to federalism.) Admittedly the rationale underlying a federalism presumption for treaties was weakened after the Seventeenth Amendment lessened the tie between the states and the Senate. But because the Senate's structural role as protector of federalism remains, maintaining the presumption—which clearly would have been appropriate under the original Constitution—seems an appropriate structural response.⁵²

Second, also as discussed above, a separate check on the treaty-making power is that treaties must be on matters of international concern.⁵³ That arises from the definition of treaty as an agreement among nations on matters affecting their mutual interest.⁵⁴ As Justice Thomas argued in his separate concurrence, a pretextual treaty, adopted between the United States and a compliant partner only for the purpose of expanding the federal government's reach into areas of state control, would be unconstitutional.⁵⁵

The difficulty with this check in practice is that it may be hard to say categorically what matters are of international concern. Justice Thomas's concurrence can be read to suggest that only matters of international significance in the eighteenth century can be the subjects of treaties.⁵⁶ But that

52 One might object that a treaty, as an international instrument, should not be interpreted according to parochial U.S. concerns because the other treaty parties would not care about protecting U.S. federalism. Adopting U.S.-based interpretive rules increases the risk of a U.S. interpretation that treaty partners view as a breach of the treaty's obligations. Increasing that risk seems contrary to the Framers' goal of making the United States a reliable treaty partner.

These objections seem insufficient on several grounds. If other countries consistently take the view that a treaty has a broad, federalism-infringing meaning, that might be sufficient evidence to overcome the conclusion that the treaty is ambiguous. Further, if a treaty is indeed ambiguous, reasonable disputes over its meaning are not likely to carry severe reputational injury. Although the Framers wished to avoid clear violations of treaties, it is not likely that they believed all disputes over treaty meaning could be avoided. In any event, regardless of other countries' views, the federalism presumption is premised on the United States' reluctance to agree to federalism-infringing terms.

A related point is that U.S. courts, when interpreting U.S. treaties, may deploy other U.S.-focused interpretive conventions such as deference to interpretations of Congress or of the executive branch. Because neither Congress nor the executive branch is likely to have the federalism concerns of the Senate supermajority, these applications of deference—even if they are appropriate in other aspects of treaty interpretation—should not be used to overcome the federalism presumption.

53 See *supra* Section I.B.

54 See EMER DE Vattel, *THE LAW OF NATIONS* 338 (Béla Kaposy & Richard Whatmore eds., Liberty Fund 2008) (1758) (giving this definition of treaty).

55 *Bond*, 134 S. Ct. at 2102 (Thomas, J., concurring in the judgment); see also Ramsey, *supra* note 30, at 978–79.

56 Thomas's concurrence is deliberately and appropriately tentative (because the issue was not argued in the case), and could be read several ways. At one point, for example, he says only that treaties cannot cover "matters without any nexus to foreign relations." *Bond*, 134 S. Ct. at 2103 (Thomas, J., concurring in the judgment). (I agree with this formula-

seems inappropriate. Many things, though not of international concern in 1787, have become so now, such as basic human rights. Where countries widely enter into treaties on a subject, it seems inescapable that as a practical matter the subject is now a matter of international concern. And indeed, for any particular treaty, it may be difficult to conclude that any matters it expressly covers are not matters of international concern (unless the treaty itself is a sham).

But again, treaties may be ambiguous. Under one reading, a treaty might reach matters so tied to domestic interests that one might doubt they are of international concern; on another reading the treaty might have more limited scope, reaching only matters that no one would doubt concern all of the treaty parties.

In such circumstances, the appropriate interpretive presumption is to adopt the narrower reading. Because the broader reading brings within the treaty matters that the treaty parties would not seem to care about, it is natural not to adopt that reading. Further, adopting the broader reading might render the treaty unconstitutional under U.S. law, an interpretation to be avoided.

Bond is an illustration. The question, from this perspective, is whether the treaty imposed on the United States an obligation to prohibit Bond's conduct. If it did not, then an attempt by Congress to prohibit Bond's conduct, under the authority of the treaty, would be unconstitutional. Quite arguably, the treaty was ambiguous on this point—indeed, more so than the statute.

To begin, there is the extreme doubt that Bond's localized conduct had any international implications.⁵⁷ There was no indication of international interest in Bond's case.⁵⁸ It is hard to imagine why any other nation would concern itself over how Bond's prosecution was handled. More broadly, it is hard to imagine any nation showing interest in how any such local crime is handled. To be sure, in the modern world, some things that seem very localized (such as a nation's application of the death penalty to one of its own citizens) have an international moral dimension that can make them matters of international concern. For this reason, a categorical approach to the question, as Justice Thomas seemed to suggest, is impractical. Whether a matter

tion. See Ramsey, *supra* note 30, at 978–79.) Elsewhere, though, he suggests that treaties could cover only “genuinely international matters such as war, peace, and trade between nations,” *Bond*, 134 S. Ct. at 2104 (Thomas, J., concurring in the judgment), or that they be “limited to matters of international intercourse,” *id.* at 2108. This language might be read to exclude areas of purely domestic regulation, even if foreign nations were (as a factual matter) interested in those areas. See also *id.* at 2111 (Alito, J., concurring in the judgment) (stating “that the treaty power is limited to agreements that address matters of legitimate international concern” without explaining how to determine what matters are of “legitimate” international concern).

57 *Bond* used small amounts of chemicals obtained from her workplace and through the mail to slightly injure a romantic rival. See *id.* at 2085 (majority opinion).

58 See *id.* at 2087 (finding “no reason to think the sovereign nations that ratified the Convention were interested in anything like Bond's common law assault”).

is one of international concern is a factual question. But irrespective of the fact that *some* local actions have international implications, there is no indication that Bond's actions did.

Second, the Convention's language (especially taken with its context) is itself confusing. As the majority opinion in *Bond* outlined, the Convention arose from concerns about the use of chemical weapons in wartime.⁵⁹ The Convention principally describes restrictions on the actions of the nations who join it. Nations are, among other things, restricted from using, developing, or stockpiling "chemical weapons."⁶⁰ Chemical weapons are defined as toxic chemicals that are (among other things) not used for "[i]ndustrial, agricultural, research, medical, pharmaceutical or other peaceful purposes."⁶¹ In this context, the opposite of "peaceful" seems most obviously to be "warlike"—connecting with the ordinary idea of chemical weapons as something used by nations to fight wars (either externally or against their own population). So far, this language makes sense as an international obligation.

The Convention then adds, in Article 7, that nations must prohibit individuals from doing what the Convention prohibits nations from doing:

Each State Party shall, in accordance with its constitutional processes, adopt the necessary measures to . . . [p]rohibit natural and legal persons anywhere on its territory or in any other place under its jurisdiction as recognized by international law from undertaking any activity prohibited to a State Party under this Convention, including enacting penal legislation with respect to such activity⁶²

This approach raises substantial ambiguity. Obviously, Article 7 means that individuals must be prohibited from using chemicals in the way nations are prohibited from using them—that is, as weapons of war. So an individual working on behalf of a government, who uses chemicals as a weapon against its enemies, must be punished. Similarly, an individual who, though not working for a government, uses chemicals as a weapon in the way a nation would—for example, as an instrument of mass terrorism—must be punished. Again, all this is readily understandable in terms of the goals and context of the Convention.

Does Article 7 also mean that individuals must be prohibited from *any* harmful use of a chemical in their private lives? That depends on the meaning of the clause tying the individual prohibition to uses prohibited to nations. One view is that indeed it includes any harmful use of a chemical.

59 *Id.*

60 See Chemical Weapons Convention, *supra* note 24, art. I, para. 1 ("Each State Party to this Convention undertakes never under any circumstances: (a) To develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone; (b) To use chemical weapons; (c) To engage in any military preparations to use chemical weapons; (d) To assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.")

61 *Id.* art. II, paras. 1, 9.

62 *Id.* art. 7.

But alternatively, it might mean only a harmful use of a chemical in the way a nation would use it—that is, as an instrument of public warfare. A private quarrel, as in *Bond*, has no counterpart in the actions of nations. Put another way, *Bond*'s use of chemicals was arguably “peaceful” because it did not disturb the peace of nations. Because the individual prohibition is tied to the national prohibition, it is unclear how that translates to purely private action.⁶³

I would resolve this ambiguity against the broader, federalism-harming reading. Before allowing Congress to reach *Bond*'s conduct, we need to be sure the Senate supermajority that adopted the treaty authorized Congress to do so. Where the treaty language is ambiguous, and where reaching *Bond*'s conduct would interfere with federalism values, the narrower reading of the treaty should be preferred.

B. *Treaty Enforcement and the Federalism Limitation*

Where a treaty unambiguously covers an area not otherwise within Congress's enumerated powers, a further limitation is appropriate. Because the United States is a federal system, a treaty that requires legislative implementation does not require that implementation be done at the national level. If the states' responses to a treaty are adequate, in the sense of not threatening international difficulties, there is no need for Congress to be involved. The reliability of the United States as a treaty partner will not be at stake so long as the states act appropriately. If that is the case, it negates the predicate for congressional action under its power to carry into execution the treaty-making power: the treaty-making power will remain unimpaired even if Congress does not act. We are by definition addressing subject matters that are in other respects reserved to the states (because they are outside Congress's otherwise enumerated powers), so there should be some hesitation in allowing

63 The statute is less ambiguous. It does not tie the individual prohibition to the governmental prohibition. Rather, it simply declares the individual prohibition directly. See Chemical Weapons Convention Implementation Act, 18 U.S.C. § 229(a)(1) (2012) (forbidding any person knowingly “to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon”). Although the statute (similar to the Convention) has an exception for “peaceful activity,” see *id.* § 229F(7)(A), the ambiguity is less apparent when addressing individual action. An individual's action is more readily described a peaceful when it is not violent; a nation's action is more readily described as peaceful when it is not warlike. Further, Justice Scalia directly addressed and rejected the “peaceful activity” argument by pointing out that the statute contains an exception for using chemicals in self-defense. See *Bond*, 134 S. Ct. at 2094 n.2 (Scalia, J., concurring in the judgment) (noting that 18 U.S.C. § 229C provides an exception for any individual self-defense device, including pepper spray or chemical mace). Thus, he argued, the statute appears to cover private activity (otherwise the exception would not be needed). However, the Convention does not have this exception, suggesting that either the treaty parties intended to prohibit using chemicals for private self-defense (an unlikely conclusion) or that the treaty did not reach local private activity. Thus, even if Justice Scalia was right that the statute was unambiguous, a different conclusion can be drawn for the treaty.

congressional action. As a result, only if states are unwilling or unable to implement a treaty is Congress's intervention necessary and proper to carry into execution the treaty-making power.⁶⁴

Adopting this approach preserves the Framers' commitment to federalism and enumerated powers, as well as to treaty enforcement. To the extent there is a material concern with treaty violations, Congress will have power to intervene, even at the cost of expanding national power into areas otherwise reserved to the states. But where there is no concern with treaty violation, federalism should be favored over congressional power.

A key question, of course, is how closely to scrutinize a congressional determination that states are not adequately enforcing a treaty. Arguably, courts are not in a good position to assess potential international implications of state actions or non-actions, as compared to Congress or (especially) the executive branch. Further, at least since *McCulloch v. Maryland*,⁶⁵ Congress's power to act as "necessary" to carry into effect another constitutional power does not require Congress to show absolute necessity (that is, that there is no other alternative).⁶⁶ Rather, Congress is understood to have considerable flexibility in assessing the necessity of an action. As a result, there may be reasonable debate about how far courts should go in overriding a reasonable congressional determination.

In *Bond*'s case, though, there seems to be no need for congressional intervention even under relatively minimal scrutiny. Using chemicals to harm another person in a private dispute is presumably illegal under all state laws. It was illegal under applicable Pennsylvania law in *Bond*.⁶⁷ It is true that Pennsylvania decided, as a matter of prosecutorial discretion, to bring only a minor charge against *Bond*, consistent with the state's assessment of the minimal aspect of the threat and injury.⁶⁸ In a sense, perhaps one could say that the treaty was being underenforced. But the treaty (even assuming it applied to *Bond*'s conduct) surely encompassed some idea of prosecutorial

64 A related limit has been suggested by Professor Carlos Vázquez. See Vázquez, *supra* note 4, at 941–42 (“[T]he power to implement treaties under the Necessary and Proper clause is the power to require compliance with treaty obligations. Because aspirational treaty provisions do not impose obligations in any meaningful sense of the term, the clause does not give Congress the power to implement such provisions. If such provisions concern matters otherwise beyond Congress’s legislative powers, the Constitution leaves their implementation to the States. This approach is consistent with the Founders’ design because the Constitution reflects the Founders’ fear of treaty violations by States, and only obligatory provisions can be violated.”); *id.* at 964–67 (further developing this position and giving the example of the UN Charter’s direction that member nations promote human rights). From this Article’s perspective, Professor Vázquez’s position is correct because implementing aspirational treaties is not necessary to preserve the United States’ international reputation for adhering to treaty obligations, and thus is not necessary to carry into execution the treaty-making power.

65 17 U.S. (1 Wheat.) 316 (1819).

66 See Cleveland & Dodge, *supra* note 14 (manuscript at 79–81) (taking a broad view of “necessary” in the context of treaty enforcement).

67 See *Bond*, 134 S. Ct. at 2092.

68 See *id.* at 2092–93.

discretion, which could be applied at the state or national level. I am not aware of any evidence that any other nation was upset by Pennsylvania's failure to aggressively prosecute Bond, or that any other nation was even paying attention to the case.⁶⁹ Similarly, I am not aware that the United States had expressed concern about any other nation underenforcing the Convention in parallel circumstances. As a result, there was no prospect that state inaction in *Bond*, or even in a run of similar cases, would have any international implications or any effects on U.S. treaty-enforcing credibility.⁷⁰

In these circumstances, even under a relatively deferential review, the appropriate conclusion should be that Congress's intervention into local private misuse of chemicals is not necessary and proper to carry into execution the treaty-making power. This approach is distinct from both the majority opinion in *Bond* and Justice Scalia's concurrence. The majority makes many of the same points regarding the lack of necessity for federal intervention.⁷¹ But it does so only to support a presumption against reading the statute broadly; it does not say what would happen if the statute were unambiguous. Under the approach proposed here, even an unambiguous statute would be unconstitutional if it were (a) otherwise outside Congress's enumerated powers and (b) not plausibly needed to assure adequate enforcement of a treaty. Justice Scalia's approach, in contrast, goes further in prohibiting Congress from acting even where (a) a matter outside Congress's enumerated powers is legitimately a matter of international concern and unambiguously incorporated into a treaty and (b) federal intervention is necessary to assure U.S. compliance because states refuse to enforce the treaty. His approach is not required by the Constitution's text and is inconsistent with the Framers' desire to assure treaty enforcement.

CONCLUSION

In sum, Justice Scalia's concurrence in *Bond* raises a valid structural concern. If Congress has unlimited power to enforce U.S. treaties, even outside of its enumerated powers, the Constitution's structure of limited and enumerated federal powers may be at risk. The risk does not, however, arise directly from the scope of the treaty-making power. While the treaty-making power is not limited by subject matter, it is limited principally by the require-

69 No country filed an amicus brief in the case. See SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/12-158.htm> (last visited Mar. 19, 2015) (listing briefs filed).

70 In contrast, in the Vienna Convention situation discussed above, see *supra* note 24, there was broad evidence that states' failure to follow Convention prescriptions regarding consular notification was creating international concerns; it had been the source of diplomatic protests and arguments in court by foreign nations. See *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 352–53 (2006). Under these circumstances, Congress would be authorized by the Convention to intervene into state criminal procedure, even if that action was beyond its otherwise enumerated powers.

71 See *Bond*, 134 S. Ct. at 2092–93 (discussing the adequacy of Pennsylvania's response).

ment that treaties receive the approval of two-thirds of the Senate. So long as Congress's power to enforce treaties is closely tied to treaty obligations clearly adopted by two-thirds of the Senate, Congress also operates under this limitation. The structural difficulty arises only if Congress attempts treaty enforcement in ways not authorized by the Senate supermajority.

As a result, in barring Congress from enforcing treaty obligations altogether, Scalia adopts too broad a rule. Constitutional structure (on which Scalia chiefly relies) does not compel it, because a congressional treaty enforcement power can be limited by tying it closely to the treaty, and thus to the requirement of supermajority Senate approval. Further, the rule is not compelled by the Constitution's text, which gives Congress power to make laws that are necessary and proper to carry into execution the treaty-making power. As argued above, a viable treaty-making power depends, among other things, on the United States' reputation for honoring its treaty obligations; as the Framers knew well from experience under the Articles, other nations see little point in making treaties with nations that do not (or cannot) keep their promises. Thus, when Congress acts to assure U.S. compliance with treaty obligations, it reinforces the United States' power to make future treaties.

Nonetheless, the structural concerns Scalia raises indicate the importance of limits on Congress's power to enforce treaties. If Congress can decide for itself what a treaty requires, the threat to the enumerated powers structure is substantial. The foregoing discussion suggests two limits. First, there should be a federalism presumption in treaty interpretation. Treaties are by definition agreements among nations on matters of international concern. As a result, they should not be read to reach matters that seem purely domestic. Although some matters that may seem purely domestic have taken on international dimensions, in the case of ambiguity, the presumption should be that domestic matters remain domestic. And Congress's enforcement powers, of course, should not extend beyond the obligations imposed by the treaty.

Second, even if a treaty is unambiguous, its obligations do not necessarily need to be enforced by Congress. It may be the case that they can adequately be enforced by the states. Where the obligations concern matters traditionally regulated by the states (especially those outside Congress's enumerated powers) the presumption should be that state enforcement is adequate and was understood as sufficient by the President and Senate when adopting the treaty. Congress's treaty enforcement power arises only where state enforcement is inadequate.

Bond illustrates both limitations. As to the first, the federal government interpreted the Chemical Weapons Convention to reach local, private misuse of chemicals, apparently a purely domestic matter. Using a federalism presumption in treaty interpretation, that reading should be rejected if there is an alternate reading of the treaty. As argued above, the treaty seems ambiguous on this point (at least as much, and probably more so, than the implementing statute). The treaty could plausibly be read to cover only the preparation and use of chemicals in a way that would disturb the peace

among nations—a reading that would limit it to matters of obvious international concern. Thus, that reading should be preferred. As to the second limitation, even if the treaty were unambiguous, there was no evidence in *Bond* that, as to local, private misuse of chemicals, state regulation was inadequate to enforce U.S. treaty obligations. In that situation, Congress's limited power of treaty enforcement should not permit Congress to displace the states from an area otherwise reserved to them by the Constitution.