

# BOND V. UNITED STATES: CHOOSING THE LESSER OF TWO EVILS

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## INTRODUCTION

In *Bond v. United States*, Carol Anne Bond used toxic chemicals in an attempt to poison her husband's lover.<sup>1</sup> The federal government prosecuted Bond for violating the Chemical Weapons Convention Implementation Act of 1998 (CWC Act).<sup>2</sup> Congress enacted the CWC Act to implement the United States' obligations under the Chemical Weapons Convention (CWC), a multilateral treaty signed in 1993 that is designed to address the global threat posed by chemical weapons.<sup>3</sup> Bond challenged the constitutional validity of the federal statute and urged the Court to overrule *Missouri v. Holland*,<sup>4</sup> a 1920 case holding that the combination of the treaty power and the Necessary and Proper Clause empowers Congress to enact treaty-implementing legislation that would exceed the scope of Congress's Article I powers in the absence of a treaty.<sup>5</sup> Chief Justice Roberts, writing for the majority, avoided the constitutional question by adopting a narrow construction of the statute.<sup>6</sup> Justice Scalia, writing for himself and Justice Thomas, would have overruled *Holland* and invalidated the CWC Act.<sup>7</sup>

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1 134 S. Ct. 2077, 2085 (2014).

2 Chemical Weapons Convention Implementation Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681.

3 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, *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 CWC].

4 252 U.S. 416 (1920).

5 *Bond*, 134 S. Ct. at 2086.

6 *Id.* at 2088–93.

7 *Id.* at 2098–102 (Scalia, J., concurring in the judgment).

This essay makes two main points. First, the majority's interpretation of the CWC Act is inconsistent with the statute and the underlying treaty. Indeed, the majority opinion displays a basic misunderstanding of the design of the underlying treaty. Second, Justice Scalia's construction of the Necessary and Proper Clause is antithetical to the structure and original understanding of the Constitution. If adopted as law, Justice Scalia's view would seriously harm the federal government's ability to conduct foreign affairs on behalf of the nation. Since Justice Scalia's constitutional error would be far more damaging than the majority's statutory error, the majority's statutory misinterpretation is the lesser of two evils.

### I. THE STATUTORY ISSUE IN *Bond*

Chief Justice Roberts began his opinion in *Bond* by invoking the horrors of World War I. He claimed that the international reaction to the use of chemical weapons in World War I led to "an overwhelming consensus in the international community that toxic chemicals should never again be used as weapons against human beings."<sup>8</sup> Nowadays, he said, "that objective is reflected in the [CWC]."<sup>9</sup> With due respect for the Chief Justice, his view of history is seriously mistaken. International reaction to the horrors of World War I led to adoption of the 1925 Geneva Protocol, which banned the use of chemical weapons.<sup>10</sup> Unfortunately, the 1925 Geneva Protocol was a failure because it did not address the two central problems that modern arms control treaties are designed to address: breakout and verification.

The 1925 Geneva Protocol merely banned the "use in war" of chemical weapons. It did not ban the manufacture or stockpiling of chemical weapons.<sup>11</sup> Accordingly, the treaty created a breakout problem: states could legally acquire large stockpiles of chemical weapons and then "break out" from the treaty constraints on a moment's notice by using those weapons in war. One way to address the breakout problem would be to ban the manufacture and stockpiling of chemical weapons. Even this approach, however, does not fully address the breakout problem. Under this approach, states could lawfully acquire large stockpiles of toxic chemicals that could be converted into weapons on very short notice. Such stockpiles of chemicals pose a significant threat to other nations. The CWC is designed to address that threat. Accordingly, the CWC obligates states not to "develop, produce, otherwise acquire, stockpile or retain chemical weapons."<sup>12</sup> Moreover, it defines the term "chemical weapons" to include "[t]oxic chemicals and their precursors."<sup>13</sup> Thus, unlike the 1925 Geneva Protocol, the 1993 CWC incorporates

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8 *Id.* at 2083.

9 *Id.*

10 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571 (entered into force Apr. 10, 1975).

11 *See id.*

12 *Id.* art. I(1)(a).

13 *Id.* art. II(1)(a).

two key features to address the breakout problem. Instead of merely banning the use of chemical weapons, it bans development, production, acquisition, and stockpiling. And, instead of focusing narrowly on chemicals that have already been converted into weapons, it defines the term “toxic chemical” broadly to encompass “[a]ny chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals.”<sup>14</sup> Both of these features are essential to the overall design of the treaty. Without both, states could lawfully acquire large stockpiles of toxic chemicals that could easily be converted into weapons of mass destruction.

Congress recognized that these features of the treaty were integral to the overall treaty design, so it incorporated both features into the CWC Act. The statute makes it unlawful for any person “to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon.”<sup>15</sup> It defines the term chemical weapon to include “[a] toxic chemical and its precursors.”<sup>16</sup> Moreover, the statute defines the term toxic chemical to mean “any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals.”<sup>17</sup> In short, Congress understood that the 1925 Geneva Protocol was seriously flawed because it did not address the breakout problem. Accordingly, Congress incorporated into the implementing legislation key features of the CWC that were specifically designed to address the breakout problem.

Chief Justice Roberts and the *Bond* majority were apparently unaware of the critical differences between the 1925 Geneva Protocol and the 1993 CWC. The majority says that “an educated user of English would not describe Bond’s crime as involving a ‘chemical weapon.’”<sup>18</sup> The opinion adds: “When used in the manner here, the chemicals in this case are not of the sort that an ordinary person would associate with instruments of chemical warfare.”<sup>19</sup> These statements are true, but they manifest the majority’s utter failure to grasp the critical differences between the 1925 Geneva Protocol and the CWC. The 1925 Geneva Protocol failed to address the threat of chemical weapons precisely because it merely prohibited the types of conduct “that an ordinary person would associate with . . . chemical warfare.”<sup>20</sup> The states that drafted and negotiated the CWC were determined to address the breakout problem by prohibiting a wide range of conduct that the ordinary person would not associate with chemical warfare. Recognizing that the 1925 Geneva Protocol had failed to address the underlying problem, Congress enacted a federal statute to implement the more far-reaching provisions

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14 *Id.* art. II(2).

15 18 U.S.C. § 229(a)(1) (2012).

16 *Id.* § 229F(1)(A).

17 *Id.* § 229F(8)(A).

18 *Bond v. United States*, 134 S. Ct. 2077, 2090 (2014).

19 *Id.*

20 *Id.*

of the CWC.<sup>21</sup> The *Bond* majority misinterpreted the CWC Act because the Justices mistakenly believed that the Act was merely intended to address the type of conduct that an ordinary person would associate with chemical warfare.

As noted above, modern arms control treaties are designed to address both breakout and verification problems. The preceding analysis focuses on breakout. Let us now turn to verification. In theory, states could address the breakout problem by establishing quantitative limits for stockpiling toxic chemicals in non-weapons form. After all, acquisition of a few grams of a toxic chemical is unlikely to pose a serious national security threat. The quantity that represents a serious threat varies depending on the type of chemical at issue. Regardless, states could conceivably agree on a detailed schedule specifying permissible quantities of different types of toxic chemicals falling below the threshold that might reasonably be deemed a threat. The problem with this approach is that it is extremely difficult to verify compliance with a non-zero, quantitative limit.<sup>22</sup> A verification regime designed to verify compliance with non-zero, quantitative limits would require states to maintain detailed inventories of regulated chemicals and would require highly intrusive inspections to verify the accuracy of those detailed inventories. Even then, verification would be problematic. In contrast, it is much simpler and less burdensome to verify compliance with a zero limit. That is why the CWC establishes a zero limit and does not include a de minimis exception for prohibited chemicals.<sup>23</sup> Any de minimis exception would make it exceedingly difficult to verify compliance with treaty prohibitions.

Article VII of the CWC obligates “[e]ach State Party . . . [to] [p]rohibit natural and legal persons anywhere on its territory . . . from undertaking any activity prohibited to a State Party under this Convention.”<sup>24</sup> Article VII helps address both breakout and verification concerns. If private parties could lawfully acquire large stockpiles of toxic chemicals, it would be very difficult for international monitors to verify that those stockpiles were owned by private actors rather than the government. Moreover, even assuming that private ownership could be established with certainty, governments in many countries could easily “break out” from treaty constraints by seizing the stockpile for military use whenever they decided to do so.<sup>25</sup> Thus, the provision

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21 See 18 U.S.C. § 229.

22 The analysis in this paragraph draws heavily on my own experience in the federal government, where I worked on the design and implementation of arms control verification regimes.

23 See CWC, *supra* note 3, art. I(1) (“Each State Party to this Convention undertakes *never under any circumstances* . . . [t]o develop, produce, otherwise acquire, stockpile or retain chemical weapons . . . .” (emphasis added)).

24 *Id.* art. VII.

25 In countries with strong protection for private property rights, like the United States, government seizure of private chemical stockpiles would face constitutional constraints. However, the treaty drafters were concerned with government seizure of private chemical stockpiles in countries with less robust protection for private property. See Jonathan B. Tucker, *From Arms Race to Abolition: The Evolving Norm Against Biological and*

obligating states to prohibit private conduct inconsistent with the treaty is designed to block one obvious mechanism that states could otherwise utilize to circumvent limitations on state conduct. Congress faithfully implemented Article VII by enacting a federal statute that makes it “unlawful for any person knowingly . . . to develop, produce, otherwise acquire . . . stockpile, retain, own, possess, or use . . . any chemical weapon.”<sup>26</sup>

The combination of factors outlined above—a broad definition of chemical weapons, a prohibition on development, acquisition, production, and stockpiling of toxic chemicals, a non-zero limit without any de minimis exception, and application of the treaty to private conduct—led Chief Justice Roberts to proclaim, with obvious exasperation, that the government’s interpretation of the statute would “make[ ] it a federal offense to poison goldfish.”<sup>27</sup> The majority could not believe that Congress so intended. But that is because the majority did not understand that states designed the CWC to remedy the various deficiencies of the 1925 Geneva Protocol. In making this claim, I am not suggesting that states specifically intended to punish people who use toxic chemicals to poison goldfish. However, I am suggesting that the government representatives who negotiated the CWC were very concerned about the breakout and verification problems that undermined the effectiveness of the 1925 Geneva Protocol. To address those concerns, they purposefully designed a treaty regime that obligates states to prohibit private production or acquisition of toxic chemicals and precursors, even in very small quantities, *unless done for legitimate, socially beneficial purposes*.

The preceding italicized phrase requires further explanation. Under the treaty, the term “[c]hemical [w]eapons” means “[t]oxic chemicals and their precursors, except where intended for purposes not prohibited under this Convention.”<sup>28</sup> Moreover, the phrase “[p]urposes [n]ot [p]rohibited [u]nder this Convention” is defined to mean “[i]ndustrial, agricultural, research, medical, pharmaceutical or other peaceful purposes.”<sup>29</sup> The CWC Act includes provisions that are substantially identical to these treaty provisions.<sup>30</sup> Thus, the treaty and statute permit the use of toxic chemicals for peaceful purposes. Bond urged the Court to construe the statutory phrase “peaceful purpose” to exclude from the statute’s reach all “non-warlike activities.”<sup>31</sup> She argued that her conduct was not prohibited by the statute because it was not “warlike.”<sup>32</sup> In contrast, an amicus brief submitted by CWC experts who participated in treaty negotiations argued that the phrase “peaceful purposes” encompasses only “beneficial” or “necessary” uses of

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*Chemical Warfare*, in THE NEW TERROR 159, 187–203 (Sidney D. Drell et al. eds., 1999) (describing the negotiations for the Chemical Weapons Convention).

26 18 U.S.C. § 229(a).

27 Bond v. United States, 134 S. Ct. 2077, 2091 (2014).

28 CWC, *supra* note 3, art. II(1).

29 *Id.* art. II(9).

30 See 18 U.S.C. §§ 229F(1)(A), (7)(A).

31 Brief for Petitioner at 51, *Bond*, 134 S. Ct. 2077 (No. 12-158).

32 *Id.* at 50–57.

toxic chemicals.<sup>33</sup> The CWC experts' argument is supported by the principle of *ejusdem generis*. According to that canon of statutory interpretation, "[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words."<sup>34</sup> The use of toxic chemicals to poison someone is not "similar in nature" to "[i]ndustrial, agricultural, research, medical, [or] pharmaceutical" uses. All of the explicitly permitted uses of toxic chemicals involve socially beneficial activities. Ms. Bond's attempt to poison her husband's lover was not a socially beneficial activity. Therefore, the statutory phrase "peaceful purpose" is best construed to exclude Ms. Bond's conduct. That construction is consistent with the overall architecture of the CWC, which is designed to prohibit all production, acquisition, and use of toxic chemicals except for socially beneficial purposes.

A brief summary of the underlying facts in *Bond* reinforces the conclusion that the CWC Act prohibited Ms. Bond's conduct. Carol Anne Bond is a microbiologist.<sup>35</sup> She "stole the arsenic-based specialty chemical 10-chlorophenoxarsine from her employer, the multinational chemical manufacturer Rohm & Haas. She also ordered a vial of potassium dichromate over the Internet. Both of these chemicals have the rare ability to cause toxic harm to individuals through minimal topical contact."<sup>36</sup> She acquired these chemicals with the avowed purpose of making Myrlinda Haynes's life "a living hell."<sup>37</sup> Thus, even before she used the chemicals to poison Ms. Haynes, Ms. Bond had violated the CWC Act because she knowingly "acquire[d], . . . retain[ed], own[ed], [and] possess[ed]" chemical weapons, as that term is defined under the statute.<sup>38</sup> If a state party to the CWC did what Ms. Bond did—i.e., acquired, retained, and possessed a small quantity of toxic chemicals in non-weapons form with the intent of using those chemicals to poison a human being—it is beyond dispute that the state would be violating its treaty obligations under the CWC. Indeed, during negotiations, treaty negotiators referred explicitly to the attack on "Georgi Markov, a defector from communist Bulgaria, [who] was killed in London in 1978 by someone wielding a ricin-loaded umbrella" to illustrate the type of peacetime conduct prohibited by the treaty.<sup>39</sup>

Since the state is prohibited from acquiring toxic chemicals for the purpose of poisoning someone, the state has a treaty obligation under Article

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33 Brief of Amici Curiae Chemical Weapons Convention Negotiators and Experts in Support of Respondent at 7–10, *Bond*, 134 S. Ct. 2077 (No. 12-158).

34 *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114–15 (2001) (quoting 2A NORMAN J. SINGER, *STATUTES AND STATUTORY CONSTRUCTION* § 47:17 (5th ed. 1991)).

35 Brief for the United States at 4, *Bond*, 134 S. Ct. 2077 (No. 12-158).

36 *Id.* (citations omitted) (internal quotation marks omitted).

37 *Id.* (internal quotation marks omitted).

38 18 U.S.C. § 229(a)(1) (2012).

39 Brief of Amici Curiae Chemical Weapons Convention Negotiators and Experts in Support of Respondent, *supra* note 33, at 25–26.

VII(1) to prohibit private individuals from acquiring toxic chemicals for the purpose of poisoning someone.<sup>40</sup> To be clear, I am not saying that the treaty obligates the United States to prosecute Ms. Bond under *federal* law. However, the treaty unambiguously obligates the United States to prohibit Bond from acquiring toxic chemicals for the purpose of poisoning a human being. Consistent with that treaty obligation, the statute unambiguously prohibited Bond from acquiring toxic chemicals for the purpose of poisoning a human being.

The *Bond* majority concluded as a matter of statutory interpretation that the CWC Act did not reach the defendant's conduct.<sup>41</sup> That interpretation of the statute is untenable because it is based on the Court's failure to appreciate the crucial differences between the 1925 Geneva Protocol and the 1993 CWC. The Court effectively rewrote the statute, rather than interpreting the statute. The Court justified its exercise in judicial legislation by invoking the need to avoid a difficult question of constitutional federalism. I turn now to that constitutional question.

## II. THE CONSTITUTIONAL QUESTION IN *Bond*

To address the constitutional question in *Bond*, it is helpful to distinguish among the three concurring opinions authored by Justices Scalia, Thomas, and Alito. In Justice Alito's view, the CWC itself "exceeds the scope of the treaty power."<sup>42</sup> Thus, the statute implementing the treaty is unconstitutional because the underlying treaty is unconstitutional, insofar as it obligates "the United States to enact domestic legislation criminalizing conduct of the sort at issue in this case."<sup>43</sup> Justices Scalia and Thomas did not join Justice Alito's opinion. Justice Thomas's opinion contends that the federal government can utilize the treaty power to regulate "intercourse with other nations," but not to regulate "purely domestic affairs."<sup>44</sup> Justices Scalia and Alito agreed with Justice Thomas on this point. However, Justices Thomas and Scalia chose not to reach the question whether the CWC exceeds the scope of the treaty power because "[t]he parties in this case have not addressed the proper scope of the Treaty Power or the validity of the treaty here."<sup>45</sup>

Justice Scalia's opinion (joined by Justice Thomas) contends that—even assuming that the CWC itself is constitutional—the federal statute implementing the CWC is unconstitutional.<sup>46</sup> Thus, according to Justices Scalia and Thomas, the federal government's power to implement treaties is narrower than its power to make treaties. I refer to this position as the "narrow view" of the federal government's treaty-implementing power. The narrow

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40 See CWC, *supra* note 3, art. VII(1).

41 *Bond*, 134 S. Ct. at 2088–93.

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

43 *Id.*

44 *Id.* at 2108 (Thomas, J., concurring in the judgment).

45 *Id.* at 2110.

46 See *id.* at 2098–102 (Scalia, J., concurring in the judgment).

view of the treaty-implementing power is problematic for two primary reasons. First, the narrow view is antithetical to the original understanding of the Constitution. Second, the narrow view, if adopted, would seriously impair the federal government's ability to conduct foreign policy on behalf of the nation.

Before defending these claims, one point of clarification is necessary. In my view, Justice Thomas's claim that the federal government cannot use the treaty power to regulate purely domestic affairs is entirely correct.<sup>47</sup> I am skeptical whether it would ever be appropriate for the Supreme Court to invalidate a treaty on the grounds that the President and Senate had concluded a treaty regulating purely domestic affairs. Nevertheless, the constitutional limit is a real limit, regardless of whether it is judicially enforceable. In any case, it is not my purpose here to address the scope of the federal government's power to make treaties. Rather, my central claim is that the Constitution is best construed to mean that the federal government's power to implement treaties is coterminous with its power to make treaties, however the treaty-making power is defined or limited.

#### A. *The Original Understanding of the Treaty-Implementing Power*

The United States declared its independence in 1776, creating a loose confederation among thirteen sovereign states. The new nation concluded three treaties with France in 1778, including a Treaty of Alliance and a Treaty of Amity and Commerce.<sup>48</sup> The United States did not adopt a formal document to codify the powers of the national government until 1781. The Articles of Confederation, in force from 1781 to 1789, stipulated: "Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction and right which is not by this confederation expressly delegated to the united states."<sup>49</sup> Thus, under the Articles, power was concentrated mostly in state governments. The national government consisted primarily of a single body, the Congress of the United States. Congress had "the sole and exclusive right and power of . . . entering into treaties and alliances."<sup>50</sup> Congress exercised this power to conclude treaties with the Netherlands, Sweden, France, Prussia, Morocco, and the United Kingdom between 1782 and 1786.<sup>51</sup>

Although Congress had the power to make treaties, it lacked substantial legislative power. Hence, Congress depended on the States to implement treaties. The problems inherent in such a decentralized governmental structure became apparent soon after the United States concluded a peace treaty

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47 See Duncan B. Hollis, *An Intersubjective Treaty Power*, 90 NOTRE DAME L. REV. 1415, 1419–34 (2015), for discussion of this point.

48 Treaty of Alliance, U.S.-Fr., Feb. 6, 1778, 8 Stat. 6; Treaty of Amity and Commerce, U.S.-Fr., Feb. 6, 1778, 8 Stat. 12.

49 ARTICLES OF CONFEDERATION of 1781, art. II.

50 *Id.* art. IX.

51 See 2 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 59–227 (Hunter Miller ed., 1931).

with the United Kingdom. Under Article VII of the 1783 peace treaty, “his Britannic Majesty” promised to “withdraw all his armies, garrisons and fleets from the said United States, and from every post, place, and harbour within the same.”<sup>52</sup> When Britain failed to implement this promise, John Adams, the minister plenipotentiary from the United States to Britain, delivered a diplomatic message to the British Secretary of State, Lord Carmarthen, protesting Britain’s failure to remove its troops.<sup>53</sup> Carmarthen responded by summarizing British complaints about U.S. violations of the peace treaty. Carmarthen’s message described in detail “the grievances complained of by Merchants and other British Subjects having estates, property and debts due to them in the several States of America.”<sup>54</sup> John Jay, the U.S. Secretary for Foreign Affairs, concluded that the British had many legitimate grievances about U.S. treaty violations, which were generally attributable to the actions of State governments.<sup>55</sup> Jay and other national leaders wanted the States to comply with the peace treaty. Under the Articles of Confederation, though, Congress was unable to compel state compliance.

Lord Carmarthen concluded his note to John Adams as follows: “I can assure you, Sir, that whenever America shall manifest a real determination to fulfil her part of the treaty, Great Britain will not hesitate to prove her sincerity to co-operate.”<sup>56</sup> In short, treaty violations attributable to state governments provided a justification for Britain to postpone removal of its troops from U.S. territory, and Britain’s willingness to remove its troops depended on a demonstration of the United States’ resolve to halt those treaty violations. Thus, Congress’s inability to compel state compliance with treaties posed a serious national security problem. “The continued occupation of the garrisons by the British Army jeopardized the security of the northern frontier and blocked vital trade routes.”<sup>57</sup>

Meanwhile, the United States’ economy suffered from a serious depression through much of the 1780s.<sup>58</sup> Thomas Paine quipped that the American states were “in want of two of the most essential matters which governments could be destitute of—money and credit.”<sup>59</sup> Several factors contributed to the economic depression, but Britain’s imposition of retaliatory trade measures was one significant factor. “America was now subject to Britain’s restrictive trade measures, excluded from the lucrative British West Indian trade . . . and liable to all the discriminatory duties levied against foreign bottoms in its direct trade with other countries.”<sup>60</sup> To make matters

52 Definitive Treaty of Peace, U.S.-Gr. Brit., art. VII, Sept. 3, 1783, 8 Stat. 80, 83.

53 The text of Adams’s Memorial is reproduced in 31 *JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789*, at 781-82 (John C. Fitzpatrick ed., 1934) (1786).

54 *Id.* at 784.

55 *Id.* at 862.

56 *Id.* at 784.

57 RICHARD B. MORRIS, *THE FORGING OF THE UNION, 1781-1789*, at 201 (1987).

58 *See id.* at 130-61.

59 2 *THE WRITINGS OF THOMAS PAINE* 149 (Moncure Daniel Conway ed., New York, G.P. Putnam’s Sons 1894), *quoted in* MORRIS, *supra* note 57, at 152.

60 MORRIS, *supra* note 57, at 134-35.

worse, “restrictive trade measures were also being imposed by America’s ally, France, and in turn by Louis XVI’s ally, Spain.”<sup>61</sup> The United States was eager to negotiate commercial treaties with Britain and other European countries to promote economic development at home. However, European nations refused to enter into commercial treaties with the United States because they knew that the national government could not guarantee treaty compliance by the states. “Continued treaty violations on the part of the American[ ] [states] served to dampen such sentiment as existed in England for a reciprocal trade treaty . . . .”<sup>62</sup> Thus, Congress’s inability to implement treaty obligations over the objections of recalcitrant state governments impaired the national government’s ability to make new treaties that were necessary for the country’s economic development.

Aside from national security and economic concerns, treaty compliance was a matter of national honor. John Jay wrote:

Contracts between Nations, like contracts between Individuals, should be faithfully executed . . . honest nations like honest Men require no constraint to do Justice; and tho impunity and the necessity of Affairs may sometimes afford temptations to pare down contracts to the Measure of convenience, yet it is never done but at the expence of that esteem, and confidence, and credit which are of infinitely more worth than all the momentary advantages which such expedients can extort.<sup>63</sup>

Similarly, Alexander Hamilton was ashamed by the country’s inability to fulfill its international obligations. He said:

We may indeed with propriety be said to have reached almost the last stage of national humiliation. There is scarcely any thing that can wound the pride or degrade the character of an independent nation which we do not experience. Are there engagements to the performance of which we are held by every tie respectable among men? These are the subjects of constant and unblushing violation.<sup>64</sup>

In sum, the national government’s inability to implement the nation’s treaty obligations over the objections of recalcitrant states created both economic and national security problems. It also thwarted the government’s attempt to conclude new treaties that would have advanced important national interests. And it was a source of national shame and dishonor.

Representatives from twelve of the thirteen states met in Philadelphia between May and September of 1787 to draft a new Constitution for the United States. As Professor Ramsey notes, “there is general agreement [among historians] that foreign affairs difficulties were a root—if not the root—of the drive to replace the Articles [of Confederation]” with a new

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61 *Id.* at 159.

62 *Id.* at 201.

63 32 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 180 (Roscoe R. Hill ed., 1936) (1787).

64 THE FEDERALIST NO. 15, at 156 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961).

Constitution.<sup>65</sup> In April 1787, as he was preparing for the Constitutional Convention, James Madison drafted a famous essay entitled “Vices of the Political System of the United States.”<sup>66</sup> One of the key vices he identified was repeated “[v]iolations of the law of nations and of treaties.”<sup>67</sup> Similarly, near the very beginning of the Convention, Edmund Randolph noted that Congress’s inability to implement treaties over the objections of state governments was one of the chief defects of the Articles of Confederation.<sup>68</sup> Thus, the men who met in Philadelphia in 1787 were determined to create a new constitutional structure that would empower the federal government to implement the nation’s treaty obligations and preclude recalcitrant states from obstructing treaty implementation.

Justice Scalia would have us believe that the Framers failed to accomplish one of their central goals because they drafted a Constitution that leaves the states with a residual power to block treaty implementation, even though the Framers intended to vest the federal government with plenary power over treaty implementation. His view is based on a strained reading of the nexus between the treaty power and the Necessary and Proper Clause. Article II of the Constitution grants the federal government the power to make treaties.<sup>69</sup> Article I, Section 10 precludes the states from making treaties.<sup>70</sup> The Necessary and Proper Clause grants Congress the power “[t]o make all Laws which shall be necessary and proper for carrying into Execution the . . . other Powers vested by this Constitution” in the federal government.<sup>71</sup> Justice Scalia contends that the Necessary and Proper Clause empowers Congress to enact laws that facilitate the exercise of the Article II power to make treaties, but does not empower Congress to enact treaty-implementing legislation, except for legislation that it has the authority to enact on the basis of other Article I powers.<sup>72</sup>

His narrow view of the treaty-implementing power ignores the critical connection between the power to make treaties and the power to implement treaties, which was foremost in the minds of the men who wrote the Constitution. By 1787, the Framers had learned from painful experience that the national government’s inability to implement treaties over the objections of recalcitrant states impaired the nation’s ability to make new treaties—treaties that were vitally important for national economic development—because other countries would not conclude new treaties with the United States unless the national government could guarantee faithful observance of its

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65 MICHAEL D. RAMSEY, *THE CONSTITUTION’S TEXT IN FOREIGN AFFAIRS* 39 (2007).

66 9 *THE PAPERS OF JAMES MADISON* 348 (Robert A. Rutland et al. eds., 1975).

67 *Id.* at 348–49.

68 1 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 18–19 (Max Farrand ed., 1911).

69 *See* U.S. CONST. art. II, § 2, cl. 2.

70 *Id.* art. I, § 10, cl. 1.

71 *Id.* art. I, § 8, cl. 18.

72 *See* *Bond v. United States*, 134 S. Ct. 2077, 2098–99 (2014) (Scalia, J., concurring in the judgment).

preexisting treaty obligations. Justice Scalia's view, if adopted as law, would make the national government dependent on State governments, *as a matter of constitutional law*,<sup>73</sup> to fulfill treaty obligations that Congress could not implement on the basis of its other Article I powers. In short, his view would reintroduce in the twenty-first century one of the central problems that the United States confronted under the Articles of Confederation: a problem that the Framers believed they had solved when they adopted a new Constitution. The Court should not adopt this construction of the Constitution unless the text positively commands it. Thankfully, the text is amenable to a different interpretation that is consistent with the Framers' intentions. Under that view, the Necessary and Proper Clause empowers Congress to enact treaty-implementing legislation because the national power to implement treaties is necessary to assure other governments that the United States will honor its treaty commitments, and the willingness of other governments to conclude treaties with the United States is necessary "for carrying into Execution" the power to make treaties.

Justice Scalia may object that my interpretation of the Necessary and Proper Clause threatens to expand the federal treaty power to the point that it obliterates state sovereignty. In fact, the Constitution protects state sovereignty by giving states substantial control over treaty formation, while simultaneously denying states the power to obstruct treaty implementation. Under Article II, the President cannot make a treaty unless "two thirds of the Senators present" consent.<sup>74</sup> Under the original Constitution, senators were chosen by state legislatures.<sup>75</sup> The combination of the supermajority requirement and the selection method for senators gave state legislatures substantial power to prevent the national government from making treaties contrary to the interests of particular states. Although the Seventeenth Amendment introduced popular election of senators, the supermajority requirement in Article II still creates a substantial barrier to treaty formation.<sup>76</sup> Thus, consistent with the Framers' intentions, treaties are hard to make and hard to break. Under Justice Scalia's narrow view of the treaty-implementing power, treaties would be easy to break because every state government would retain the power to violate treaties beyond the scope of Congress's Article I powers, and the federal government would be powerless to compel state compliance with those treaty obligations. That narrow treaty-

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73 There is no question that in the context of treaty negotiations and treaty ratification, the federal government can choose to establish a scheme that relies primarily on state governments to implement U.S. obligations under a particular treaty. *See infra* Section II.C. However, Justice Scalia would interpret the Constitution to mandate that choice for an entire class of treaties. In contrast, I believe that the Constitution grants the federal government the power to implement treaties over the objections of recalcitrant state governments because that was one of the Framers' primary goals when they adopted the Constitution to replace the Articles of Confederation.

74 U.S. CONST. art. II, § 2, cl. 2.

75 *Id.* art. I, § 3, cl. 1.

76 *See* David Sloss, *International Agreements and the Political Safeguards of Federalism*, 55 STAN. L. REV. 1963, 1984 & n.115 (2003).

implementing power was a key flaw under the Articles of Confederation that the Constitution was designed to remedy.

In sum, the rule of *Missouri v. Holland*—that Article I empowers Congress to enact treaty-implementing legislation that it could not enact in the absence of a treaty—is entirely consistent with the principle that the federal government is a government of limited, enumerated powers. Congress’s power to implement treaties is a limited power because it is linked to the Article II power to make treaties, which itself is a limited federal power.<sup>77</sup> Moreover, Congress’s treaty-implementing power is an enumerated power because it fits comfortably within the meaning of the Necessary and Proper Clause, as the Framers would have understood that clause in light of their experience under the Articles of Confederation.

### B. *Lessons from the Bricker Amendment Debate*

Before Ms. Bond brought her case to the Supreme Court, the last major effort to overrule *Missouri v. Holland* arose in the context of the Bricker Amendment controversy. The so-called “Bricker Amendment” was actually a series of proposed constitutional amendments introduced in the Senate in the early 1950s.<sup>78</sup> The various proposals were designed to address perceived threats that treaties, especially human rights treaties, posed to the U.S. constitutional system.<sup>79</sup> The Senate Judiciary Committee held two sets of hearings on the proposed amendments: from May to June 1952, when Truman was President; and from February to April 1953, when Eisenhower was President.<sup>80</sup> The Judiciary Committee reported a proposed amendment to the full Senate in June 1953.<sup>81</sup> Between 1951 and 1954, the Senate, the executive branch, the American Bar Association (ABA), and others devoted substantial time and energy to the Bricker Amendment controversy.<sup>82</sup>

ABA leaders led the charge in favor of a constitutional amendment, along with Senator John Bricker, a Republican from Ohio who was the leading advocate for the amendment in the Senate. Proponents of the amend-

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77 The power to make treaties is limited by the two-thirds rule, and by the requirement that the treaty power may only be used to address matters of international concern. See *supra* note 47 and accompanying text.

78 See generally DUANE TANANBAUM, *THE BRICKER AMENDMENT CONTROVERSY* (1988) (providing a political history of the Bricker Amendment).

79 On the political linkage between the Bricker Amendment and opposition to human rights treaties, see generally NATALIE HEVENER KAUFMAN, *HUMAN RIGHTS TREATIES AND THE SENATE* (1990).

80 *Treaties and Executive Agreements: Hearings on S.J. Res. 1 and S.J. Res. 43 Before a Subcomm. of the Senate Comm. on the Judiciary*, 83d Cong. (1953) [hereinafter *1953 Hearings*]; *Treaties and Executive Agreements: Hearings on S.J. Res. 130 Before a Subcomm. of the Comm. on the Judiciary*, 82d Cong. (1952) [hereinafter *1952 Hearings*].

81 S. REP. NO. 83-412 (1953).

82 Executive branch materials related to the Bricker Amendment are collected in 1 *FOREIGN RELATIONS OF THE UNITED STATES, 1952–1954*, at 1768–856 (William Z. Slany et al. eds., 1983) [hereinafter 1 FRUS], available at <https://history.state.gov/historicaldocuments/frus1952-54v01p2/comp7>.

ment sought to accomplish three primary goals: (1) to restrict the President's power to use executive agreements as a substitute for Article II treaties; (2) to modify the Supremacy Clause so that most or all treaties would be non-self-executing; and (3) to overrule *Missouri v. Holland*.<sup>83</sup> The third goal is the most significant for the purpose of this Article, but the other two goals also merit brief comments to clarify the contours of the Bricker Amendment debate.

The Supreme Court decided in *Belmont* and *Pink* that sole executive agreements—i.e., international agreements concluded by the President without Senate consent—can supersede conflicting state laws, just as treaties supersede conflicting state laws.<sup>84</sup> Senator Bricker wanted to reverse or limit *Belmont* and *Pink*. Hence, the amendment he proposed in February 1952 stated: “Executive agreements shall not be made in lieu of treaties.”<sup>85</sup> The Eisenhower Administration strenuously opposed limits on the domestic effects of sole executive agreements,<sup>86</sup> but the President almost lost on this issue. The so-called “George substitute,” introduced by Senator Walter George in January 1954, stated: “An international agreement other than a treaty shall become effective as internal law in the United States only by an act of the Congress.”<sup>87</sup> The George substitute would have overruled *Belmont* and *Pink* by making clear that sole executive agreements are not effective as domestic law unless Congress enacts legislation to give them domestic legal effect. The Senate voted 60–31 in favor of the George substitute, just one vote short of the necessary two-thirds majority.<sup>88</sup> Although the amendment did not pass, the vote manifested substantial bipartisan support for a constitutional amendment that would have constrained the President's power to create domestic law by means of sole executive agreements.

Whereas President Eisenhower refused to compromise on the issue of sole executive agreements, he was much more willing to compromise on the self-execution issue. In January 1954, Attorney General Brownell and Senator Bricker agreed on the text of a proposed constitutional amendment that would have made most treaties non-self-executing.<sup>89</sup> That amendment said:

The power to make treaties shall extend to the international relations of the United States but shall not be employed to regulate matters which are not necessary and proper for the conduct of our foreign affairs and which are normally and appropriately within the local jurisdiction of the States. A treaty or other international agreement shall become effective as internal

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83 252 U.S. 416 (1920).

84 *United States v. Pink*, 315 U.S. 203, 217–21 (1942); *United States v. Belmont*, 301 U.S. 324, 331–32 (1937). After *Belmont* and *Pink*, the scope of the President's power to supersede conflicting state law by means of sole executive agreements remains unclear. However, *Belmont* and *Pink* established that the President has some power to supersede state laws by adopting sole executive agreements.

85 S.J. Res. 130, 82d Cong. § 4 (1952); 98 CONG. REC. 908 (1952).

86 See 1 FRUS, *supra* note 82, at 1781–82; TANANBAUM, *supra* note 78, at 71–72.

87 See 100 CONG. REC. 853 (1954); 100 CONG. REC. 1103 (1954).

88 See 1 FRUS, *supra* note 82, at 1851–52; TANANBAUM, *supra* note 78, at 175–90.

89 See 1 FRUS, *supra* note 82, at 1827–32; TANANBAUM, *supra* note 78, at 133–36.

law in the United States only through acts of Congress provided however that treaty provisions relating to the rights and obligations of aliens in the United States shall take effect as provided in such treaties.<sup>90</sup>

The first sentence of the proposed amendment was intended to preclude the federal government from using the treaty power to enter into human rights treaties. The second sentence would have made most treaties non-self-executing, except for treaties “relating to the rights and obligations of aliens in the United States.” The Eisenhower Administration was willing to accept this amendment because it did not constrain the President’s power to make sole executive agreements and because it would have left *Missouri v. Holland* untouched. Senator Bricker initially agreed to the compromise, but reversed himself under pressure from Frank Holman, a past president of the ABA who was a leading champion of the drive to amend the Constitution to overrule *Holland*.<sup>91</sup> Attorney General Brownell reported that “Senator Bricker had agreed, then went back to Ohio, checked with Mr. Holman, then turned around from the agreement.”<sup>92</sup> Ultimately, the Senate voted 50–42 against a version of the Bricker Amendment that would have made most treaties non-self-executing.<sup>93</sup>

Of the various issues swirling around the Bricker Amendment controversy, debates about the wisdom of overruling *Holland* were the most controversial. The ABA House of Delegates approved a proposed constitutional amendment in February 1952, stipulating that “[a] treaty shall become effective as internal law in the United States only through legislation by Congress *which it could enact under its delegated powers in the absence of such treaty*.”<sup>94</sup> The italicized language was commonly referred to as the “which clause.” That clause was specifically intended to overrule *Holland* because key ABA leaders were convinced that the *Holland* rule posed a significant threat to state sovereignty. In February 1953, Senator Arthur Watkins (R-UT), working closely with the ABA, introduced a proposed constitutional amendment that included the “which clause.”<sup>95</sup> The version of the Bricker Amendment reported to the full Senate by the Judiciary Committee also included the “which clause,” despite strenuous objections voiced by a minority on the committee.<sup>96</sup> The Senate as a whole never voted on an amendment containing the “which clause.” Ongoing consultations between the Senate and the Eisenhower Administration in late 1953 and early 1954 ultimately persuaded

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90 Tentative Brownell-Bricker-Ferguson Compromise, Jan. 1954, § 2, *reprinted in* TANANBAUM, *supra* note 78, at 225.

91 See TANANBAUM, *supra* note 78, at 135–36. For more information about Frank Holman and his influence within the ABA, see KAUFMAN, *supra* note 79, at 16–30.

92 1 FRUS, *supra* note 82, at 1830.

93 See 100 CONG. REC. 2262 (1954); TANANBAUM, *supra* note 78, at 152–53, 166–69.

94 77 ANN. REP. A.B.A. 447–48 (1952) (emphasis added).

95 99 CONG. REC. 1078–79 (1953).

96 S. REP. NO. 83-412, at 1 (1953) (full text of amendment); *see also id.* at 13–24 (explaining the majority’s support for the “which clause”); *id.* at 41–47 (explaining the minority’s opposition to the “which clause”).

Bricker's supporters to abandon the "which clause" because they recognized that the Senate would vote against any version of the amendment containing such a clause.<sup>97</sup>

The "which clause" would have limited Congress's power to implement treaties by overruling *Holland*, leaving the federal government dependent upon the states to implement treaties beyond the scope of Congress's Article I powers. Both the Truman and Eisenhower Administrations strongly opposed the "which clause." They argued that the clause would severely constrain the federal government's power to implement treaties, thereby reviving the problems that the United States experienced under the Articles of Confederation.<sup>98</sup>

Whereas President Eisenhower was willing to compromise on self-execution, he was firmly opposed to the ABA's attempt to overrule *Holland*. During a press conference in January 1954, a reporter asked President Eisenhower about the Bricker Amendment. The President explicitly identified himself as a "States' Righter."<sup>99</sup> He said he would "gladly agree" to some proposed constitutional amendments related to treaties. However, he said:

I would like each of you to ask yourself this question: [W]hy was the Constitution formed, and to replace the old Articles of Confederation?

If you will look up the history of the time, you will find that each one of the States under the Articles of Confederation had a right to repudiate a treaty. Because of this fact, the Founding Fathers . . . provided that a treaty properly ratified should take precedence over any State law, including that State's constitution.

That is so that . . . your President and your Secretary of State . . . can represent one government, and can speak with that much authority. They are not trying the impossible task of representing 48 governments. . . .

. . . .  
 . . . But when you come down to this, that we have to go right back to the general system that prevailed before our Constitution was adopted, then I shall certainly never agree.<sup>100</sup>

Thus, in the President's view, the proposal to overrule *Holland* was unacceptable—despite his firm commitment to States' rights—because it would effectively revive the system that prevailed under the Articles of Confederation, leaving the President and Secretary of State with the "impossible task of representing 48 governments."

John Foster Dulles, who served as Secretary of State under Eisenhower, was no great friend of the treaty power. Speaking to a regional meeting of

97 See generally 1 FRUS, *supra* note 82, at 1826–52; TANANBAUM, *supra* note 78, at 133–56.

98 See, e.g., 1953 Hearings, *supra* note 80, at 901–05, 924–28 (statement of Herbert Brownell, Jr., Att'y Gen. of the United States); 1952 Hearings, *supra* note 80, at 517–26 (statement of Philip B. Perlman, Solicitor General of the United States).

99 Dwight D. Eisenhower, *The President's News Conference of January 13, 1954*, reprinted in PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: DWIGHT D. EISENHOWER, at 52 (1954).

100 *Id.* at 52–53.

the ABA in 1952, before he became Secretary of State, Dulles warned that “[t]he treaty-making power is an extraordinary power liable to abuse.”<sup>101</sup> He explained that treaties “can take powers away from the Congress and give them to the President; they can take powers from the State and give them to the Federal Government or to some international body and they can cut across the rights given the people by the constitutional Bill of Rights.”<sup>102</sup> One year later, though, as Secretary of State, he spoke forcefully against the ABA proposal to overrule *Holland*. He asserted:

[The ABA’s proposed amendment] would create a no-man’s land in foreign affairs. It would require the concurrence of all 48 States to make effective such common treaties as treaties of friendship, commerce, and navigation, extradition, reciprocal inheritance taxation, migratory birds, collection of foreign debts, and status of foreign troops. In this field of foreign affairs our country would not speak with 1 voice but with 49. The primary objective of the framers of our Constitution in this respect would be defeated.<sup>103</sup>

Like President Eisenhower, Secretary of State Dulles was a firm believer in states’ rights who feared abuse of the treaty power. Even so, he believed that the ABA’s proposed cure—overruling *Holland*—was worse than the disease, because it would severely impair the federal government’s ability to conduct foreign affairs on behalf of the nation.

Perhaps most surprisingly, Senator Bricker also opposed the ABA’s proposal to overrule *Holland*.<sup>104</sup> Unlike the ABA leaders, Bricker believed that the *Holland* rule was necessary to preserve the national government’s power to implement treaties over the objections of recalcitrant states. Bricker introduced three different versions of the Bricker Amendment in the Senate: in September 1951, February 1952, and January 1953.<sup>105</sup> None of his proposed amendments contained the “which clause.” In February 1953, Bricker wrote letters to his fellow Senators to explain his opposition to the ABA’s proposed amendment:

He explained that the ABA’s amendment . . . would make it difficult if not impossible to negotiate reciprocal agreements securing for Americans the right to own property or engage in business in other countries in exchange for foreign nationals being granted similar privileges in the United States. Since these matters were regulated by the individual states, Congress would

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101 Dulles’s speech is quoted in part in the February 1, 1953 Report of the ABA Standing Committee on Peace and Law. See *1953 Hearings*, *supra* note 80, at 43–47 (reproducing key portions of that report).

102 *Id.* at 43.

103 *1953 Hearings*, *supra* note 80, at 829 (statement of John Foster Dulles, Secretary of State of the United States).

104 Bricker initially opposed the “which clause” because he did not wish to impose undue constraints on Congress’s legislative powers. Later, he endorsed the clause to preserve his political alliance with ABA leaders. See TANANBAUM, *supra* note 78, at 80–82 (discussing Bricker’s initial opposition to the ABA proposal); *id.* at 91–92 (discussing Bricker’s capitulation to the ABA in the spring of 1953).

105 All three proposed amendments are reprinted in TANANBAUM, *supra* note 78, at 221–23 app. A, C–D.

be unable to implement such compacts if it were stripped of its authority to adopt any legislation necessary and proper to carrying out such a treaty. State action would be required, and Bricker questioned the wisdom of an amendment that gave the states what amounts to a veto power over foreign policy. He was no defender of growing federal authority, but even Bricker realized that the ABA's amendment, especially the "which" clause, went too far in trying to prevent federal encroachments.<sup>106</sup>

Like President Eisenhower and Secretary of State Dulles, Senator Bricker was determined to prevent the use of the treaty power to encroach upon states' rights. But like the President, Bricker recognized that the *Holland* rule was essential to preserve national control over treaty implementation so that individual states could not exercise "a veto power over foreign policy."<sup>107</sup>

In sum, Justice Scalia's attempt to overrule *Holland* by judicial fiat has much in common with the ABA's earlier attempt to overrule *Holland* by constitutional amendment. The proposed constitutional amendment failed because the ABA's most important political allies—Republicans who feared abuse of the treaty power and were strongly committed to states' rights—recognized that a decision to overrule *Holland* would revive the problems that the United States experienced under the Articles of Confederation by constraining the federal government's power to implement treaties over the objections of recalcitrant states.

Two key developments since the 1950s reinforce the practical importance of the *Holland* rule under our current constitutional system. First, over the past two decades the Supreme Court has given teeth to the doctrine of limited and enumerated powers by enforcing constitutional limits on the scope of Congress's enumerated legislative powers.<sup>108</sup> In contrast, the Bricker debates occurred in an era when the Supreme Court adopted a much broader view of the scope of Congress's enumerated powers. When the Court adopted a broad view of Congress's commerce power, as it did between 1937 and 1995,<sup>109</sup> the *Holland* rule had very little practical significance because Congress could have implemented almost any treaty without relying on the combination of the treaty power and the Necessary and Proper Clause. In contrast, under the narrower view of the commerce power that the Court has applied since 1995, a decision to overrule *Holland* would

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106 *Id.* at 82 (internal quotation marks omitted) (citing letters from Bricker to Senators Ives and Smith).

107 *Id.*

108 *See, e.g.,* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012) (restricting the scope of Congress's legislative power under the Spending Clause); City of Boerne v. Flores, 521 U.S. 507 (1997) (restricting the scope of Congress's legislative power under Section 5 of the Fourteenth Amendment); United States v. Lopez, 514 U.S. 549 (1995) (restricting the scope of Congress's legislative power under the Commerce Clause).

109 *Compare Lopez*, 514 U.S. 549, with Wickard v. Filburn, 317 U.S. 111 (1942) (adopting an exceptionally broad view of Congress's commerce power), and NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (upholding the National Labor Relations Act against a Commerce Clause challenge).

impose tighter practical constraints on Congress's treaty-implementing power because the *Holland* rule might provide the only viable basis for federal treaty-implementing legislation in some cases.<sup>110</sup>

Second, the practical significance of the *Holland* rule is related to the scope of non-self-execution doctrine. Before 1945, the vast majority of treaties ratified by the United States were understood to be self-executing.<sup>111</sup> During the century-and-a-half between the Founding and World War II, state and federal courts issued only roughly fifteen to twenty published decisions holding that a treaty was non-self-executing.<sup>112</sup> In the modern era, by contrast, state and federal courts routinely hold that treaties are non-self-executing. The reasons for the courts' shifting approach to self-execution doctrine are complex, but the publication of the *Restatement (Second) of the Foreign Relations Law* in 1965 and the Supreme Court's 2008 decision in *Medellin v. Texas*<sup>113</sup> were important factors that contributed to the expansion of the class of non-self-executing treaties and the corresponding shrinkage of the class of

110 Professors Cleveland and Dodge contend that Congress could invoke its power under the Define and Punish Clause as an alternative basis for treaty-implementing legislation. See Sarah H. Cleveland & William S. Dodge, *Defining and Punishing Offenses Under Treaties*, 124 YALE L.J. (forthcoming 2015), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2310779](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2310779). I find their argument quite persuasive, but I am not optimistic that the Court would agree with them.

111 See, e.g., Quincy Wright, *The Constitutionality of Treaties*, 13 AM. J. INT'L L. 242, 263–64 (1919) (“[A]ll treaties might be called ‘self-executing’ in the sense that their formal conclusion imposes an immediate responsibility upon every governmental authority whose action may be necessary to give it complete effect.”).

112 It is difficult to provide an exact number because some cases arguably hold that a treaty is non-self-executing without using that term. For example, most commentators agree that the Supreme Court held a treaty to be non-self-executing in *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829), although the Court did not use the term. I have argued elsewhere that the non-self-execution portion of Marshall's opinion in *Foster* is really a minority opinion. *Foster* aside, the following is a reasonably complete list of other cases decided before 1945 in which courts apparently held a treaty to be non-self-executing: *Cameron Septic Tank Co. v. City of Knoxville*, 227 U.S. 39, 47–50 (1913); *Z. & F. Assets Realization Corp. v. Hull*, 114 F.2d 464, 470–73 (D.C. Cir. 1940); *George E. Warren Corp. v. United States*, 94 F.2d 597, 599 (2d Cir. 1938); *O'Donnell v. United States*, 91 F.2d 14, 39 (9th Cir. 1936); *Robertson v. Gen. Elec. Co.*, 32 F.2d 495, 499–502 (4th Cir. 1929); *The Sagatind*, 11 F.2d 673, 675 (2d Cir. 1926); *In re Stoffregen*, 6 F.2d 943, 944 (D.C. Cir. 1925); *Weedin v. Wong Tat Hing*, 6 F.2d 201, 202 (9th Cir. 1925); *United Shoe Mach. Co. v. Duplessis Shoe Mach. Co.*, 155 F. 842, 848 (1st Cir. 1907); *Wadsworth v. Boysen*, 148 F. 771, 774 (8th Cir. 1906); *Rousseau v. Brown*, 21 App. D.C. 73, 76 (D.C. Cir. 1903); *Leitensdorfer v. Campbell*, 15 F. Cas. 270, 272 (C.C.D. Colo. 1878) (No. 8225); *Taylor v. Morton*, 23 F. Cas. 784, 787 (C.C.D. Mass. 1855) (No. 13,799); *Turner v. Am. Baptist Missionary Union*, 24 F. Cas. 344, 345–46 (C.C.D. Mich. 1852) (No. 14,251); *United States v. New Bedford Bridge*, 27 F. Cas. 91, 104–07 (C.C.D. Mass. 1847) (No. 15,867); *The Over the Top*, 5 F.2d 838, 845 (D. Conn. 1925). There do not appear to be any published state court decisions before 1945 holding a treaty to be non-self-executing.

113 552 U.S. 491 (2008).

self-executing treaties.<sup>114</sup> As a practical matter, the *Holland* rule does not affect the implementation of self-executing treaties because federal legislation is not necessary to implement those treaties. Thus, if the Court decided tomorrow to overrule *Holland*, the expansion of the class of non-self-executing treaties over the past several decades would magnify the practical impact of that decision by increasing the number of cases where the federal government would be forced to rely on the states to implement the nation's treaty obligations.

### C. A Contemporary Example

On November 23, 2007, the United States signed the Convention on the International Recovery of Child Support and Other Forms of Family Maintenance (Child Support Convention or Convention).<sup>115</sup> The complex effort to encourage states to implement the Convention shows that the federal government knows how to implement treaties in a manner that respects state autonomy. The Child Support Convention “will, for the first time on a worldwide scale, create uniform, simple, and inexpensive procedures for the establishment, recognition, and enforcement of child support and family maintenance obligations in international cases.”<sup>116</sup> President Bush transmitted the treaty to the Senate in September 2008.<sup>117</sup> The Senate Foreign Relations Committee held a public hearing on the Convention in October 2009.<sup>118</sup> The Senate consented to ratification in September 2010.<sup>119</sup> As of this writing, the United States has still not ratified the treaty. The delay in treaty ratification is related to the complex process envisioned for treaty implementation.

While the treaty was being negotiated in The Hague, the Uniform Law Commission (ULC) was preparing for domestic implementation of the treaty. The ULC, also known as the National Conference of Commissioners on Uniform State Laws, recommends model legislation to state legislatures. The ULC had previously promulgated the Uniform Interstate Family Support Act (UIFSA). As of 1998, all fifty states had adopted UIFSA, in part because the 1996 Welfare Reform Act, a federal statute, “made the enactment of UIFSA . . . a condition of state eligibility for the federal subsidy for child support enforcement.”<sup>120</sup> In July 2008, the ULC approved amendments to

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114 See DAVID SLOSS, *TREATY SUPREMACY AND HUMAN RIGHTS: THE STORY OF AN UNKNOWN CONSTITUTIONAL REVOLUTION AND ITS UNINTENDED CONSEQUENCES* (forthcoming 2016) (on file with author).

115 Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, Nov. 23, 2007, S. TREATY DOC. NO. 110-21, 47 I.L.M. 257 (2008) [hereinafter Child Support Convention].

116 S. EXEC. REP. NO. 111-2, at 1 (2010).

117 Child Support Convention, *supra* note 115.

118 See S. EXEC. REP. NO. 111-2, *supra* note 116, at 7.

119 See 156 CONG. REC. S17, 229–30 (daily ed. Sept. 29, 2010).

120 Battle Rankin Robinson, *Integrating an International Convention into State Law: The UIFSA Experience*, 43 FAM. L.Q. 61, 65 (2009).

UIFSA that were designed to facilitate state implementation of the Child Support Convention. Accordingly, the Senate Foreign Relations Committee recommended that treaty implementation “would be achieved through adoption of an amended version of UIFSA by states and other relevant jurisdictions, as well as through conforming amendments to Title IV of the Social Security Act.”<sup>121</sup> As of December 2014, only twelve states had adopted the 2008 UIFSA amendments.<sup>122</sup> Nevertheless, full implementation is likely within the next year or two because Congress enacted legislation in September 2014 that conditions the continued availability of certain federal benefits on the enactment of conforming state legislation by January 1, 2016.<sup>123</sup> The United States plans to ratify the Child Support Convention after all fifty states have incorporated the UIFSA amendments into state legislation.

It is instructive to compare the implementation mechanism for the Child Support Convention with the implementation mechanism chosen for the CWC. The primary goal of the Child Support Convention “is to ensure the effective international recovery of child support and other forms of family maintenance” through recognition and enforcement of maintenance decisions.<sup>124</sup> State courts already enforce child support decisions from courts in other states, so there are existing mechanisms at the state level that can be utilized to implement the Convention. Moreover, UIFSA was a preexisting model law that “proved to be a near-perfect vehicle for integrating a federally negotiated treaty into American state law.”<sup>125</sup> In contrast, federal courts are rarely called upon to enforce child support orders issued by state courts, so federal enforcement of the Child Support Convention would have required either: (1) adding a new category of cases to the dockets of federal courts; or (2) creating a new federal administrative bureaucracy to implement the Convention. In light of these factors, it was clearly more convenient and efficient to rely on state governments to implement the Convention.

In contrast, reliance on state governments to implement the CWC would have been neither convenient nor efficient. The CWC obligates the United States to “[p]rohibit natural and legal persons anywhere on its territory” from developing, producing, acquiring, stockpiling or retaining “[t]oxic chemicals and their precursors,” except for purposes not prohibited by the Convention.<sup>126</sup> The Uniform Law Commission has never promulgated a model law that regulates the development, production, and stockpiling of

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121 S. EXEC. REP. NO. 111-2, *supra* note 116, at 6.

122 See *Interstate Family Support Act Amendments (2008)*, UNIF. LAW COMM’N, <http://www.uniformlawcommission.com/Act.aspx?title=Interstate%20Family%20Support%20Act%20Amendments%20%282008%29> (last visited Mar. 6, 2015).

123 Preventing Sex Trafficking and Strengthening Families Act, Pub. L. No. 113-183, § 301, 128 Stat. 1919, 1943–45 (2014).

124 Child Support Convention, *supra* note 115, art. I.

125 Robinson, *supra* note 120, at 64.

126 See CWC, *supra* note 3, arts. I, II, VII.

toxic chemicals.<sup>127</sup> I have not surveyed the laws of all fifty states, but it seems unlikely that any state has enacted comprehensive regulations governing the development, production, acquisition, and stockpiling of toxic chemicals. Therefore, a decision to rely on state governments to implement the CWC would have required the federal government to invent a novel mechanism to encourage states to enact new laws quite unlike preexisting state laws. In contrast, Congress could have relied on its commerce power to enact a federal statute governing the development, production, and stockpiling of toxic chemicals with a nexus to interstate commerce. Since the vast majority of toxic chemicals have some nexus to interstate commerce, the *Holland* rule expands the scope of federal regulation only slightly by enabling Congress to regulate the small fraction of toxic chemicals that lack a sufficient nexus to interstate commerce to justify regulation under the Commerce Clause. Therefore, in the case of the CWC, it was much more convenient and efficient to adopt federal implementing legislation, rather than relying on the states to implement U.S. treaty obligations. Indeed, a constitutional rule that forced the federal government to rely on the states to implement the CWC would probably preclude the United States from fulfilling its treaty obligation to “[p]rohibit natural and legal persons anywhere on its territory” from developing, producing, acquiring, stockpiling, or retaining “[t]oxic chemicals and their precursors.”<sup>128</sup>

Of course, the goals of convenience and efficiency cannot justify enactment of federal legislation that exceeds the scope of Congress’s enumerated powers. Nevertheless, the Court is entitled to consider factors like convenience and efficiency in the context of deciding how broadly or narrowly to construe the scope of Congress’s enumerated powers. The analysis in Section II.A shows that the *Holland* rule is consistent with the text, structure, and original understanding of the Constitution. The comparison of the CWC with the Child Support Convention demonstrates that the *Holland* rule has not induced the federal political branches reflexively to favor federal implementation over state implementation, to the detriment of the states.<sup>129</sup> To the contrary, the *Holland* rule gives Congress and the President the flexibility to decide, on a case-by-case basis, between state and federal mechanisms for treaty implementation, with a view to ensuring that the United States faithfully executes its treaty obligations. The Court should hesitate to announce a new constitutional rule that deprives Congress and the President of that needed flexibility, especially because there is no evidence that Congress has abused the treaty-implementing power that the Court recognized in *Holland*.

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127 For a list of model acts promulgated by the ULC, see *Acts*, UNIF. LAW COMM’N, <http://www.uniformlawcommission.com/Acts.aspx> (last visited Mar. 6, 2015).

128 See CWC, *supra* note 3, arts. I, II, VII.

129 For more detailed analysis of the ways in which the executive branch accounts for federalism concerns in its treaty implementation decisions, see Duncan B. Hollis, *Executive Federalism: Forging New Federalist Constraints on the Treaty Power*, 79 S. CAL. L. REV. 1327 (2006).

## CONCLUSION

One puzzling question that arises from *Bond* is this: why did the federal prosecutor in Pennsylvania decide to charge Bond under the CWC Act? He could have saved himself and others a lot of trouble by settling for a conviction for mail theft.<sup>130</sup> Was the prosecutor trying to set up a test case to give the Court an opportunity to overrule *Holland*? Was he simply pursuing the maximum penalty that he thought the law would support? We may never know the answer to those questions. Regardless, as a matter of prudent judicial policy, the Court should be reluctant to apply the heavy hammer of the Constitution to rectify a problem arising from a federal prosecutor's overzealous charging decision. Fortunately, a majority of the Justices chose the prudent course: they misinterpreted the CWC Act to avoid ruling on the constitutional question. If Justice Scalia had prevailed, the outcome would have been far worse.

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<sup>130</sup> Bond pled guilty to mail theft, in violation of 18 U.S.C. § 1708. *United States v. Bond*, 581 F.3d 128, 131 (3d Cir. 2009), *rev'd*, 131 S. Ct. 2355 (2011), *remanded to* 681 F.3d 149 (3d Cir. 2012), *rev'd*, 134 S. Ct. 2077 (2014).

