

# *Bond v. United States: Concurring in the Judgment*

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## **Introduction**

When Mr. Bond first impregnated Mrs. Bond's best friend, the international Chemical Weapons Convention was probably the furthest thing from his mind.<sup>1</sup> But when Mrs. Bond found out, her thoughts ran right to potassium dichromate and 10-chloro-10H-phenoxarsine.

Mrs. Bond promptly decided to spread these chemicals on the pregnant paramour's doorknob and mailbox.<sup>2</sup> And even though the "best friend" was scarcely harmed (because the chemicals were farcically easy to spot), Mrs. Bond found herself charged with violation of the Chemical Weapons Convention Implementation Act.<sup>3</sup> Improbably enough, this lurid local drama, which played out entirely in Norristown, Pennsylvania, would present momentous constitutional questions about the foreign relations law of the United States.

Now, the Chemical Weapons Convention was quite obviously inspired by a more fearsome set of concerns—paradigmatically, state use of chemical weapons in wartime and/or terrorist use of chemical weapons against civilian populations. No one suggests that the treaty-makers had jilted wives like Mrs. Bond in mind.<sup>4</sup> And the federal statute was expressly enacted to implement this treaty. But, nevertheless, the statute seemed to reach Mrs. Bond's conduct, and

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<sup>1</sup> *Bond v. United States*, 134 S. Ct. 2077 (2014).

<sup>2</sup> *Id.* at 2085.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 2088.

an ambitious assistant United States attorney decided to make it a federal case.

Mrs. Bond entered a conditional guilty plea, reserving the right to appeal. The government, bizarrely, started by contending that Mrs. Bond lacked standing to make a Tenth Amendment/enumerated powers argument, even though her liberty was on the line; and the U.S. Court of Appeals for the Third Circuit, oddly, agreed.<sup>5</sup> Then, though, the government reversed course and confessed error: of course a criminal defendant has standing to argue that Congress lacked power to enact the statute at issue.<sup>6</sup> And in 2011, the Supreme Court reversed 9-0.<sup>7</sup>

This term, the case was back at the Supreme Court on the merits. Mrs. Bond argued, first, that the statute did not reach her conduct—a statutory interpretation argument that turned out to have surprising traction.

Second, in the alternative, Mrs. Bond argued that if the statute does reach her conduct, then Congress had no constitutional power to enact it and it could not be applied to her. Congress's legislative powers are enumerated, primarily in Article I, Section 8. So, as a general matter, for every federal statute, one ought to be able to find a corresponding power over the subject matter in the enumerated list. Mrs. Bond took a look at the list and argued that she found no enumerated power over purely local chemical assault.

The government, oddly, largely conceded this point, waiving any argument that this statute was a regulation of interstate commerce.<sup>8</sup> Instead, the government made the following remarkable assertion. It argued that because the United States had entered into a treaty concerning chemical weapons, Congress automatically has the power to enact a statute on this subject, even if it would have lacked this power otherwise. It argued, in other words, that *a treaty can increase the legislative power of Congress*.

And indeed, in 1920, the Supreme Court seemed to say exactly that. Justice Oliver Wendell Holmes wrote for the Court: "If the treaty is valid there can be no dispute about the validity of the [implementing]

<sup>5</sup> United States v. Bond, 581 F.3d 128, 137 (3d Cir. 2009).

<sup>6</sup> Bond, 134 S. Ct. at 2086.

<sup>7</sup> Bond v. United States, 131 S. Ct. 2355, 2359 (2011).

<sup>8</sup> United States v. Bond, 681 F.3d 149, 151 n.1 (3d Cir. 2012).

statute under Article I, § 8, as a necessary and proper means to execute the powers of the government.”<sup>9</sup>

This was the proposition that caught the interest of the Cato Institute. In 2005, in the *Harvard Law Review*, I argued that this sentence is fundamentally inconsistent with constitutional text and structure, and that it should be overruled.<sup>10</sup> If a treaty could increase the legislative powers of Congress, then enumerating those powers in the first place was a fool’s errand; the president and Senate, with the concurrence of, say, Zimbabwe, could easily circumvent the enumeration and vest Congress with plenary legislative power. Cato agreed (as did the Center for Constitutional Jurisprudence and the Atlantic Legal Foundation), and so we filed an amicus brief to that effect,<sup>11</sup> based on my article.<sup>12</sup> We argued that *Missouri v. Holland* was wrong: a treaty cannot increase the legislative power of Congress.

In what must be a new record for a criminal defendant, the Supreme Court again ruled for Mrs. Bond, and again the vote was 9-0.<sup>13</sup> (Meanwhile, for the Obama administration, this is one of at least a dozen unanimous losses in the last three terms,<sup>14</sup> which may also be some sort of record.) Mrs. Bond’s conviction was overturned.

But although all nine justices agreed about the result, there were substantial disagreements about the reasoning. Unfortunately, Chief Justice John Roberts, writing for the Court, managed to sidestep the constitutional issue, expressing no view on the important constitutional question of whether a treaty can increase the legislative power of Congress. But the Court’s opinion is nevertheless worth studying, if only as an object lesson in dodgy statutory interpretation. Meanwhile, Justices Antonin Scalia, Clarence Thomas, and Samuel Alito rightly did reach the important constitutional question, each writing

<sup>9</sup> *Missouri v. Holland*, 252 U.S. 416, 432 (1920).

<sup>10</sup> Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 Harv. L. Rev. 1867 (2005).

<sup>11</sup> Brief of Amici Curiae Cato Institute, Center for Constitutional Jurisprudence, and Atlantic Legal Foundation in Support of Petitioner at 2, *Bond v. United States*, 134 S. Ct. 2077 (2014) (No. 12-158) [hereinafter Cato Brief].

<sup>12</sup> Rosenkranz, *supra* note 10.

<sup>13</sup> *Bond v. United States*, 134 S. Ct. 2077, 2082 (2014).

<sup>14</sup> See Ilya Shapiro, *No, Mr. President, You Can’t Do Whatever You Want*, *Forbes*, June 27, 2014, <http://www.forbes.com/sites/ilyashapiro/2014/06/27/no-mr-president-you-cant-do-whatever-you-want>.

a separate concurrence in the judgment. Collectively, these three opinions grapple with the intertwined issues of (1) the scope of the treaty power and (2) the scope of Congress's power to legislate pursuant to treaty. Because these issues have rarely arisen, these concurrences stand as some of the most scholarly and thoughtful treaty opinions ever to emanate from the Supreme Court.

### I. Was Mrs. Bond's Conduct Covered by the Statute?

The Court began with the statutory interpretation question: *Did the statute reach Mrs. Bond's conduct?* This is standard practice. The Court does and should avoid difficult constitutional questions when it fairly can,<sup>15</sup> and if Mrs. Bond's conduct was not covered by the statute, then that is the end of the case. It is undisputed that Mrs. Bond possessed and used a chemical to harm her neighbor. But did this constitute possession and use of a "chemical weapon" under the Chemical Weapons Convention Implementation Act?

The statute provides that no person may knowingly "develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any *chemical weapon*."<sup>16</sup> At first glance, the key term is ambiguous. Mrs. Bond clearly possessed and used *something*, but was it a "chemical weapon"? Under normal circumstances, this might pose an interpretive riddle, but in this case, Congress itself has expressly defined the term. The statute defines the phrase "chemical weapon" to mean "[a] *toxic chemical* and its precursors, except where intended for a *purpose not prohibited* under this chapter as long as the type and quantity is consistent with such a purpose."<sup>17</sup> Now, this definition itself may appear to be ambiguous. A "chemical weapon" is a "toxic chemical," but this just begs the question: did Mrs. Bond possess and use a "toxic chemical"? And even if so, was her "purpose not prohibited"? Happily, Congress expressly defined both of these terms too. A "toxic chemical" is defined very broadly as "*any chemical* which through its chemical action on life processes can cause death, temporary incapacitation or

<sup>15</sup> *Escambia County v. McMillan*, 466 U.S. 48, 51 (1984) (per curiam); see also *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

<sup>16</sup> 18 U. S.C. § 229(a)(1) (2012) (emphasis added).

<sup>17</sup> 18 U.S.C. § 229F(1)(A) (2012) (emphasis added).

permanent harm to humans or animals.”<sup>18</sup> To remove all doubt, the definition goes on to specify that “[t]he term includes *all such chemicals*, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere.”<sup>19</sup> And a “purpose not prohibited” is “[a]ny *peaceful* purpose related to an industrial, agricultural, research, medical, or pharmaceutical activity or other activity.”<sup>20</sup>

In short, the Chemical Weapons Convention Implementation Act is a model of legislative drafting in one important sense. Several of its key terms may be ambiguous at first glance, *but Congress has expressly defined these terms*. Each time a term seems to pose an interpretive puzzle, there is a definitional provision that solves the puzzle.

Working bottom to top through these interlocking definitions takes some doing, but there is nothing ambiguous about the process or the result. Definitional provisions are like algebraic substitutions: where one sees X, one should read Y. Here is Justice Scalia, demonstrating, in one paragraph, how this is done:

[1] Bond possessed and used “chemical[s] which through [their] chemical action on life processes can cause death, temporary incapacitation or permanent harm.” [2] Thus, she possessed “toxic chemicals.” [3] And, because they were not possessed or used only for a “purpose not prohibited,” §229F(1)(A), they were “chemical weapons.” Ergo, Bond violated the Act. End of statutory analysis, I would have thought.<sup>21</sup>

Alas, this inexorable logic garnered only three votes at the Supreme Court. “The Court does not think the interpretive exercise so simple. But that is only because its result-driven antitextualism befores what is evident.”<sup>22</sup>

The Court’s basic objection to Justice Scalia’s analysis “is that it would ‘dramatically intrude[] upon traditional state criminal jurisdiction,’ and we avoid reading statutes to have such reach in the

<sup>18</sup> 18 U.S.C. § 229F(8)(A) (emphasis added).

<sup>19</sup> *Id.* (emphasis added).

<sup>20</sup> 18 U.S.C. § 229F(7)(A) (emphasis added).

<sup>21</sup> *Bond v. United States*, 134 S. Ct. 2077, 2094 (2014) (Scalia, J., concurring in the judgment).

<sup>22</sup> *Id.* at 2095.

absence of a clear indication that they do.”<sup>23</sup> This, the Court suggests, is a fundamental principle of federal statutory interpretation: “it is appropriate to refer to basic principles of federalism embodied in the Constitution to resolve ambiguity in a federal statute.”<sup>24</sup>

Fair enough, and this solicitude for federalism is to be applauded, but the key word here is “ambiguity.” As the Court acknowledges, this principle does not come into play if the statute is clear. And, again, at the end of the chain of statutory definitions in this case is a provision that could not be clearer: the statute applies to chemicals that “can cause death, temporary incapacitation or permanent harm.” It is undisputed that Mrs. Bond’s chosen chemicals can cause such harm. In order to bring its federalism canon into play, the Court must struggle mightily to find ambiguity in a carefully defined term. The effort is unpersuasive.

The Court gets off on the wrong foot with the first sentence of analysis: “Section 229 exists to implement the Convention, so we begin with that international agreement.”<sup>25</sup> In a question of statutory interpretation, one should always begin not with why a statute purportedly exists but with what it actually says.<sup>26</sup> Here, the Court begins, not with the text of the statute, or even the text of the treaty, but rather with the Court’s own guess as to the intention of the treaty makers. “There is no reason to think the sovereign nations that ratified the Convention were interested in anything like Bond’s common law assault.”<sup>27</sup> Probably true, but surely beside the point. Mrs. Bond was charged with violating a United States statute, duly passed by the House of Representatives, passed by the Senate, and signed by the president. The private intentions of, say, Vladimir Putin, should have nothing to do with its interpretation.

In any case, after positing the private intentions of foreign sovereigns, the Court then turns to the statute itself, ostensibly to divine the meaning of “chemical weapon.” But here again, the Court starts off on the wrong foot: “To begin, as a matter of natural meaning, an educated user of English would not describe Bond’s crime as

<sup>23</sup> *Id.* at 2088 (majority opinion) (quoting *United States v. Bass*, 404 U.S. 336, 350 (1971)).

<sup>24</sup> *Id.* at 2090.

<sup>25</sup> *Id.* at 2087.

<sup>26</sup> See, e.g., *U.S. v. Alvarez*, 511 U.S. 350, 356 (1994) (“When interpreting a statute, we look first and foremost to its text.”).

<sup>27</sup> *Bond*, 134 S. Ct. at 2087.

involving a ‘chemical weapon.’”<sup>28</sup> True, but irrelevant. There is no call to speculate about the “natural meaning” of “chemical weapon,” because *Congress has defined the term*.

To understand how statutory definitions work, it is useful first to consider how statutes work without them. If Congress uses a vague phrase . . . without defining it, then courts must give the phrase content by bringing various tools of statutory interpretation to bear on the ambiguity . . . . Courts might look the words up in a dictionary. They might look to other uses of the phrase in the same statute or perhaps in other statutes and compare contexts. They might look to committee reports and other forms of legislative history. They might try to discern the purpose of the act . . . . Conversely, when Congress inserts a definitional section, courts resort not to their usual grab bags of interpretive tools, but to the statutory definition alone. Congress in effect replaces a complicated and fuzzy algorithm with a simple cut-and-paste function: “Where one sees X, one shall read Y.” No guesswork is necessary . . . . Cut and paste.<sup>29</sup>

The entire point of a statutory definition is to obviate an unstructured judicial inquiry into “natural meaning.” When Congress fails to define a term, the Court may try to discern its “natural meaning,” and this judicially derived definition will win the day. But when Congress does define a term, the congressional definition must trump any judicial divination of “natural meaning” in exactly the same way, and for the same reason, that statutes trump common law.<sup>30</sup> This is so even if—one might say especially if—the legislative

<sup>28</sup> *Id.* at 2090.

<sup>29</sup> Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 *Harv. L. Rev.* 2085, 2103–04 (2002).

<sup>30</sup> *Id.* at 2107; see also *id.* at 2119 (“The ‘interpretive indicia’ of a text depend entirely on the interpretive methodology applied to it. That is why it is essential, when asking whether Congress may pass a general prospective interpretive rule, to ask first: *what is the constitutional status of the rule that Congress would displace?* To claim, as [Laurence] Tribe does, that all ‘rules of construction contained in the United States Code’ may be trumped by ‘other interpretive indicia’ is in effect to claim that all the interpretive tools currently used by the courts—even mere syntactical canons—are constitutionally required. Since it is implausible that the Constitution requires a completely specified interpretive methodology, this view amounts to an untenable endorsement of imperial judging at the expense of democratic legislation.”(footnotes omitted) (emphasis in original)).

definition differs substantially from common usage. As Justice Scalia writes:

There is no opinion of ours, and none written by any court or put forward by any commentator since Aristotle, which says, or even suggests, that “dissonance” between ordinary meaning and the unambiguous words of a definition is to be resolved in favor of ordinary meaning. If that were the case, there would hardly be any use in providing a definition.<sup>31</sup>

To see the point most simply, consider the use of dictionaries. The judicial search for “natural meaning” will often begin with a turn to dictionaries. But an immediate problem presents itself. To which dictionary should courts turn? In this case, the Court chooses *Webster’s Third New International Dictionary* and *The American Heritage Dictionary*.<sup>32</sup> But how can it be sure that Congress didn’t have the *Oxford English Dictionary* in mind instead?<sup>33</sup>

Rather than leaving potential ambiguities to the vagaries of “natural meaning” or dictionary roulette, Congress may choose to define key terms itself. In effect, Congress declares that, for certain specified terms, the U.S. Code itself is the official and exclusive dictionary.<sup>34</sup> When Congress does so, its definition should be the final word on the matter. The Court has generally been perfectly clear about this point: “When a statute includes an explicit definition, we must follow that definition, even if it varies from that term’s ordinary meaning.”<sup>35</sup>

But in *Bond*, the Court turns this principle on its head. In Part III-B, the heart of the Court’s opinion, it quotes both *Webster’s Third New International Dictionary* and *The American Heritage Dictionary*. Yet not once in this section does it quote, let alone parse, the definition that Congress itself provided in the U.S. Code. Only by overlooking Congress’s definition altogether does the Court find the ambiguity that it seeks. In an act of interpretive perversity, the Court (1) posits a “natural meaning” of “chemical weapons,” (2) declares that “natural

<sup>31</sup> *Bond*, 134 S. Ct. at 2096 (Scalia, J., concurring in the judgment).

<sup>32</sup> *Id.* at 2090 (majority opinion).

<sup>33</sup> See generally Rosenkranz, *supra* note 29, at 2147.

<sup>34</sup> See *id.* at 2103–06.

<sup>35</sup> *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000) (emphasis added).

meaning” to be ambiguous, and then (3) holds that this ambiguous “natural meaning” trumps Congress’s own clear definition.

Here is the Court, explaining the source of the supposed ambiguity:

[A]mbiguity derives from the improbably broad reach of the key statutory definition given the term—“chemical weapon”—being defined; the deeply serious consequences of adopting such a boundless reading; and the lack of any apparent need to do so in light of the context from which the statute arose—a treaty about chemical warfare and terrorism. We conclude that, in this curious case, we can insist on a clear indication that Congress meant to reach purely local crimes, before interpreting the statute’s expansive language in a way that intrudes on the police power of the States.<sup>36</sup>

And here is Justice Scalia’s devastating reply: “Imagine what future courts can do with that judge-empowering principle: Whatever has improbably broad, deeply serious, and apparently unnecessary consequences . . . is ambiguous!”<sup>37</sup>

Oddly, the Court seems to have overlooked the strongest precedent for its position. In *Will v. Mich. Dep’t of State Police*, the Court seemed to allow “common usage” to trump the Dictionary Act, holding that a general definition at the beginning of the U.S. Code was not a clear enough statement to overcome a particular federalism presumption of statutory interpretation.<sup>38</sup> This holding is much closer to the Court’s approach than any of the other cases on which it relies.

In any event, though, *Will* is distinguishable and Justice Scalia would still have the better of the argument. The Dictionary Act is generally applicable throughout the U.S. Code, and perhaps federalism canons are “constitutional default rule[s] required by the Tenth Amendment,”<sup>39</sup> which cannot be reversed *wholesale* by a global interpretive rule. But in this case, the definitional provision is not *generally applicable*; it is *statute-specific*. When a statute specifies that X shall mean Y *for purposes of that particular statute*, that definition should constitute a clear enough statement to overcome any such presumption.<sup>40</sup>

<sup>36</sup> Bond, 134 S. Ct. at 2090.

<sup>37</sup> *Id.* at 2096 (Scalia, J., concurring in the judgment).

<sup>38</sup> 491 U.S. 58, 69–70 (1989).

<sup>39</sup> See Rosenkranz, *supra* note 29, at 2122.

<sup>40</sup> See *id.* at 2121–23.

The silver lining of the Court's statutory sleight-of-hand is that it may be limited to these facts. At each key point in its analysis, the Court is at pains to emphasize that this is an "unusual case."<sup>41</sup> One senses that the Court—or at least the chief justice—was a bit unnerved by Justice Scalia's prediction that the majority's "interpretive principles never before imagined . . . will bedevil our jurisprudence (and proliferate litigation) for years to come."<sup>42</sup>

Not so, coos the Court, for this is a "curious case."<sup>43</sup>

*This case is unusual, and our analysis is appropriately limited. Our disagreement with our colleagues reduces to whether section 229 is "utterly clear." Post, at 5 (SCALIA, J., concurring in judgment). We think it is not, given that the definition of "chemical weapon" in a particular case can reach beyond any normal notion of such a weapon, that the context from which the statute arose demonstrates a much more limited prohibition was intended, and that the most sweeping reading of the statute would fundamentally upset the Constitution's balance between national and local power. This exceptional convergence of factors gives us serious reason to doubt the Government's expansive reading of section 229, and calls for us to interpret the statute more narrowly.*<sup>44</sup>

Happily, this sounds almost like the infamous *Bush v. Gore* one-train-only disclaimer: "Our consideration is limited to the present circumstances."<sup>45</sup> It is to be hoped that "[t]his exceptional convergence of factors" will never converge again, and the Court will return to its prior practice of honoring statutory definitions provided by Congress.

In any event, the Court concluded, by dubious statutory interpretation, that the statute did not reach Mrs. Bond's conduct. Thus, her conviction must be overturned—the right result, but for the wrong reason. For the majority, that was the end of the case.

<sup>41</sup> *Id.* at 2092.

<sup>42</sup> *Id.* at 2102.

<sup>43</sup> *Bond v. United States*, 134 S. Ct. 2077, 2090 (2014).

<sup>44</sup> *Id.* at 2093 (emphasis added).

<sup>45</sup> *Bush v. Gore*, 531 U.S. 98, 109 (2000).

## II. Can a Treaty Increase the Legislative Power of Congress?<sup>46</sup>

But for Justices Scalia, Thomas, and Alito, the statute is crystal clear, and it clearly covers Mrs. Bond's conduct. So they are obliged to answer a momentous constitutional question: *did Congress have power to enact the statute in the first place?*

As to this point, the government argued that, because the United States has entered into a treaty about chemical weapons, Congress automatically has the power to enact a statute on this subject, even if it would have lacked this power otherwise. It argued, in other words, that *a treaty can increase the legislative power of Congress*. For this proposition, it relied on a single sentence from *Missouri v. Holland*: "If the treaty is valid there can be no dispute about the validity of the [implementing] statute under Article I, § 8, as a necessary and proper means to execute the powers of the government."<sup>47</sup>

Cato filed a brief as amicus, based on my *Harvard Law Review* article, arguing that *Missouri v. Holland* is wrong on this point and should be overruled.<sup>48</sup> Justice Scalia, joined by Justice Thomas, agreed with us, adopting not just our conclusion but our reasoning as well. Cato's record at the Court is remarkably good,<sup>49</sup> but it is rare that an opinion ends up tracking our brief so closely.

### A. Text

The two relevant clauses of the Constitution are the Necessary and Proper Clause and the Treaty Clause, though you would never know it from Justice Holmes's cryptic opinion in *Missouri v. Holland*. "Justice Holmes did not quote either the Treaty Clause or the Necessary and Proper Clause, let alone discuss how they fit together grammatically. Indeed, it is striking to find that the phrase 'necessary and proper' and the phrase 'to make treaties' *never* appear in

<sup>46</sup> This part is largely derived from Nicholas Quinn Rosenkranz, Justice Scalia's Masterful Concurrence in *Bond v. United States*, Volokh Conspiracy (June 3, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/06/03/justice-scalias-masterful-concurrence-in-bond-v-united-states>.

<sup>47</sup> *Missouri v. Holland*, 252 U.S. 416, 432 (1920).

<sup>48</sup> Cato Brief, *supra* note 11, at 2; Rosenkranz, *supra* note 10, at 1867.

<sup>49</sup> See, e.g., Ilya Shapiro, Cato Went 10-1 at Supreme Court This Term, Cato at Liberty (Jul. 2, 2014), <http://www.cato.org/blog/cato-went-10-1-supreme-court-term>.

the same sentence in the *United States Reports*.<sup>50</sup> But now, at last, they shall. Justice Scalia quotes both clauses and carefully conjoins them: “Read together, the two Clauses empower Congress to pass laws ‘necessary and proper for carrying into Execution . . . [the] Power . . . to make Treaties.’”<sup>51</sup>

Once the clauses are properly conjoined, it becomes clear that they do not give Congress the power that the government claimed in this case. Per Justice Scalia: “It is obvious what the Clauses, read together, do *not* say. They do not authorize Congress to enact laws for carrying into execution ‘Treaties.’”<sup>52</sup> The key phrase is the infinitive “to make”: “The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution . . . [the] Power . . . *to make* Treaties.”

As Justice Scalia explains: “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.’”<sup>53</sup> The distinction between “making” a treaty and giving it domestic legal effect goes back at least as far as Blackstone.<sup>54</sup> As Justice Scalia writes: “Upon the President’s agreement and the Senate’s ratification, a treaty . . . has been *made* and is not susceptible of any more making.”<sup>55</sup>

In short, as Justice Scalia explains:

[A] power to help the President *make* treaties is not a power to *implement* treaties already made. See generally Rosenkranz, Executing the Treaty Power, 118 Harv. L. Rev. 1867 (2005).

<sup>50</sup> Rosenkranz, *supra* note 10, at 1882 (emphasis in original).

<sup>51</sup> *Bond v. United States*, 134 S. Ct. 2077, 2098 (2014) (Scalia, J., concurring in the judgment).

<sup>52</sup> *Id.* at 2098 (emphasis in original); see also Rosenkranz, *supra* note 10, at 1882 (“The Power granted to Congress is emphatically not the power to make laws for carrying into execution ‘the treaty power,’ let alone the power to make laws for carrying into execution ‘all treaties.’”).

<sup>53</sup> *Bond*, 134 S. Ct. at 2099 (Scalia, J., concurring in the judgment); see also Rosenkranz, *supra* note 10, at 1884 (“Nor will it do to say that the phrase ‘make Treaties’ is a term of art meaning ‘conclude treaties with foreign nations and then give them domestic legal effect.’”).

<sup>54</sup> Rosenkranz, *supra* note 10, at 1867.

<sup>55</sup> *Bond*, 134 S. Ct. at 2098 (Scalia, J., concurring in the judgment); see also Rosenkranz, *supra* note 10, at 1884 (“The ‘Power . . . to make Treaties’ is exhausted once a treaty is ratified; implementation is something else altogether.”) (emphasis in original).

Once a treaty has been made, Congress's power to do what is "necessary and proper" to assist the making of treaties drops out of the picture. To legislate compliance with the United States' treaty obligations, Congress must rely upon its independent (though quite robust) Article I, § 8, powers.<sup>56</sup>

In this case, Congress could not rely on any other Article I, Section 8, power (oddly, the government waived reliance on the Commerce Clause), and so the statute should have fallen.

### *B. Structure*

The textual point coheres perfectly with constitutional structure. Justice Scalia begins with the constitutional axiom that Congress has limited and enumerated powers, and then explains how the government's argument would constitute a "loophole" to that fundamental principle.<sup>57</sup> If the government is right, "then the possibilities of what the Federal Government may accomplish, with the right treaty in hand, are endless and hardly farfetched . . . . It could begin, as some scholars have suggested, with abrogation of this Court's constitutional rulings."<sup>58</sup> But this is, as Justice Scalia says, "the least of the problem."<sup>59</sup> The government's position "places Congress only one treaty away from acquiring a general police power."<sup>60</sup> This is an unthinkable result: countless canonical opinions insist that Congress can have no such power.

To see the point another way, consider that, under *Reid v. Covert*, a treaty cannot empower Congress to violate the Bill of Rights.<sup>61</sup> But under *Missouri v. Holland*, the Tenth Amendment is treated differently: a treaty *can* empower Congress to exceed its enumerated powers and violate the Tenth Amendment. This distinction is untenable. "The distinction between provisions protecting individual liberty, on the one hand, and 'structural' provisions, on the other, cannot be the explanation, since structure in general—and especially the

<sup>56</sup> *Bond*, 134 S. Ct. at 2099 (Scalia, J., concurring in the judgment) (emphasis in original).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 2100.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 2101.

<sup>61</sup> *Reid v. Covert*, 354 U.S. 1, 16 (1957) (plurality).

structure of limited federal powers—is *designed* to protect individual liberty.”<sup>62</sup> *Reid* and *Holland* cannot be reconciled; *Reid* is right and *Holland* is wrong.

This leaves one last quirk. If a self-executing treaty can reach matters other than those in Article I, Section 8, isn’t it odd to say that a non-self-executing treaty followed by an implementing statute cannot? At first glance, this may seem anomalous, but it actually makes perfect structural sense. Justice Scalia explains:

Suppose, for example, that the self-aggrandizing Federal Government wishes to take over the law of intestacy. If the President and the Senate find some foreign state as a ready accomplice, they have two options. First, they can enter into a treaty with “stipulations” specific enough that they “require no legislation to make them operative,” *Whitney v. Robertson*, 124 U. S. 190, 194 (1888), which would mean in this example something like a comprehensive probate code. But for that to succeed, the President and a supermajority of the Senate would need to reach agreement on all the details—which, when once embodied in the treaty, could not be altered or superseded by ordinary legislation. The second option—far the better one—is for Congress to gain lasting and flexible control over the law of intestacy by means of a non-self-executing treaty. “[Implementing] legislation is as much subject to modification and repeal by Congress as legislation upon any other subject.” *Ibid.* And to make such a treaty, the President and Senate would need to agree only that they desire power over the law of intestacy.<sup>63</sup>

One could say the same thing about family law:

[A]ssume that the federal government desires power that it would otherwise lack over some subject matter—say, for example, family law. One option would be to make a self-executing treaty with the prolixity of a family law code, which would, of its own force, constitute the family law of the United States. This option is unlikely to be very tempting, however, because it would require that the President and two-thirds of the Senate agree on a particular family law code, to be frozen into the treaty (and arguably beyond the

<sup>62</sup> Bond, 134 S. Ct. at 2101 (Scalia, J., concurring in the judgment) (emphasis in original); see also Cato Brief, *supra* note 11, at 21.

<sup>63</sup> Bond, 134 S. Ct. at 2101–02 (Scalia, J., concurring in the judgment).

power of Congress to amend or supersede). But if Justice Holmes were correct, there would be a second option: the United States could enter into a *non-self-executing* treaty that simply promised (to attempt) to regulate family law in the United States “in a manner that best protects the institution of the family.” This treaty would be far more tempting to the treaty-makers on the American side, because it would require the President and two-thirds of the Senate to agree on only one thing: *that they want power over family law*.<sup>64</sup>

The ultimate point here is that “the Constitution should not be construed to create this doubly perverse incentive—an incentive to enter ‘entangling alliances’ merely to attain the desired side effect of increased domestic legislative power.”<sup>65</sup> This deep structural problem can be solved only by repudiating *Missouri v. Holland* and holding that a treaty cannot increase the legislative power of Congress.

### III. Are There Subject-Matter Limitations on the Scope of the Treaty Power?

#### A. Justice Thomas’s Concurrence

The discussion above has an unspoken premise: Justice Scalia assumed that the treaty itself was a valid treaty. It is this assumption that sets up the question of whether the treaty can increase the legislative power of Congress. Justice Scalia made that assumption because the parties did too. Mrs. Bond did not argue that the president lacked the power to enter into the treaty, and she did not contend that the treaty itself was invalid.

Nevertheless, Justice Thomas wrote a separate concurrence about the scope of the treaty power, which Justices Scalia and Alito joined. The Constitution provides that “The President . . . shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.”<sup>66</sup> As Justice Thomas points out, though: “The Constitution does not . . . comprehensively define the proper bounds of the Treaty Power, and this Court has not yet had occasion to do so.”<sup>67</sup> In other words, the

<sup>64</sup> Rosenkranz, *supra* note 10, at 1930 (emphasis in original).

<sup>65</sup> *Id.* at 1932.

<sup>66</sup> U.S. Const. art. II, § 2, cl. 2.

<sup>67</sup> Bond, 134 S. Ct. at 2103 (Thomas, J., concurring in the judgment).

Constitution spells out the procedure for making treaties, but it does not expressly define the word “Treaties” or specify what are proper treaties under the clause. “As a result,” explains Justice Thomas, “some have suggested that the Treaty Power is boundless—that it can reach any subject matter, even those that are of strictly domestic concern.”<sup>68</sup>

This is a startling suggestion, especially when combined with the *Missouri v. Holland* point discussed above.<sup>69</sup> Again, *Missouri v. Holland* seemed to say that Congress automatically has power to make a law implementing a treaty, even if it would have lacked the power to make that same law absent the treaty. It seemed to say, in other words, that a treaty can increase the legislative powers of Congress. If this is so, and if it is correct that a treaty “can reach any subject matter, even those that are of strictly domestic concern,”<sup>70</sup> then “the legislative powers are not merely somewhat expandable by treaty; they are expandable virtually without limit.”<sup>71</sup>

Justice Thomas emphatically rejects that possibility. First, he joins Justice Scalia’s concurrence, concluding that *Missouri v. Holland* is wrong: a treaty cannot increase the legislative power of Congress. Second, he “write[s] separately to suggest that the Treaty Power is itself a limited federal power.”<sup>72</sup>

The balance of his concurrence is a thorough and scholarly historical exploration of what those limits might be. His opinion is a model of originalism—parsing early treatises, Founding-era dictionaries, pre-constitutional practice, constitutional ratification debates, the Jay Treaty debates, and any other source that might shed light on the original meaning of the word “Treaties.” And while he does not reach a final conclusion—again, Mrs. Bond did not challenge the validity of the treaty in this case—Justice Thomas does find powerful historical evidence “suggesting that *the Treaty Power can be used to*

<sup>68</sup> *Id.* at 2100 (citing Restatement (Third) of Foreign Relations Law of the United States § 302, cmt. c (1986)).

<sup>69</sup> See *supra* Part II.

<sup>70</sup> See *supra* note 61 and accompanying text.

<sup>71</sup> Rosenkranz, *supra* note 10, at 1893.

<sup>72</sup> Bond, 134 S. Ct. at 2103 (Thomas, J., concurring in the judgment).

*arrange intercourse with other nations, but not to regulate purely domestic affairs.*"<sup>73</sup>

This distinction is quite plausible. It makes good structural sense, and Justice Thomas's historical evidence is compelling. In practice, however, it might prove to be a very difficult line to draw. Justice Thomas recognizes this problem, but he insists that the Court should not be daunted:

In an appropriate case, I would draw a line that respects the original understanding of the Treaty Power. I acknowledge that the distinction between matters of international intercourse and matters of purely domestic regulation may not be obvious in all cases. But this Court has long recognized that the Treaty Power is limited, and hypothetical difficulties in line-drawing are no reason to ignore a constitutional limit on federal power.<sup>74</sup>

#### *B. Justice Alito's Concurrence*

Justice Alito's opinion is, in some ways, the most intriguing of them all. But to understand its significance, it is crucial to recall where he stands on the other three opinions.

Again, the majority opinion held that the Chemical Weapons Convention Implementation Act did not reach Mrs. Bond's conduct. For those six justices, that conclusion is enough to decide the case: her conviction must be overturned. But Justice Alito did not sign on to the majority opinion; instead, he signed onto the statutory interpretation section of Justice Scalia's opinion, concluding that the statute clearly *does* reach her conduct. This conclusion cannot end the case, because Mrs. Bond's constitutional arguments remain.

Justice Scalia's opinion concludes that *Missouri v. Holland* is wrong: a treaty cannot increase the legislative power of Congress. Since the treaty could not sustain the statute, the statute could not constitutionally be applied to Mrs. Bond. For Justice Scalia, joined by Justice Thomas, that conclusion resolves the case: Mrs. Bond's conviction must be overturned. So those two opinions suffice to resolve the case

<sup>73</sup> *Id.* (emphasis added).

<sup>74</sup> *Id.* at 2110.

for eight of the justices. But Justice Alito did not join that part of Justice Scalia's opinion.

Justice Thomas's opinion "suggest[s]"<sup>75</sup> a possible limit on the president's power to make treaties, and Justice Alito does join that opinion. But nowhere in that opinion does Justice Thomas suggest that anything is wrong with this particular treaty. Again, Mrs. Bond conceded the validity of the treaty, and so Justice Thomas had no occasion to second-guess it or to apply his proposed "international intercourse" test to the present case. His disposition of the case was already determined by Justice Scalia's opinion, which he joined.

So, as a matter of logic, Justice Alito's votes on the prior three opinions do not suffice to decide the case. Absent an opinion of his own, there would not be enough information to determine why he votes to reverse. With that context in mind, it is interesting to parse his one-page concurrence in the judgment. Here is the constitutional analysis in full:

For the reasons set out in Parts I–III of JUSTICE THOMAS' concurring opinion, which I join, I believe that the treaty power is limited to agreements that address matters of legitimate international concern. The treaty pursuant to which §229 was enacted, the Chemical Weapons Convention, is not self-executing, and thus the Convention itself does not have domestic effect without congressional action. The control of true chemical weapons, as that term is customarily understood, is a matter of great international concern, and therefore the heart of the Convention clearly represents a valid exercise of the treaty power. But insofar as the Convention may be read to obligate the United States to enact domestic legislation criminalizing conduct of the sort at issue in this case, which typically is the sort of conduct regulated by the States, the Convention exceeds the scope of the treaty power. Section 229 cannot be regarded as necessary and proper to carry into execution the treaty power, and accordingly it lies outside Congress' reach unless supported by some other power enumerated in the Constitution. The Government has presented no such justification for this statute.<sup>76</sup>

<sup>75</sup> *Id.* at 2103, 2105, 2109.

<sup>76</sup> *Id.* at 2111 (Alito, J., concurring in the judgment).

This is a rich and dense paragraph, but it seems perhaps a bit too quick. Justice Alito may well be right that “the treaty power is limited to agreements that address matters of legitimate international concern.” But simply adverting to Justice Thomas’s opinion may not suffice to make the point. After all, by its own terms, Justice Thomas’s opinion merely “suggests”<sup>77</sup> such a limit; remember, Justice Thomas joined Justice Scalia’s opinion, so for him, any limits on the treaty power were not necessary to decide the case. And, in any event, Justice Thomas’s opinion “suggest[ed]” that the treaty power was limited to “matters of international intercourse,”<sup>78</sup> whereas Justice Alito adopts a subtly different formulation: “matters of legitimate international concern.”<sup>79</sup> One can imagine that these two different formulations might have substantially different consequences.

The heart of Justice Alito’s opinion is this passage:

But insofar as the Convention may be read to obligate the United States to enact domestic legislation criminalizing conduct of the sort at issue in this case, which typically is the sort of conduct regulated by the States, the Convention exceeds the scope of the treaty power. Section 229 cannot be regarded as necessary and proper to carry into execution the treaty power, and accordingly it lies outside Congress’ reach.<sup>80</sup>

The key word here is “insofar.” Did the convention in fact oblige the United States to enact Section 229? The word “insofar” is a neat hedge, but the opinion is rather striking either way. Consider both possibilities.

First, assume that the answer is yes. If so, then Justice Alito concludes that the treaty “exceeds the scope of the treaty power.” In 225 years, the Court has never declared a treaty unconstitutional.<sup>81</sup> Even Justice Thomas, who wrote separately to suggest limits on the treaty power, did not endeavor to apply his suggested limits to this

<sup>77</sup> See *supra* note 75 and accompanying text.

<sup>78</sup> *Bond*, 134 S. Ct. at 2104 (Thomas, J., concurring in the judgment).

<sup>79</sup> *Id.* at 2111 (Alito, J., concurring in the judgment).

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

<sup>81</sup> See Cong. Research Serv., *The Constitution of the United States of America: Analysis and Interpretation*, S. Doc. No. 112-9, at 508 (Centennial ed. 2014) (“It does not appear that the Court has ever held a treaty unconstitutional.”).

particular treaty, let alone declare it unconstitutional. Moreover, Mrs. Bond herself did not argue that this treaty is unconstitutional. If, in fact, Justice Alito meant to declare this treaty unconstitutional *sua sponte*, that would be a dramatic and important conclusion, worthy of a more comprehensive opinion.

Alternatively, assume that the answer is no: the word “insofar” also leaves open the possibility that the convention is *not* best read to obligate the United States to enact the statute at issue in this case. If not, then the treaty is presumably valid and constitutional. But then, consider Justice Alito’s next sentence: “Section 229 cannot be regarded as necessary and proper to carry into execution the treaty power, and accordingly it lies outside Congress’ reach.” The logic here seems to be that if a treaty does *not* “obligate” the United States to enact a particular statute (as we are assuming in this paragraph), then it cannot empower Congress to enact that statute.

Now, Cato certainly agrees with that proposition; it is *a fortiori* from our brief, from my article, and from Justice Scalia’s concurrence. We would say that a treaty cannot empower Congress to enact a statute even if the treaty *does* purport to obligate Congress to do so, let alone if it does not. But again, Justice Alito did not sign on to that part of Justice Scalia’s concurrence. So, for him, this is a new proposition of law. The logical summary of this position is as follows: a valid treaty that *does* obligate Congress “to enact domestic legislation criminalizing . . . the sort of conduct [typically] regulated by the States” *might* empower Congress to enact such legislation (*Holland* says yes; Scalia and Cato and I say no; Justice Alito does not say); but a valid treaty that does *not* obligate (but perhaps cajoles?) Congress to pass such legislation *cannot* empower Congress to do so. This might be right, but it is new and important, and it is in tension with at least a few cases (which seem to suggest that implementing legislation need only be *rationally related* to a treaty).<sup>82</sup> Again, if this

<sup>82</sup> See *Missouri v. Holland*, 252 U.S. 416, 432 (1920); *United States v. Lue*, 134 F.3d 79, 84 (2d Cir. 1998); *United States v. Eramdjian*, 155 F. Supp. 914, 920 (S.D. Cal. 1957) (“Although no mention of marihuana is made in the treaties, marihuana is definitely related to the drug problem and the evils that flow from the use of drugs. A statute which has its impact on both the drugs named in the treaty and on marihuana, related as it is to the drug addiction problem, would seem to us a valid statute to implement a valid treaty.” (footnote omitted)); see also Rosenkranz, *supra* note 10, at 1931.

is the true gravamen of Justice Alito's concurrence, then it is a very important point, worthy of a more detailed opinion.

In short, Justice Alito clearly has subtle intuitions about the scope of the treaty power and about the scope of Congress's power to legislate pursuant to treaty. Unfortunately, there are only hints of these intuitions in his rich but cryptic concurrence. At any rate, Justice Alito correctly concludes that the statute "lies outside Congress' reach" and so cannot constitutionally be applied to Mrs. Bond.<sup>83</sup>

### **Conclusion**

*Bond v. United States* was, in a way, a disappointment; many had hoped that the Court would at last disavow Justice Holmes's pernicious suggestion that a treaty can increase the legislative power of Congress. Instead, a majority of the Court avoided this important issue, but only by an implausible stretch of statutory interpretation.

The Court should generally be commended for avoiding difficult constitutional questions when it is fairly possible to do so. But the Roberts Court seems to take this principle too far. When the statute is clear and the constitutional issue is squarely presented, there is no "judicial restraint" in rewriting the statute to dodge the constitutional question. As Justice Scalia says:

We have here a supposedly "narrow" opinion which, in order to be "narrow," sets forth interpretive principles never before imagined that will bedevil our jurisprudence (and proliferate litigation) for years to come. The immediate product of these interpretive novelties is a statute that should be the envy of every lawmaker bent on trapping the unwary with vague and uncertain criminal prohibitions. All this to leave in place an ill-considered *ipse dixit* that enables the fundamental constitutional principle of limited federal powers to be set aside by the President and Senate's exercise of the treaty power. We should not have shirked our duty and distorted the law to preserve that assertion; we should have welcomed and eagerly grasped the opportunity—nay, the obligation—to consider and repudiate it.<sup>84</sup>

<sup>83</sup> Bond, 134 S. Ct. at 2111 (Alito, J., concurring in the judgment).

<sup>84</sup> *Id.* at 2102 (Scalia, J., concurring in the judgment).

Happily, though, three justices did grasp this opportunity. Justice Thomas, joined by Justices Scalia and Alito, wrote an originalist tour de force suggesting “that the Treaty Power can be used to arrange intercourse with other nations, but not to regulate purely domestic affairs.”<sup>85</sup>

And Justice Scalia, joined by Justice Thomas, produced a textual and structural masterpiece, concluding that the Necessary and Proper Clause does not empower Congress to implement treaties. “To legislate compliance with the United States’ treaty obligations, Congress must rely on its independent (though quite robust) Article I, § 8, powers.”<sup>86</sup>

As for *Missouri v. Holland*, Justices Scalia, Thomas, and Alito all agree that it “upheld a statute implementing [a] treaty based on an improperly broad view of the Necessary and Proper Clause.”<sup>87</sup> Two of them—Scalia and Thomas—went further and made clear that a treaty cannot increase the legislative power of Congress; *Missouri v. Holland*’s single “unreasoned and citation-less sentence”<sup>88</sup> to the contrary was an “ill-considered *ipse dixit*”<sup>89</sup> that should be “repudiate[d].”<sup>90</sup>

Unfortunately, these were concurrences, not majorities. However, it is important to remember that the other six justices expressed no view about whether a treaty can increase the legislative power of Congress. These powerful concurrences went unanswered, and they may well provide a roadmap in a future case. *Missouri v. Holland* remains the law of the land, but in a proper case, it may yet be overruled.

<sup>85</sup> *Id.* at 2103 (Thomas, J., concurring in the judgment).

<sup>86</sup> *Id.* at 2099 (Scalia, J., concurring in the judgment).

<sup>87</sup> *Id.* at 2109 (Thomas, J., concurring in the judgment).

<sup>88</sup> *Id.* at 2098 (Scalia, J., concurring in the judgment).

<sup>89</sup> *Id.* at 2102; see also Rosenkranz, *supra* note 10, at 1932.

<sup>90</sup> Bond, 134 S. Ct. at 2102 (Scalia, J., concurring in the judgment).