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## REDEEMING BOND?

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Professor Heather Gerken subjects the Supreme Court's decision in *Bond v. United States*<sup>1</sup> to a range of pointed and well-deserved criticisms. In particular, she notes the circularity of Chief Justice Roberts's statutory analysis, writing that "the Court thought the statute was ambiguous . . . [b]ecause it had to be."<sup>2</sup> Gerken also characterizes *Bond* as a return to what she terms a "relational" theory of federalism,<sup>3</sup> according to which the analysis begins with the power of the states. She contrasts this approach with what she suggests is the only other alternative offered by the Rehnquist and Roberts Courts: an analysis that "defines federal power in isolation."<sup>4</sup> This federal power-driven approach "start[s] with Congress and attempt[s] to delineate the bounds of its power without reference to the states."<sup>5</sup> In the return to the relational account, Gerken finds something to praise in *Bond* (although she notes that the Court "takes the wrong path to get there" by focusing on state sovereignty,<sup>6</sup> a concept she believes has become "a campfire story"<sup>7</sup>). A federalism analysis that starts with the states is clear, and it avoids the problem of "how to bound the boundless."<sup>8</sup> In the end, then, Gerken endorses *Bond* as a demonstration that "[b]ad theory can make good law or at least halfway decent doctrine" that is "reasonably manageable and coherent."<sup>9</sup>

What Gerken praises the Court for, however, I would argue is a pervasive, and now deepening, problem in recent federalism doctrine. The "clear statement" rule of *Bond*<sup>10</sup> — which, given that it breaks down in the pages of the Court's muddled ambiguity analysis, Gerken

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<sup>1</sup> 134 S. Ct. 2077 (2014).

<sup>2</sup> Heather K. Gerken, *The Supreme Court, 2013 Term — Comment: Slipping the Bonds of Federalism*, 128 HARV. L. REV. 85, 90 (2014).

<sup>3</sup> *Id.* at 97.

<sup>4</sup> *Id.* at 98; *see id.* at 97–99. I have discussed the differences between the Article I-focused approach to federalism and a Tenth Amendment-focused one in the context of the Necessary and Proper and General Welfare Clauses. *See* Alison L. LaCroix, *The Shadow Powers of Article I*, 123 YALE L.J. 2044, 2047–48 (2014).

<sup>5</sup> Gerken, *supra* note 2, at 86.

<sup>6</sup> *Id.* at 122.

<sup>7</sup> *Id.* at 123.

<sup>8</sup> *Id.* at 101.

<sup>9</sup> *Id.* at 123.

<sup>10</sup> *Bond v. United States*, 134 S. Ct. 2077, 2093 (2014).

rightly treats as existing only in the Court's description of what it is doing — appears to be a rule directing that federalism analysis begin with a search for, and measurement of, the essential localness of the particular activity to be regulated. Unless the relational, state-focused account is premised on a substantive commitment to state sovereignty itself, however — a view that Gerken clearly does not embrace, as she terms it “mostly claptrap”<sup>11</sup> — it is not clear why the relational account is a clearer statement than an Article I–focused approach would be. By itself, the state-focused approach provides no additional analytical clarity unless it is accompanied by a prior determination of which side should win in a contest between federal and state power.

If we follow Gerken, however, and disclaim a normative preference for strong state sovereignty, we might equally well begin the federalism investigation by looking to congressional power. Starting with Congress's Article I power does not mean that federal authority is limitless, any more than starting with the states' power means that state authority will always prevail. So, if the state-focused approach to answering federalism questions is not clear, and if one does not endorse a substantive position of strong state sovereignty, what in the end does *Bond* contribute to the doctrine on federalism?

In my view, *Bond* works a significant change in the federalism case law, but not precisely in the direction that Gerken suggests. Gerken frames *Bond* as a crisis averted for more nationally inclined champions of federalism, and as a salutary opportunity to rethink how a state-focused analysis might be applied to federalism cases. But although *Bond* initially appears to depend on the relationship between the state side of the federalism analysis and the congressional side, it ultimately turns out to be much more about a judicially defined hierarchy of congressional powers. And while the Court labors to conceal behind a scrim of statutory interpretation its sweeping structural and supra-textual account of why the Chemical Weapons Convention Implementation Act of 1998 does not reach Carol Anne Bond's conduct, it continues its quiet transformation of federalism doctrine.

### I. LOCALNESS AND THE HIERARCHY OF ARTICLE I POWERS

*Bond* demonstrates that a majority of the Court believes that there exists a stable category of “purely local” activities.<sup>12</sup> We already knew this; one need only think back to *United States v. Lopez*<sup>13</sup> and, more recently, *National Federation of Independent Business v. Sebelius*<sup>14</sup>

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<sup>11</sup> Gerken, *supra* note 2, at 99.

<sup>12</sup> *Bond*, 134 S. Ct. at 2092.

<sup>13</sup> 514 U.S. 549 (1995).

<sup>14</sup> 132 S. Ct. 2566 (2012).

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(*NFIB*), to see the power of “the local” in federalism analysis. But *Bond* is different because it shows us the Court formulating a hierarchy of congressional powers that turns in part on the strength of this localness analysis. Even Chief Justice Roberts’s opinion for the Court, which quickly disavows any need to decide a constitutional question,<sup>15</sup> returns repeatedly to the theme of the local.<sup>16</sup>

*Bond* gives us a scale of localness that bears directly on the strength of Congress’s powers: the more local the Court deems the activity in question, the more barriers the Court will place in the way of congressional regulation. The novelty of *Bond* is including the power to implement treaties among the low-level congressional powers — the suspect ones down at the bottom of the hierarchy, where most activities are local enough to render them largely unregulable by Congress. And which power is at the top of the hierarchy? The Article I power without peer, the commerce power: a clause so powerful, a case law so problematic, that in case after case, the government has declined even to argue its applicability.<sup>17</sup> In the end, then, *Bond* is a case about the commerce power.

To see this, let us return to the two main problems with *Bond*. First, consider the evident — but perhaps deliberate — confusion about the basis of Chief Justice Roberts’s opinion for the Court. Is it “just” a case of statutory construction, or does the decision in fact turn on deep constitutional principles? As Justice Scalia noted in his concurrence, the Court’s opinion “starts with the federalism-related consequences of the statute’s meaning and reasons backwards, holding that, if the statute has what the Court considers a disruptive effect on the ‘federal-state balance’ of criminal jurisdiction, that effect causes the text, even if clear on its face, to be ambiguous.”<sup>18</sup> But an equally striking aspect of the Chief Justice’s opinion — aside from an inexplicably

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<sup>15</sup> *Bond*, 134 S. Ct. at 2087 (stating that the “well-established principle . . . that normally the Court will not decide a constitutional question if there is some other ground on which to dispose of the case” required the Court to begin with the statutory issue (quoting *Escambia County v. McMillan*, 466 U.S. 48, 51 (1984) (per curiam)) (internal quotation marks omitted)).

<sup>16</sup> *Id.* (referring to “the Constitution’s division of responsibility between sovereigns and leaving the prosecution of purely local crimes to the States”).

<sup>17</sup> See, e.g., Transcript of Oral Argument at 22, United States v. Comstock, 560 U.S. 126 (2010) (No. 08-1224), [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/08-1224.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-1224.pdf) [<http://perma.cc/P49L-XABV>] (Then-Solicitor General Elena Kagan declined to offer a Commerce Clause-based argument for the federal civil commitment statute on the ground that “the government has never argued the Commerce Clause here in the sense that it has never argued that these activities have a substantial effect on interstate commerce, and it hasn’t done so because of . . . the *Morrison* precedent.” (citing *United States v. Morrison*, 529 U.S. 598 (2000) (striking down a civil remedy provision of the Violence Against Women Act as beyond the scope of Congress’s commerce power)); see also LaCroix, *supra* note 4, at 2072–73 (discussing the role of the commerce power in *Comstock* and other cases).

<sup>18</sup> *Bond*, 134 S. Ct. at 2095 (Scalia, J., concurring) (emphasis omitted) (citation omitted).

sharp tone more characteristic of an angry dissent — is its relentless focus on the “purely local” nature of Bond’s activity.<sup>19</sup> As Justice Scalia and Professor Gerken both point out, the statute at issue was not ambiguous and clearly covered Bond’s conduct.<sup>20</sup> Despite the Court’s statements about sticking to the statutory issue, however, this undeniable foray into constitutional analysis raises the substantive stakes. Moreover, it gives the Court the rhetorical ability to conjure and then hold at bay another bête noire, an unfettered federal police power — the antithesis of a concern for local authority.

This brings us to *Bond*’s second and more significant consequence: it continues the recent trend of federalism cases in which the Court suggests that there is a hierarchy of Article I powers. In such cases, the Court insists on a distinct domain of “purely local” activity that is presumptively not federally regulable, and it then measures Congress’s power relative to the localness of that domain.<sup>21</sup> The Court thus has set up a pair of interlocking scales: first, a scale of localness, which in turn bears directly on a second scale, the strength of Congress’s Article I powers. This approach stands in sharp contrast to other approaches that begin with congressional power, interpret it according to the enumeration principle, and treat it as “supreme within its sphere of action” before reaching any freestanding concerns about state sovereignty.<sup>22</sup> Under the Court’s new approach, the more local the underlying activity is deemed, the weaker the respective congressional power in that domain must be.

And, paradoxically, the stronger the congressional power, the harder it has become to actually use.<sup>23</sup> Here is where the two scales — localness and the hierarchy of congressional powers — interact. The consequence of a finding of localness depends on which of the congressional powers is at stake.<sup>24</sup> A finding that a particular activity is paradigmatically “local” will outweigh a lower-level Article I power, but it

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<sup>19</sup> *Id.* at 2083, 2087, 2090, 2092 (majority opinion).

<sup>20</sup> See *id.* at 2094–95 (Scalia, J., concurring); Gerken, *supra* note 2, at 89–90.

<sup>21</sup> See generally LaCroix, *supra* note 4 (discussing cases dealing with the necessary and proper and spending powers).

<sup>22</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819); see also *Hammer v. Dagenhart*, 247 U.S. 251, 278 (1918) (Holmes, J., dissenting) (“I should have thought that the most conspicuous decisions of this Court had made it clear that the power to regulate commerce and other constitutional powers could not be cut down or qualified by the fact that it might interfere with the carrying out of the domestic policy of any State.”).

<sup>23</sup> My colleague Aziz Huq has made a related but distinct argument that the Court has adopted a “tiers of scrutiny” approach to enumerated powers cases. See Aziz Z. Huq, *Tiers of Scrutiny in Enumerated Powers Jurisprudence*, 80 U. CHI. L. REV. 575 (2013).

<sup>24</sup> Note that this discussion focuses solely on Congress’s Article I powers. The question of the relative hierarchy of the Article I powers versus Congress’s power under section 5 of the Fourteenth Amendment is a distinct issue.

might not squelch a regulation under one of the powers that the Court increasingly treats as higher-value sources of congressional authority.

The hierarchy of Article I powers that emerges from the Court's recent decisions proceeds roughly as follows, in order from strongest to weakest: commerce power<sup>25</sup> (strongest but hardest for Congress to use); taxing power<sup>26</sup> (somewhat less strong, somewhat easier to use); treaty power<sup>27</sup> (still usable after *Bond*, but perhaps less strong than in its *Missouri v. Holland*<sup>28</sup> zenith); necessary and proper power<sup>29</sup> (least strong when used on its own, except for persons in federal custody, based on a misreading of *McCulloch v. Maryland*<sup>30</sup>). Indeed, in *NFIB*, the potentially broad scope of the necessary and proper power elicited a particularly notable statement of the hierarchical approach to Article I from Chief Justice Roberts.<sup>31</sup> As I have argued elsewhere, however, Chief Justice John Marshall's use of the phrase "great substantive and independent power" in *McCulloch*<sup>32</sup> was not a limit on the use of the necessary and proper power,<sup>33</sup> but rather a synonym for the phrase "powers already explicitly enumerated in Article I."<sup>34</sup> The hierarchical approach to congressional power, therefore, is an innovation of the recent Court, not a legacy of the early republic.

Moreover, the higher a particular Article I power ranks in the hierarchy, the more sedulously the Court polices the boundaries of that power. Consider the status of the post-*Lopez* commerce power: more constrained than in its mid-twentieth-century heyday,<sup>35</sup> certainly, but still powerful within its sphere, as the post-*Lopez* amendment to the

<sup>25</sup> See *United States v. Comstock*, 560 U.S. 126 (2010); *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995).

<sup>26</sup> See Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 132 S. Ct. 2566, 2598 (2012) (upholding the Patient Protection and Affordable Care Act (ACA) on taxing power grounds); see also *Sissel v. U.S. Dep't of Health & Human Servs.*, 760 F.3d 1 (D.C. Cir. 2014) (upholding ACA against Origination Clause challenge).

<sup>27</sup> It should be noted that the phrase "the treaty power" refers not to a single enumerated Article I power, but to the combination of the president's power, "by and with the Advice and Consent of the Senate, to make Treaties," U.S. CONST. art. II, § 2, cl. 2, and Congress's power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof," *id.* art. I, § 8, cl. 18.

<sup>28</sup> 252 U.S. 416 (1920).

<sup>29</sup> See *United States v. Kebodeaux*, 133 S. Ct. 2496, 2502–03 (2013); *Comstock*, 560 U.S. at 142.

<sup>30</sup> 17 U.S. (4 Wheat.) 316 (1819); see *LaCroix*, *supra* note 4, at 2076–77 (critiquing this approach).

<sup>31</sup> See *NFIB*, 132 S. Ct. at 2593.

<sup>32</sup> 17 U.S. at 411.

<sup>33</sup> *LaCroix*, *supra* note 4, at 2062 & n.81, 2079 & n.148.

<sup>34</sup> *Id.* at 2079 n.148.

<sup>35</sup> See *Wickard v. Filburn*, 317 U.S. 111 (1942) (upholding production quotas under the Agricultural Adjustment Act of 1938).

Gun-Free School Zones Act of 1990<sup>36</sup> and a host of decisions concerning regulations of interstate markets<sup>37</sup> demonstrate. Yet the outer boundaries of the power remain deliberately uncontested, and its limiting precedents seem to be accorded more than the usual precedential weight. This tension in Commerce Clause doctrine stems at least in part from recent administrations' decisions not to press the Court to revisit the *Lopez* and *Morrison* tests, even in cases where the commerce-power rationale would seem particularly apt — for example, in connection with federal criminal statutes.<sup>38</sup>

## II. THE TROUBLE WITH LOCALNESS AND HIERARCHY: ONE SCALE TOO MANY

The problems with the hierarchical approach to congressional power begin with the fact that it simply is not warranted by the text or the structure of the Constitution. Nowhere does Article I state that certain of its clauses are entitled to more judicial deference than others. Moreover, to the extent that the hierarchical approach to congressional power relies on an initial assessment of some elusive degree of localness in the underlying activity, it is not clear why a local activity regulated under a treaty-implementing statute should be subject to greater scrutiny than an equally local activity regulated under the commerce power.

Local power, territory, and even sovereignty are vital and necessary parts of a federal union; without a local sphere, a federal union is something else entirely — not a federal, but an “incorporating” union, to borrow a distinction made by John Witherspoon on the floor of the Continental Congress in August 1776.<sup>39</sup> The designation of an activity or a power as local is thus central to dividing power within a federation. The scope of the federal legislature’s authority is not without limits, but it should not depend on judicial assessments of local-

<sup>36</sup> 18 U.S.C. § 922(q)(2)(A) (2012) (providing that “[i]t shall be unlawful for any individual knowingly to possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone”).

<sup>37</sup> See, e.g., *Gonzales v. Raich*, 545 U.S. 1 (2005) (upholding penalties against the production and use of home-grown medicinal marijuana under the federal Controlled Substances Act); cf. *NFIB*, 132 S. Ct. at 2566 (upholding the individual mandate provision of the ACA and thus its effects on interstate healthcare markets, albeit under the taxing power but not the commerce power).

<sup>38</sup> See, e.g., *Bond v. United States*, 134 S. Ct. 2077, 2087 (2014) (“The Government frequently defends federal criminal legislation on the ground that the legislation is authorized pursuant to Congress’s power to regulate interstate commerce. In this case, however, the Court of Appeals held that the Government had explicitly disavowed that argument before the District Court.”); Transcript of Oral Argument, *supra* note 17, at 21–22.

<sup>39</sup> Quoted in *John Adams’ Notes of Debates*, in 4 LETTERS OF DELEGATES TO CONGRESS 593 (Paul H. Smith ed., 1979).

ness. *Bond* illustrates the novel and damaging effects of the localness and hierarchy inquiries on modern federalism analysis.

How does this pair of sliding scales appear in the *Bond* decision? First, the Court suggests that if a given allegedly criminal act seems local — an attempt to cause a skin rash in a spouse’s new partner, for example — then the Chemical Weapons Convention Implementation Act presumptively does not cover it.<sup>40</sup>

But what if the chemicals Ms. Bond used had traveled in interstate commerce, or if their illegal distribution might affect an existing interstate market in such compounds? Surely Congress could criminalize Ms. Bond’s conduct under its interstate commerce power — the fount of much of federal criminal law dating back to the earliest days of the republic — without having to resort to the more cumbersome treaty-plus-statute mechanism. Assuming the underlying conduct was economic (for example, the purchase of such chemicals in order to poison a rival), a federal statute criminalizing such conduct under the commerce power would seem unproblematic.

In short, one can easily imagine a scenario in which congressional power under the Commerce Clause would extend to criminalizing the local activity at issue in *Bond* without resorting to the treaty power. In other words, if Congress had used a stronger regulatory weapon from within its Article I arsenal, it could perhaps have won a more resounding victory in *Bond*, despite the localness of the underlying activity. Given that fact, the Court’s supposedly key analytic factor, localness, cannot bear the weight the Chief Justice’s opinion places on it. Judicial assessments of localness do not define the boundaries of Congress’s power under Article I; those boundaries are set forth in the language of Article I itself. However local the doorknob, no one would think of pointing to Second Ypres in order to defeat the prosecution of an interstate purchaser of poisonous chemicals.

### III. THE TREATY POWER AS A FEDERATIVE POWER

The power to conduct external affairs, including the power to enter into treaties, is a crucial duty of the central level of government in any federal system. John Locke described it as “the management of the security and interest of the publick without.”<sup>41</sup> The “federative Power,” as Locke termed it, comprised the “Power of War and Peace, Leagues

<sup>40</sup> *Bond*, 134 S. Ct. at 2092 (noting that “the background principle that Congress does not normally intrude upon the police power of the States is critically important. In light of that principle, we are reluctant to conclude that Congress meant to punish Bond’s crime with a federal prosecution for a chemical weapons attack” and contrasting Bond’s case with the “handful of prosecutions” that have been brought under section 229).

<sup>41</sup> JOHN LOCKE, TWO TREATISES OF GOVERNMENT 365 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

and Alliances, and all the Transactions, with all Persons and Communities without the Commonwealth.”<sup>42</sup> For all their chariness toward strong federal power deployed domestically, the Articles of Confederation clearly deposited the full array of external powers in “the United States in Congress assembled.”<sup>43</sup>

Locke and the Articles are primary sources for the eighteenth-century view of the purpose of the treaty power.<sup>44</sup> But Locke’s theory of the federative power is relevant not only for historians or for originalists. It also illustrates the problems with the Supreme Court’s treatment of the treaty power in *Bond*. Those shortcomings are evident in light of founding-era sources, doctrinal keystones such as *McCulloch v. Maryland*, and pre- and post-New Deal understandings of congressional power — in short, the entire sweep of American constitutional law. The ability to “assume among the powers of the earth, [a] separate and equal station” in 1776 included the powers necessary to operate as a state on the international stage.<sup>45</sup> Even if the Court persists in a hierarchical view of the Article I powers, the treaty power should be understood as an essential vector of federal authority outward to the arena of nation-states. The sovereignty claims of the several states are therefore largely irrelevant to its exercise.

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

<sup>43</sup> See ARTICLES OF CONFEDERATION of 1781, arts. VI, IX.

<sup>44</sup> See DAVID C. HENDRICKSON, PEACE PACT: THE LOST WORLD OF THE AMERICAN FOUNDING 23, 154 (2003).

<sup>45</sup> THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).