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## ESSAY

### LIMITS ON THE TREATY POWER

*U.S. Senator Ted Cruz*

During Justice Sotomayor’s Senate Judiciary Committee confirmation hearing, she rightly stated that “American law does not permit the use of foreign law or international law to interpret the Constitution.”<sup>1</sup> But she also correctly recognized that some U.S. laws rely upon certain international law sources.<sup>2</sup> For instance, the Alien Tort Statute<sup>3</sup> “allows federal courts to recognize certain causes of action based on sufficiently definite norms of international law.”<sup>4</sup>

Treaties are probably the most prevalent mechanism by which domestic law adopts international law. A treaty is “primarily a compact between independent nations.”<sup>5</sup> Article II, Section 2 of the Constitution gives the President the power “to make Treaties, provided two thirds of the Senators present concur.”<sup>6</sup> And the Supremacy Clause provides that “treaties,” like statutes, count as “the supreme law of the land.”<sup>7</sup> Some treaties “automatically have effect as domestic law”<sup>8</sup> — these are called self-executing treaties. Other treaties “constitute international law commitments,” but they “do not by themselves function as binding federal law”<sup>9</sup> — these are called non-self-executing treaties.

Because treaties are the supreme law of the land, they could potentially become a vehicle for the federal government either to give away power to international actors or to accumulate power otherwise reserved for the states or individuals. Either possibility can be prevented if sufficient limits are placed on the federal government’s authority to make and implement treaties. Some treaties, like the Arms Trade

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<sup>1</sup> CQ Transcriptions, *Sen. Chuck Schumer Holds a Hearing on the Nomination of Judge Sonia Sotomayor to Be an Associate Justice of the U.S. Supreme Court*, WASH. POST (July 14, 2009, 4:24 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/14/AR2009071402630.html>.

<sup>2</sup> *See id.* (“[T]here are situations in which American law tells you to look at international or foreign law.”).

<sup>3</sup> 28 U.S.C. § 1350 (2012) (“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”).

<sup>4</sup> *Kiobel v. Royal Dutch Petrol. Co.*, 133 S. Ct. 1659, 1664 (2013).

<sup>5</sup> *Head Money Cases*, 112 U.S. 580, 598 (1884).

<sup>6</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>7</sup> U.S. CONST. art. VI, cl. 2.

<sup>8</sup> *Medellín v. Texas*, 552 U.S. 491, 504 (2008).

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

Treaty,<sup>10</sup> the United Nations Convention on the Law of the Sea,<sup>11</sup> and the Convention on the Rights of Persons with Disabilities,<sup>12</sup> purport to let international actors set policy in areas already regulated by the federal government. These and other treaties could be used to infringe on state sovereignty. Many commentators are chomping at the bit for the federal government to make or implement treaties as a way of enacting laws that the Supreme Court has otherwise held as exceeding the federal government's powers.<sup>13</sup> As Professor Nicholas Rosenkranz noted, scholars have even suggested that the International Covenant on Civil and Political Rights<sup>14</sup> could resuscitate the Religious Freedom Restoration Act partially invalidated in *City of Boerne v. Flores*<sup>15</sup> or the Violence Against Women Act partially invalidated in *United States v. Morrison*.<sup>16</sup>

With treaties potentially supplanting federal and state governmental authority, the President and Senate should carefully scrutinize all treaties, as a policy matter. We must jealously guard the separation of powers and state sovereignty if we are to preserve the constitutional structure our Framers gave us.

At the same time, our courts must scrutinize the federal government's powers to make and implement treaties. Our federal government is one of enumerated, limited powers, and the courts should not let the treaty power become a loophole that jettisons the very real limits on the federal government's authority.

Luckily, the Roberts Court has signaled that it will recognize the limits on the federal government's treaty power. As Solicitor General of Texas, I had the privilege of arguing *Medellín v. Texas*,<sup>17</sup> which recognized critical limits on the federal government's power to use a non-self-executing treaty to supersede state law.<sup>18</sup>

In *Medellín*, the United States had entered into the Vienna Convention on Consular Relations,<sup>19</sup> a non-self-executing treaty providing

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<sup>10</sup> *Done* Apr. 2, 2013, 52 I.L.M. 988.

<sup>11</sup> *Opened for Signature* Dec. 10, 1982, 1833 U.N.T.S. 397. For arguments against ratification of the Convention on the Law of the Sea, see George F. Will, *The LOST Sinkhole*, WASH. POST. (June 22, 2012), [http://articles.washingtonpost.com/2012-06-22/opinions/35461763\\_1\\_royalty-payments-reagan-adviser-sea-treaty](http://articles.washingtonpost.com/2012-06-22/opinions/35461763_1_royalty-payments-reagan-adviser-sea-treaty).

<sup>12</sup> Dec. 13, 2006, 2515 U.N.T.S. 3.

<sup>13</sup> Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867, 1871-73 & nn.19-25 (2005).

<sup>14</sup> *Adopted* Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (ratified with reservations by the United States Senate on Apr. 2, 1992).

<sup>15</sup> 521 U.S. 507 (1997).

<sup>16</sup> 529 U.S. 598 (2000); see Rosenkranz, *supra* note 13, at 1871-72 & nn.19, 22 (collecting sources).

<sup>17</sup> 552 U.S. 491 (2008).

<sup>18</sup> *Id.* at 530.

<sup>19</sup> Apr. 24, 1963, 21 U.S.T. 77 [hereinafter Vienna Convention].

that “if a person detained by a foreign country ‘so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State’ of such detention, and ‘inform the [detainee] of his righ[t]’ to request assistance from the consul of his own state.”<sup>20</sup> The International Court of Justice, an arm of the United Nations, held that fifty-one Mexican nationals did not receive their Vienna Convention consular-notification rights before being convicted in state courts.<sup>21</sup> The ICJ further ruled that these 51 Mexican nationals were entitled to reconsideration of their state-court convictions and sentences, notwithstanding any state procedural default rules barring defendants from raising these Vienna Convention arguments on collateral review because the issues were not raised at trial or on direct appeal.<sup>22</sup> President George W. Bush then issued a “Memorandum to the Attorney General,” stating that the United States would “discharge its international obligations” under the ICJ’s ruling “by having State courts give effect to the decision.”<sup>23</sup>

The Court held that state procedural default rules could not be displaced by the non-self-executing Vienna Convention, the ICJ’s ruling, or the President’s Memorandum.<sup>24</sup> *Medellín* first ruled that the ICJ’s ruling was not “automatically enforceable domestic law” in light of the U.N. Charter’s structure for enforcing ICJ decisions.<sup>25</sup> And it then clarified that the President cannot use a non-self-executing treaty “to unilaterally make treaty obligations binding on domestic courts.”<sup>26</sup>

*Medellín* therefore prevented the President from using a treaty to run roughshod over the courts and the states. But *Medellín* involved an unusual fact pattern, and many questions remain about the scope of the federal government’s treaty power.

The Supreme Court is on the cusp of deciding another important case about the treaty power: *Bond v. United States*.<sup>27</sup> *Bond* will test whether an international treaty gave Congress the authority to create a federal law criminalizing conduct from a domestic dispute involving wholly local conduct. How the Court resolves *Bond* could have enormous implications for our constitutional structure.

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<sup>20</sup> *Medellín*, 552 U.S. at 499 (alterations in original) (quoting Vienna Convention, *supra* note 19, art. 36(1)(b)).

<sup>21</sup> *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12, ¶ 153 (Mar. 31).

<sup>22</sup> *Medellín*, 552 U.S. at 497–98.

<sup>23</sup> *Id.* at 498 (quoting Memorandum from President George W. Bush to the Attorney General (Feb. 28, 2005), available at <http://www.refworld.org/pdfid/429c2fd94.pdf>.) (internal quotation marks omitted).

<sup>24</sup> *Id.* at 532.

<sup>25</sup> *Id.* at 510.

<sup>26</sup> *Id.* at 527.

<sup>27</sup> 133 S. Ct. 978 (2013) (mem.) (granting certiorari).

This Essay will proceed in five parts. Part I starts with first principles of our constitutional structure, examining sovereignty, the treaty power, and foreign affairs. Part II briefly lays out the facts in *Bond v. United States*, which raises many difficult issues that will be discussed in the remainder of the Essay.

Part III sets forth the central thesis of this Essay: courts should enforce constitutional limits on the President's power to make treaties and Congress's power to implement treaties by preventing either from infringing on the sovereignty reserved to the states. Whether one couches this as a Tenth Amendment or a structural argument, the basic point is the people, acting in their sovereign capacity, delegated only limited powers to the federal government while reserving the remaining sovereign powers to the states or individuals. If the federal government could evade the limits on its powers by making or implementing treaties, then our system of dual sovereignty would be grievously undermined. Part III therefore argues that the President cannot make any treaties displacing state sovereignty and that the Necessary and Proper Clause power does not give Congress the authority to implement a treaty in a way that displaces state sovereignty.

Part IV applies this Essay's thesis and considers whether Justice Holmes's 1920 *Missouri v. Holland*<sup>28</sup> opinion must be overruled. *Missouri v. Holland* has been viewed as the seminal case on the federal government's treaty power for decades. Many view it as granting the federal government near-carte blanche authority to make and implement treaties. This Essay suggests that *Missouri v. Holland* can be construed simply as rejecting a facial challenge to a particular treaty, which may have validly covered some subject matter falling within Congress's Commerce Clause authority. But if *Missouri v. Holland* cannot be construed in that way, then it should be overruled in light of recent precedents from the Rehnquist Court and Roberts Court that police the boundaries of our constitutional structure. Finally, Part V concludes by applying this Essay's framework to contend that the Supreme Court should reverse the Third Circuit's ruling in *Bond* and overturn *Bond*'s federal conviction.

## I. SOVEREIGNTY, THE TREATY POWER, AND FOREIGN AFFAIRS

Much of the Framers' conception of government is owed to John Locke. John Locke's *Second Treatise on Civil Government* argued that sovereignty initially lies with the people.<sup>29</sup> When Locke wrote this in the seventeenth century, it was a novel idea that shattered the prevail-

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

<sup>29</sup> See JOHN LOCKE, TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 137–138, 141–142 (Ian Shapiro ed., Yale Univ. Press 2003).

ing view that sovereignty lay with the English monarch or parliament. This simple, revolutionary idea shaped our nation. If the ultimate power resides with the people, then the people control government, rather than the government controlling the people. The people, as initial holders of their sovereignty, agree to cede some power to form society and government for their collective prosperity and security. But the government's power emanates from the sovereign will of the people.

As the American people exercised their sovereign will in constituting our government, the Framers did not create a single governmental structure that possessed all power. In the words of Justice Kennedy: "The Framers split the atom of sovereignty."<sup>30</sup> That is, the Framers ingeniously divided governmental power through various mechanisms, such as the separation of powers and federalism. They separated the legislative, executive, and judicial powers into three distinct branches of a federal government.<sup>31</sup> And they limited the powers possessed by the federal government by explicitly enumerating its powers while reserving unenumerated powers, like the general police power, to the states.<sup>32</sup>

Of particular relevance to this Essay, the Framers similarly carved up the power to make treaties. Article II, Section 2 provides that the President has the "Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur."<sup>33</sup> By housing this power in Article II, the Framers designated the treaty power as one of the President's executive powers — as opposed to one of Congress's legislative powers. And "virtually every important thinker who influenced the founding generation thought of treaty making as an executive function."<sup>34</sup>

Yet just as the President retains a veto power over Congress's legislative power,<sup>35</sup> the Senate retains a veto over the President's treaty power by preventing adoption of a treaty unless two thirds of the Senate approves. Note, however, that Senators were originally chosen by state legislatures rather than through direct election. John Jay saw this as an advantage: those "who best understand our national interests" would be the ones voting on treaties.<sup>36</sup> In contrast, Jay warned

<sup>30</sup> *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

<sup>31</sup> See U.S. CONST. art. I, § 1; U.S. CONST. art. II, § 1, cl. 1; U.S. CONST. art. III, § 1.

<sup>32</sup> See U.S. CONST. amend. X.

<sup>33</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>34</sup> Gary Lawson & Guy Seidman, *The Jeffersonian Treaty Clause*, 2006 U. ILL. L. REV. 1, 44 n.158. *But cf.* THE FEDERALIST NO. 75, at 449 (Alexander Hamilton) (Clinton Rossiter ed., 2003) (arguing that the treaty power was not necessarily legislative or executive, because a treaty did not "prescribe rules for the regulation of the society" or require "execution of the laws" — it was the power to enter into contracts with foreign nations).

<sup>35</sup> See U.S. CONST. art. I, § 7, cl. 2.

<sup>36</sup> THE FEDERALIST NO. 64 (John Jay), *supra* note 34, at 389.

against involving the “popular assembly” in the treaty power,<sup>37</sup> and Hamilton explicitly argued that the House of Representatives should not be included in the treaty-making process.<sup>38</sup>

The Senate’s veto over the President’s power to make treaties shows that the treaty power was so substantial that it required further dilution among the branches. As Jay remarked:

The power of making treaties is an important one, especially as it relates to war, peace, and commerce; and it should not be delegated but in such a mode, and with such precautions, as will afford the highest security that it will be exercised by men the best qualified for the purpose, and in the manner most conducive to the public good.<sup>39</sup>

Hamilton, too, did not trust the President alone to wield the hefty treaty power, as he feared that one could “betray the interests of the state to the acquisition of wealth.”<sup>40</sup>

At the same time, the Framers realized it was impractical to expect a collective body, like Congress or the Senate, to negotiate the minutiae of treaties. Jay understood that sometimes treaties must be made in secret, and the executive is the branch best positioned to keep “negotiation of treaties” secret.<sup>41</sup> The President was therefore allowed “to manage the business of intelligence in such manner as prudence may suggest” by negotiating treaties, “although the President must, in forming them, act by the advice and consent of the Senate.”<sup>42</sup> This, Jay realized, “provides that our negotiations for treaties shall have every advantage which can be derived from talents, information, integrity, and deliberate investigations, on the one hand, and from secrecy and dispatch on the other.”<sup>43</sup> Hamilton, too, noted the comparative advantage that the President had over Congress in this regard: “The qualities elsewhere detailed as indispensable in the management of foreign negotiations point out the executive as the most fit agent in those transactions . . . .”<sup>44</sup>

The treaty power is a carefully devised mechanism for the federal government to enter into agreements with foreign nations. And it needed to be precisely calibrated because treaties would constitute the supreme law of the land in the United States.<sup>45</sup> By dividing the treaty power — first by reserving unenumerated powers to the states, and then by housing the federal treaty power in the executive branch with

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<sup>37</sup> *Id.* at 390.

<sup>38</sup> THE FEDERALIST NO. 75 (Alexander Hamilton), *supra* note 34, at 451.

<sup>39</sup> THE FEDERALIST NO. 64 (John Jay), *supra* note 34, at 388.

<sup>40</sup> THE FEDERALIST NO. 75 (Alexander Hamilton), *supra* note 34, at 450.

<sup>41</sup> THE FEDERALIST NO. 64 (John Jay), *supra* note 34, at 390.

<sup>42</sup> *Id.* at 391.

<sup>43</sup> *Id.* at 391–92.

<sup>44</sup> THE FEDERALIST NO. 75 (Alexander Hamilton), *supra* note 34, at 449.

<sup>45</sup> U.S. CONST. art. VI, cl. 2.

a Senate veto — the Framers sought to check the use of this significant lawmaking tool.

The Framers divided governmental power in this manner because they had seen firsthand, from their experience with Britain, that concentrated authority predictably results in tyranny. Indeed, James Madison remarked that “[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny.”<sup>46</sup>

The separation of powers and federalism, therefore, are a manifestation of the Framers’ rejection of unchecked government power. They correctly believed that societies could not magically progress to a point where humans constantly looked out for a common good divorced from self-interest. As Madison famously noted: “If men were angels, no government would be necessary.”<sup>47</sup> This same concern was present in creating the treaty power. In observing that a President could abuse the treaty power for his personal gain if the President alone possessed this power, Hamilton stated:

The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and circumstanced as would be a President of the United States.<sup>48</sup>

Similarly, the Framers saw they were not living in a world of utopian foreign nations, and these nations often did not have the best interests of the United States in mind. Thus, our fledgling nation had to project strength to the rest of the world while remaining disentangled from conflicts among other countries. To project strength, Jay counseled that a federal government, rather than thirteen separate state governments, was necessary to maintain “security for the preservation of peace and tranquillity.”<sup>49</sup> And to avoid entanglements with other countries, Jay advised that the United States should not give foreign nations “*just* causes of war.”<sup>50</sup> Specifically, Jay identified “violations of treaties” and “direct violence” as the two most prevalent just causes of war.<sup>51</sup> Of course, nations also go to war for unjust or “pretended” causes, like “military glory,” “ambition,” or commercial motives.<sup>52</sup> In any event, Jay rightfully explained that strength would dissuade other countries from disrupting our peace.

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<sup>46</sup> THE FEDERALIST NO. 47 (James Madison), *supra* note 34, at 298.

<sup>47</sup> THE FEDERALIST NO. 51 (James Madison), *supra* note 34, at 319.

<sup>48</sup> THE FEDERALIST NO. 75 (Alexander Hamilton), *supra* note 34, at 450.

<sup>49</sup> THE FEDERALIST NO. 3 (John Jay), *supra* note 34, at 36.

<sup>50</sup> *Id.* at 37.

<sup>51</sup> *Id.*

<sup>52</sup> THE FEDERALIST NO. 4 (John Jay), *supra* note 34, at 40 (emphasis omitted).

## II. *BOND V. UNITED STATES*: TESTING THE LIMITS OF THE TREATY POWER

One need not dream up fanciful hypotheticals to test the outer bounds of the treaty power. *Bond v. United States*, which is currently pending before the U.S. Supreme Court, provides a concrete set of facts showing how pervasive the treaty power could be without meaningful constitutional restraints.

### A. *Chemical Weapons Convention*

The 1993 Chemical Weapons Convention — formally known as the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction<sup>53</sup> — is an international arms-control agreement. Its purpose is to “achiev[e] effective progress towards general and complete disarmament . . . , including the prohibition and elimination of all types of weapons of mass destruction.”<sup>54</sup> The Convention mandates that signatory countries, as opposed to individuals, can “never under any circumstances . . . develop, produce, otherwise acquire, stockpile or retain chemical weapons” or “use” them.<sup>55</sup> It further requires signatory states to prohibit individuals from acting in a manner that would violate the Convention if the individuals were a signatory state.<sup>56</sup> But the Convention does not contain self-executing provisions that obligate states to impose these duties on individuals. So it is a non-self-executing treaty that does not “automatically have effect as domestic law.”<sup>57</sup>

The U.S. Senate ratified the Convention in 1997.<sup>58</sup> A year later, Congress acted to implement the Convention by creating domestic law that would prohibit individuals from violating the Convention, the Chemical Weapons Convention Implementation Act of 1998.<sup>59</sup>

Congress’s implementing statute went far beyond the purpose of the Convention by covering much more than weapons of mass destruction. Congress repealed the existing federal crime for using chemical weapons, which had defined “chemical weapon” to mean only a “weapon that is designed or intended to cause widespread death or se-

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<sup>53</sup> *Opened for signature* Jan. 13, 1993, 1974 U.N.T.S. 45 [hereinafter *Chemical Weapons Convention*].

<sup>54</sup> *Id.*, pmb1.

<sup>55</sup> *Id.*, art. I(1).

<sup>56</sup> *Id.*, art. VII(1)(a).

<sup>57</sup> *Medellín v. Texas*, 552 U.S. 491, 504 (2008) (internal quotation marks omitted); *see also* *Chemical Weapons Convention*, *supra* note 53, art. VII(1) (“Each State Party shall, in accordance with its constitutional processes, adopt the necessary measures to implement its obligations under this Convention.”).

<sup>58</sup> 143 Cong. Rec. 6427 (1997).

<sup>59</sup> 18 U.S.C. §§ 229–229F (2012); 22 U.S.C. §§ 6701–6771 (2012).

rious bodily injury through the release, dissemination, or impact of toxic or poisonous chemicals or precursors of toxic or poisonous chemicals.”<sup>60</sup> Although that repealed definition was tailored to cover weapons of mass destruction, the new federal crime for using chemical weapons<sup>61</sup> swept in many more substances. The 1998 Act adopted the Convention’s definition of “chemical weapon,” which covers any “toxic chemical and its precursors, except where intended for a purpose not prohibited under this chapter.”<sup>62</sup> And “toxic chemical,” in turn, includes “any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals.”<sup>63</sup> The statute does include an exemption for a toxic chemical intended for “[a]ny peaceful purpose related to an industrial, agricultural, research, medical, or pharmaceutical activity or other activity.”<sup>64</sup> Nevertheless, the chemical weapons crime created by the 1998 Act was not tailored to prohibit only weapons of mass destruction, even though that was the express purpose of the Convention.

*B. A Domestic Dispute in Lansdale, Pennsylvania*

In light of the breadth of Congress’s implementing statute for the Chemicals Weapons Convention, it should come as no surprise that it was used to prosecute someone for a domestic dispute involving wholly local conduct.

Carol Anne Bond lived near Philadelphia, and she sought revenge after finding out that her close friend, Myrlinda Haynes, was pregnant and that the father was Bond’s husband.<sup>65</sup> Bond harassed Haynes with telephone calls and letters, which resulted in a minor state criminal conviction.<sup>66</sup> Bond then stole a particular chemical from her employer, a chemical manufacturer, and ordered another chemical over the internet.<sup>67</sup> She placed these chemicals on Haynes’s mailbox, car door handle, and front doorknob.<sup>68</sup> As a result, Haynes suffered a minor burn on her hand.<sup>69</sup>

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<sup>60</sup> 18 U.S.C. § 2332c(b)(2) (1994 & Supp. I 1996) (repealed 1998).

<sup>61</sup> 18 U.S.C. § 229(a)(1) (2012).

<sup>62</sup> *Id.* § 229F(1)(A); *see also* Chemical Weapons Convention, *supra* note 53, art. II(1)(a).

<sup>63</sup> 18 U.S.C. § 229F(8)(A) (2012).

<sup>64</sup> *Id.* § 229F(7)(A).

<sup>65</sup> *Bond v. United States*, 131 S. Ct. 2355, 2360 (2011).

<sup>66</sup> *Id.*

<sup>67</sup> *United States v. Bond*, 681 F.3d 149, 151 (3d Cir. 2012), *cert. granted*, 133 S. Ct. 978 (2013).

<sup>68</sup> *Bond*, 131 S. Ct. at 2360.

<sup>69</sup> *Id.*

Bond probably could have been charged with violations of state law, like assault,<sup>70</sup> aggravated assault,<sup>71</sup> or harassment.<sup>72</sup> Instead, the federal government stepped in and charged Bond with violating the Chemical Weapons Convention Implementation Act, alleging that she used chemical weapons when she placed chemicals on Haynes's mailbox, car door handle, and front doorknob.<sup>73</sup>

Bond argued that Congress lacked the constitutional authority to enact the Act, at least as applied to her conduct in the domestic dispute.<sup>74</sup> The district court rejected her argument.<sup>75</sup> Bond then pled guilty on the condition that she retained her right to appeal her constitutional argument.<sup>76</sup> The district court sentenced her to six years imprisonment.<sup>77</sup>

The Third Circuit held that Bond lacked standing to raise this argument,<sup>78</sup> and the U.S. Supreme Court unanimously reversed in finding that Bond did have standing to challenge the Act as applied to her.<sup>79</sup> On remand, the Third Circuit rejected Bond's constitutional argument on the merits, finding that Congress had authority to enact the Chemical Weapons Convention Implementation Act under the Necessary and Proper Clause.<sup>80</sup> The Third Circuit quoted Justice Holmes's 1920 opinion, *Missouri v. Holland*, for the proposition that, "if a treaty is valid, 'there can be no dispute about the validity of the statute [implementing it] under Article I, Section 8, as a necessary and proper means to execute the powers of the Government.'"<sup>81</sup> The Supreme Court granted certiorari<sup>82</sup> and has heard argument in what could be one of the most important treaty cases it has ever considered.

### III. CONSTITUTIONAL LIMITS ON CREATING AND IMPLEMENTING TREATIES

The central thesis of this Essay is simple: the President, even with Senate acquiescence, has no constitutional authority to make a treaty with a foreign nation that gives away any portion of the sovereignty

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<sup>70</sup> 18 PA. CONS. STAT. ANN. § 2701. (West 2000 & Supp. 2013).

<sup>71</sup> *Id.* § 2702.

<sup>72</sup> *Id.* § 2709.

<sup>73</sup> *Bond*, 131 S. Ct. at 2360.

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

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *United States v. Bond*, 581 F.3d 128, 137 (3d Cir. 2009).), *rev'd*, 131 S. Ct. 2355.

<sup>79</sup> *Bond*, 131 S. Ct. at 2367.

<sup>80</sup> *United States v. Bond*, 681 F.3d 149, 165–66 (3d Cir. 2012), *cert. granted*, 133 S. Ct. 978 (2013).

<sup>81</sup> *Id.* at 152 (quoting *Missouri v. Holland*, 252 U.S. 416, 432 (1920)).

<sup>82</sup> *Bond v. United States*, 133 S. Ct. 978 (2013).

reserved to the states. Similarly, Congress has no constitutional authority to implement a treaty through legislation that takes away any portion of the sovereignty reserved to the states.

*A. First Principles: Sovereignty and Enumerated Federal Powers*

We must return to sovereignty to assess whether constitutional limits exist to restrain the federal government's power to create and implement treaties, and what those limits might be. Sovereignty lies with the people, as Locke taught both us and the Framers. The people in turn formed our government. But Americans did not give their federal government *carte blanche* to create whatever laws the federal government chooses.

"The Constitution creates a Federal Government of enumerated powers."<sup>83</sup> Our Framers purposely designed it that way. As Madison stated, "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."<sup>84</sup> States, moreover, retain "a residuary and inviolable sovereignty."<sup>85</sup> If there were any doubt about that proposition at the Founding, the Tenth Amendment in the Bill of Rights clarified: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."<sup>86</sup> Thus, "[a]s every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government."<sup>87</sup>

The Supreme Court in the first *Bond* case, dealing with *Bond's* standing, expounded on these principles. "[A]llocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States . . . in part, [as] an end in itself, to ensure that States function as political entities in their own right."<sup>88</sup> Preserving the sovereign dignity of the states, though, was not the only reason to construct the federal government as one of enumerated powers. Individual liberty is also preserved by divided government: "By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power."<sup>89</sup>

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<sup>83</sup> *United States v. Lopez*, 514 U.S. 549, 552 (1995).

<sup>84</sup> THE FEDERALIST NO. 45 (James Madison), *supra* note 34, at 289.

<sup>85</sup> THE FEDERALIST NO. 39 (James Madison), *supra* note 34, at 242.

<sup>86</sup> U.S. CONST. amend. X.

<sup>87</sup> *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991).

<sup>88</sup> *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011).

<sup>89</sup> *Id.*

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So the people, acting as sovereign, only delegated to the federal government certain enumerated powers. Congress has specifically defined powers enumerated in Article I, Section 8. For example, Congress has the power to tax and spend, to regulate commerce with foreign nations and among the several states, and to declare war.<sup>90</sup> The Constitution therefore “withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation.”<sup>91</sup>

Article II delineates the President’s powers at a higher level of generality, but those powers are nevertheless still enumerated. The President is the “Commander in Chief,” can grant “Pardons,” appoints and commissions “Officers of the United States” with the advice and consent of the Senate, makes recess appointments, must “take Care that the Laws be faithfully executed,” and can “make Treaties” with the approval of two-thirds of the Senate.<sup>92</sup> But nowhere does the Constitution give the President a general power to do whatever he believes is necessary for the public interest.

Consequently, when the federal government acts to create or implement a treaty, the Constitution requires that it do so pursuant to an enumerated power. If no enumerated power justifies the creation or implementation of a treaty, the federal government is acting beyond its delegated authority, thus violating the sovereignty of the states and the people. And even if a treaty fell within an enumerated power, the federal government would still act unconstitutionally if an independent provision of the Constitution, such as the Bill of Rights, affirmatively denied the authority.

The most commonly cited enumerated powers supporting treaties are (1) the President’s Treaty Clause power, (2) Congress’s Commerce Clause power, and (3) Congress’s Necessary and Proper Clause power. The first power implicates a treaty’s creation, while the latter two involve a treaty’s implementation. A self-executing treaty will not require congressional implementation, because such a treaty creates domestic law. Self-executing treaties will therefore raise questions about the President’s Treaty Clause power but not Congress’s power to implement these treaties. A non-self-executing treaty will raise questions about Congress’s power to implement these treaties, because they will require congressional implementation to impose domestic obligations on individuals. This Part will now consider the limits on the President’s and Congress’s enumerated powers to make or implement treaties.

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<sup>90</sup> U.S. CONST. art. I, § 8.

<sup>91</sup> *United States v. Lopez*, 514 U.S. 549, 566 (1995).

<sup>92</sup> U.S. CONST. art. II.

*B. Limits on the President's Power to Make Treaties*

Before Congress can implement a treaty through legislation, the President must create a valid treaty. There are critical limits on the President's power to make treaties: (1) two-thirds of the Senate must approve of the treaty; (2) the treaty cannot violate an independent constitutional bar; and (3) the treaty cannot disrupt our constitutional structure by giving away sovereignty reserved to the states. The first two limits are widely recognized, but most scholars believe the third was rejected in Justice Holmes's 1920 decision in *Missouri v. Holland*.<sup>93</sup> This Essay, however, argues in favor of all three limitations, which would preserve constitutional limits on federal power and protect state sovereignty.

The President's power to make treaties is limited by the procedures required by the Treaty Clause. This clause gives the President the "Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur."<sup>94</sup> This places an obvious limitation on the President's power to make treaties: if fewer than two-thirds of the Senators present concur that the treaty should be made, then the United States has not made any treaty. The President therefore cannot unilaterally enter into a treaty.

Nor can treaties violate independent constitutional bars. For example, if the President, with Senate approval, entered into a self-executing treaty that banned all political speech, that treaty would be invalid as contrary to the First Amendment's Free Speech Clause. A four-Justice plurality acknowledged this principle in *Reid v. Covert*,<sup>95</sup> holding that treaties authorizing military commission trials of American citizens abroad on military bases could not displace Fifth and Sixth Amendment criminal procedure rights.<sup>96</sup> Justice Black, joined by Chief Justice Warren, Justice Douglas, and Justice Brennan, recognized:

[N]o agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution.

. . . There is nothing in [Article VI, the Supremacy Clause,] which intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution. . . . It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights — let alone alien to our entire constitutional history and tradition — to construe Article VI as

<sup>93</sup> See Rosenkranz, *supra* note 13, at 1874.

<sup>94</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>95</sup> 354 U.S. 1 (1957).

<sup>96</sup> *Id.* at 15–19 (plurality opinion).

permitting the United States to exercise power under an international agreement without observing constitutional prohibitions. In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V. The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined.<sup>97</sup>

In the *Bond* litigation, the Obama Administration appears to agree that treaties cannot violate “the Constitution’s express prohibitions (such as those in the Bill of Rights).”<sup>98</sup>

In contrast, the Administration appears to argue that the treaty power contains no “subject-matter-based limitations.”<sup>99</sup> This is the “predominant view” in the legal academy: that there are essentially no other subject-matter limits on the President’s power to make treaties.<sup>100</sup> Under this majority view, which stems from *Missouri v. Holland*, a treaty can exercise power otherwise reserved to the states. This Essay argues to the contrary: the President cannot make a treaty that displaces the sovereign powers reserved to the states.<sup>101</sup>

1. *Missouri v. Holland and the President’s Power to Make Non-Self-Executing Treaties.* — The facts of *Missouri v. Holland* are striking and provide a roadmap for how the federal government could use treaties to aggrandize power otherwise reserved for the states:

In 1913, Congress enacted a statute to regulate the hunting of migratory birds. Two lower federal courts declared the statute invalid, finding that it was not within any enumerated power of Congress, and the Department of Justice feared that the statute might meet the same fate in the Supreme Court. It was suggested, however, that migratory birds were a subject of concern to other nations as well, for example Canada; and if the United States and Canada agreed to cooperate to protect the birds, Congress could enact the legislation it had previously adopted under its power to do

<sup>97</sup> *Id.* at 16–17 (footnote omitted).

<sup>98</sup> Brief for the United States at 46, *Bond v. United States*, No. 12-158 (U.S. Aug. 9, 2013).

<sup>99</sup> *Id.*

<sup>100</sup> Rosenkranz, *supra* note 13, at 1878; *see id.* at 1878 n.52 (collecting authorities).

<sup>101</sup> Professors Gary Lawson and Guy Seidman have presented a distinct argument that the President’s treaty power should be limited by his other enumerated executive powers. *See* Lawson & Seidman, *supra* note 34, at 15. According to them, the Treaty Clause is not an independent substantive font of executive power, but instead “a vehicle for implementing otherwise-granted national powers in the international arena.” *Id.* This view may track similar structural concerns as a Tenth Amendment reserved state sovereignty limit. But the ultimate concern of a Tenth Amendment limit is preserving state sovereignty as a structural principle, as opposed to having to answer whether the Treaty Clause grants substantive powers. Under a Tenth Amendment limit, it does not matter whether the Treaty Clause possibly grants some substantive powers beyond the President’s other enumerated powers — the President still could not displace reserved state sovereignty even if the Treaty Clause would otherwise grant him additional substantive powers.

what is ‘necessary and proper’ to implement the treaty. The treaty was made [and] the statute enacted . . .<sup>102</sup>

The Migratory Bird Treaty at issue in *Missouri v. Holland* was a non-self-executing treaty.<sup>103</sup> Rather than challenge Congress’s authority to pass a statute implementing this treaty, Missouri challenged the President’s authority to make the treaty in the first place.<sup>104</sup> Missouri argued that the President’s power to make treaties was limited by the Tenth Amendment, such that a treaty could not address subject matter that did not fall within Congress’s enumerated legislative powers.<sup>105</sup> Justice Holmes phrased the question presented, with evident disdain, as, “The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment.”<sup>106</sup>

The Court held, by a vote of seven to two, that the Tenth Amendment did not render the treaty invalid.<sup>107</sup> Justice Holmes reasoned that “[i]t is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could.”<sup>108</sup> The Court did not decide whether the two lower federal courts had correctly invalidated the pre-treaty migratory bird statutes as exceeding Congress’s enumerated powers.<sup>109</sup> But it did identify the purportedly national and international character of migratory birds: “The subject-matter is only transitorily within the State and has no permanent habitat therein.”<sup>110</sup>

The legal academy has read *Missouri v. Holland* as rejecting any and all structural constitutional limitations on the President’s Treaty Clause power. That, however, may be an overreading of *Missouri v. Holland*, as discussed further below in Part IV. First, *Missouri v. Holland* may have turned on the international character of the regulated subject matter — that is, migratory birds. In other words, the Tenth Amendment may prohibit the President from entering into treaties regulating wholly domestic conduct, but migratory birds by their nature are not necessarily a matter of pure internal concern.

More fundamentally, a *non*-self-executing treaty might never violate the Tenth Amendment or infringe on state sovereignty. The treaty

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<sup>102</sup> LOUIS HENKIN, FOREIGN AFFAIRS AND THE US CONSTITUTION 190 (2d ed. 1996) (footnotes omitted).

<sup>103</sup> Rosenkranz, *supra* note 13, at 1877.

<sup>104</sup> *Id.* at 1879.

<sup>105</sup> *See id.*

<sup>106</sup> *Missouri v. Holland*, 252 U.S. 416, 433–34 (1920).

<sup>107</sup> *See id.* at 435.

<sup>108</sup> *Id.* at 433.

<sup>109</sup> *Id.* at 432.

<sup>110</sup> *Id.* at 435.

in *Missouri v. Holland* was a non-self-executing treaty,<sup>111</sup> so it was an agreement between nations that imposed no binding domestic obligations on states or individuals.<sup>112</sup> A non-self-executing treaty can be “a promise to enact certain legislation”; “[s]uch a promise constitutes a binding *international* legal commitment, but it does not, in itself, constitute domestic law.”<sup>113</sup> So in *Missouri v. Holland*, the President may have promised other countries that the United States would enact migratory bird legislation, but the President’s promise itself was only an agreement made between nations.<sup>114</sup>

The President may very well have constitutional authority to enter into promises that he knows the United States either will not, or cannot, keep. After all, the “President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.”<sup>115</sup> Treaties are agreements like contracts, and all law students learn that contracts can be breached for many reasons, including efficiency. It may not be prudent for a President to breach treaties or to enter into treaties that he knows will be ignored. But that question of prudence is different from the question of constitutional authority to make such a promise.

The President, consequently, may have the authority to “promise” a foreign nation that the United States will enact certain domestic legislation — even if Congress has no power to enact this legislation, or the President believes that there is no chance that Congress would enact the legislation even if it had the power.<sup>116</sup> In our system of limited government, the President does not have complete power; only Congress exercises the federal legislative power, and significant powers have been reserved for the states. So when the President makes any promise that the United States will take future action that can only be undertaken by other governmental actors, the President never knows for certain whether the United States will follow through and honor this promise. The President faces this scenario any time the President enters into a non-self-executing treaty promising domestic legislation.

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<sup>111</sup> See *id.* at 430–31 (describing legislation and regulations implemented in compliance with the treaty agreement).

<sup>112</sup> See *Medellín v. Texas*, 552 U.S. 491, 504–05 (2008).

<sup>113</sup> Rosenkranz, *supra* note 13, at 1877.

<sup>114</sup> See THE FEDERALIST NO. 75 (Alexander Hamilton), *supra* note 34, at 365 (stating that treaties are “not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign”).

<sup>115</sup> *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) (quoting 10 Annals of Cong. 613 (1800)); see *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 414 (2003) (noting that the President has a “vast share of responsibility for the conduct of our foreign relations”) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring)).

<sup>116</sup> See *Curtiss-Wright*, 299 U.S. at 315 (noting the “fundamental” differences “between the powers of the federal government in respect of foreign or external affairs and those in respect of domestic or internal affairs”).

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Indeed, two-thirds of the Senate may agree to the treaty, but that does not necessarily reflect the Senate's view on the propriety of implementing legislation. Nor does the Senate's concurrence give any indication on how the House of Representatives would vote on proposed legislation.

If the Tenth Amendment never limits the President's authority to enter into a non-self-executing treaty, then *Missouri v. Holland* would have correctly held that the Tenth Amendment did not deny the President authority to enter into the non-self-executing Migratory Bird Treaty. That realization, though, does not address other important questions about treaties. One would still have to determine whether there were limits on (1) the President's power to make *self-executing* treaties or (2) Congress's authority to legislatively implement treaties. Those issues will now be considered in turn.

2. *The President's Power to Make Self-Executing Treaties.* — Assume *arguendo* that the Migratory Bird Treaty in *Missouri v. Holland* and the Chemical Weapons Convention in *Bond* were actually *self-executing* treaties. That is, assume that the treaties themselves had domestic effect that prohibited individuals in the United States from hunting migratory birds or using chemicals (in the same manner as Congress's actual subsequent implementing legislation). In these hypothetical scenarios, the President would not have simply made a promise among nations. Instead, he and the Senate would have enacted binding domestic law through treaties. The ability to impose domestic obligations on states and individuals triggers Tenth Amendment concerns about the sovereign states and their reserved powers. So to test the limits on the President's power to make self-executing treaties, make one further assumption: that these hypothetical self-executing treaties cover some areas reserved for the states under our system of dual sovereignty.

The Framers explicitly enumerated the powers of the federal government, and all unenumerated powers were "reserved to the States respectively, or to the people."<sup>117</sup> If the states retain some sphere of sovereign authority over which the federal government has no power, then all attempts by the federal government to infringe on this sovereign state authority should be unconstitutional — regardless of whether the federal government tries to do so through the President's Treaty Clause power or Congress's enumerated powers. As Thomas Jefferson explained, the treaty power "*must have meant to except . . . the rights reserved to the states*; for surely the President and Senate cannot do by

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<sup>117</sup> U.S. CONST. amend. X.

treaty what the whole government is interdicted from doing in any way.”<sup>118</sup>

Throughout the years, the Supreme Court has recognized Jefferson’s insight that treaties should not be able to alter the Constitution’s balance of power between the federal and state governments. As early as 1836, the Court explained, “Congress cannot, by legislation, enlarge the federal jurisdiction, nor can it be enlarged under the treaty-making power.”<sup>119</sup> In 1872, the Court expanded on this point:

[T]he framers of the Constitution intended that [the treaty power] should extend to all those objects which in the intercourse of nations had usually been regarded as the proper subjects of negotiation and treaty, if not inconsistent with the nature of our government and the relation between the States and the United States.<sup>120</sup>

So by 1890, the Court noted that the treaty power is subject to “those restraints which are found in [the Constitution] against the action of the government . . . and those arising from the nature of the government itself, and of that of the States.”<sup>121</sup> The recognition of structural limitations on the treaty power is not just a nineteenth-century concept. In 1988, the Court said “it is well established that ‘no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution.’”<sup>122</sup>

Nor does the Tenth Amendment simply state a “truism,” as the Supreme Court infamously surmised in 1941.<sup>123</sup> The Tenth Amendment was included in the Bill of Rights to recognize that there are, in fact, significant powers reserved to the states. That is precisely why the Court subsequently backtracked from its “truism” comment, noting that “[t]he Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States’ integrity or their ability to function effectively in a federal system.”<sup>124</sup> One possible implication of the Court’s “truism” remark is that there are no powers reserved exclusively to the states. But if that were so — if state sovereign powers were a null set — then the Tenth Amendment would be superfluous, as would the whole of Article I, Section 8.

But even putting aside this Tenth Amendment textual argument, there are significant structural arguments in favor of limiting the President’s Treaty Clause power. It would have been absurd for the

<sup>118</sup> THOMAS JEFFERSON, *MANUAL OF PARLIAMENTARY PRACTICE* 110 (Clark & Maynard 1870) (1801) (emphasis added).

<sup>119</sup> *Mayor of New Orleans v. United States*, 35 U.S. (10 Pet.) 662, 736 (1836).

<sup>120</sup> *Holden v. Joy*, 84 U.S. (17 Wall.) 211, 243 (1872).

<sup>121</sup> *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890).

<sup>122</sup> *Boos v. Barry*, 485 U.S. 312, 324 (1988) (quoting *Reid v. Covert*, 354 U.S. 1, 16 (1957)).

<sup>123</sup> *United States v. Darby*, 312 U.S. 100, 124 (1941).

<sup>124</sup> *Fry v. United States*, 421 U.S. 542, 547 n.7 (1975).

Framers to implement multiple checks and balances for creating a system of dual sovereignty, and to explicitly delineate the President's and Congress's powers, only to allow the Treaty Clause power to completely displace all state sovereign authority. And it would be doubly absurd to condition this displacement of state sovereignty on a foreign nation's assent. Professors Lawson and Seidman may have put it best:

If the Treaty Clause does give the President and the Senate power to alter state capitals, . . . then the entire federal structure, apart from a few fortuitously worded prohibitions on federal action in Article I, Section 9, is a President and two-thirds of a quorum of senators (and perhaps a bona fide demand from a foreign government) away from destruction.<sup>125</sup>

The Supreme Court has also repeatedly recognized that our constitutional structure prevents circumvention of enumerated limits on federal power, even if the Constitution's text does not explicitly prohibit a certain exercise of federal power. *New York v. United States* held that the federal government cannot commandeer state governments into passing or enforcing a federal regulatory program.<sup>126</sup> *New York* rightly explained:

[J]ust as a cup may be half empty or half full, it makes no difference whether one views the question at issue in these cases as one of ascertaining the limits of the power delegated to the Federal Government under the affirmative provisions of the Constitution or one of discerning the core of sovereignty retained by the States under the Tenth Amendment. Either way, we must determine whether any of the . . . challenged provisions . . . oversteps the boundary between federal and state authority.<sup>127</sup>

*Printz v. United States*<sup>128</sup> subsequently built upon *New York* in holding that the federal government "cannot circumvent [*New York's*] prohibition by conscripting the State's officers directly."<sup>129</sup> *Printz* reasoned that "such commands are fundamentally incompatible with our constitutional system of dual sovereignty."<sup>130</sup> Just recently, the Court relied heavily on *New York* to invalidate conditional spending provisions of the Affordable Care Act.<sup>131</sup> Although Congress's Spending Clause power does not say anything explicit about conditional spending, the Court recognized that coercive conditional spending would "undermine the status of the States as independent sovereigns in our federal system."<sup>132</sup>

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<sup>125</sup> Gary Lawson & Guy Seidman, *The Jeffersonian Treaty Clause*, 2006 U. ILL. L. REV. 1, 57.

<sup>126</sup> 505 U.S. 144 (1992).

<sup>127</sup> *Id.* at 159.

<sup>128</sup> 521 U.S. 898 (1997).

<sup>129</sup> *Id.* at 935.

<sup>130</sup> *Id.*

<sup>131</sup> See Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2601–03 (2013) (opinion of Roberts, C.J.); *id.* at 2659–61 (joint dissent).

<sup>132</sup> *Id.* at 2602 (opinion of Roberts, C.J.).

If the federal Treaty Clause power could violate state sovereignty, it would disrupt our constitutional structure and encroach on state sovereignty just like in *New York, Printz*, and *NFIB v. Sebelius*. Regardless of whether this is viewed as a Tenth Amendment problem or an enumerated powers dispute, the bottom line is the federal government cannot aggrandize power otherwise reserved to the states. Our Constitution, and its structure devised by the Framers, does not allow this destruction of state sovereignty.

One frequent objection to structural limits on the Treaty Clause power is that they do not give the federal government sufficient latitude to negotiate peace treaties with concessions.<sup>133</sup> This objection posits that the federal government must have authority to preserve the union by getting out of war through any means and that it is absurd to think that ceding state territory is a violation of state sovereignty.<sup>134</sup>

The Court, however, has suggested that this may not be absurd. The *Reid* plurality quoted an 1890 Supreme Court precedent for the proposition that a treaty cannot take away state territory without the state's consent:

The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent.<sup>135</sup>

Regardless, even if the President must have the ability to cede state territory as part of a peace treaty, Professors Lawson and Seidman respond by arguing that this could be cabined as a narrow exception to Tenth Amendment state sovereignty limits on the Treaty Clause power. The rationale for this exception would be that ceding state territory as part of a peace treaty “implements the presidential decision to sacrifice part of the country during wartime in order to save the rest.”<sup>136</sup>

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<sup>133</sup> See, e.g., Lawson & Seidman, *supra* note 125, at 62–67.

<sup>134</sup> See *id.* at 63 (“Vasan Kesavan has recently demonstrated, at great length, that the general understanding at the time of the framing was that treaties permitted the cession of American territory, including territory that was part of a state, without the consent of the state in which the territory was located. We accept the proposition that a fully informed eighteenth-century audience would have been startled to discover that the federal government had no power to cede territory, even as part of a peace settlement.” (footnote omitted)).

<sup>135</sup> *Reid v. Covert*, 354 U.S. 1, 17–18 (1957) (plurality opinion) (quoting *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890) (internal quotation marks omitted)).

<sup>136</sup> Lawson & Seidman, *supra* note 125, at 63. (“During wartime, however, the President has the power to ‘cede’ state territory by refusing to defend it (or by defending it and losing). . . . A treaty of peace that formally cedes the conquered territory thereby implements the presidential decision to sacrifice part of the country during wartime in order to save the rest.” *Id.*).

But Lawson and Seidman would cabin this authority to cede state territory to “peace settlement[s]” made “during wartime”; the Treaty Clause power would not permit this otherwise, so the President could not cede state territory via treaty as “part of ordinary commercial relations.”<sup>137</sup> Perhaps a formal congressional declaration of war, or its equivalent, generally would be required for the President to have power to cede state territory.<sup>138</sup> This structural check would ensure that the significant power to displace state sovereignty was used only with the acquiescence of both houses of Congress — when the President’s “authority is at its maximum,” per Justice Jackson’s famous *Steel Seizure* concurrence.<sup>139</sup>

In any event, even if there are certain hypotheticals involving war that may increase the treaty power, the sovereignty of the people — and the sovereignty they duly delegated to the states at the Founding — should not be discarded lightly. That is precisely why the Tenth Amendment and the Constitution’s structure place limits on the President’s power to make treaties.

### C. *Limits on Congress’s Power to Implement Treaties*

The previous part dealt with limits on the President’s Treaty Clause power to create a treaty in the first place. If the President validly creates a treaty, another question regarding the federal government’s treaty powers arises: are there limits on Congress’s ability to implement duly made treaties? The Supreme Court in *Medellín* ruled that the President lacks constitutional authority to “transform[] an international obligation arising from a non-self-executing treaty into domestic law.”<sup>140</sup> That responsibility, the Court held, “falls to Congress.”<sup>141</sup> So we must consider whether there are any limits on Congress’s ability to implement a treaty legislatively.

Although Congress could rely on one of its enumerated powers besides that arising from the Necessary and Proper Clause — such as that laid out in the Commerce Clause — the more important question is whether the existence of a treaty can ever enhance Congress’s implementation powers or whether the Necessary and Proper Clause always limits Congress’s power to implement a treaty. Some of the same concerns addressed in the previous part about the President’s Treaty Clause power will also be present in analyzing Congress’s power to implement treaties, but the two are not necessarily intertwined. Some

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<sup>137</sup> *Id.* at 64.

<sup>138</sup> *See* U.S. CONST. art. I, § 8, cl. 11.

<sup>139</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring in the judgment).

<sup>140</sup> *Medellín v. Texas*, 552 U.S. 491, 525 (2008).

<sup>141</sup> *Id.* at 525–26.

have plausibly argued that even if the President could enter into a treaty that covered subject matter outside of Congress's enumerated powers, Congress's powers still would not be increased.<sup>142</sup>

For nearly a century, the touchstone of this analysis has been one line 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>143</sup> So according to Justice Holmes, the Necessary and Proper Clause gives Congress authority to pass any legislation implementing a treaty.

Even if one accepts Justice Holmes's interpretation of the Necessary and Proper Clause, there could still be limits on Congress's power to implement treaties. Namely, there could have to be a sufficient nexus between the treaty and Congress's implementing legislation. Legislation that has nothing to do with a treaty's subject matter would be neither "necessary" nor "proper for carrying into Execution" that treaty.<sup>144</sup> For instance, the Chemical Weapons Convention would not give Congress the authority to enact legislation that has nothing to do with chemical weapons. Such legislation would lack constitutional authority just like the Gun-Free Schools Zone Act invalidated in *United States v. Lopez*<sup>145</sup> or the parts of the Violence Against Women Act struck down in *Morrison*.<sup>146</sup> The Supreme Court has not had to clarify how closely the implementing legislation must fit with the treaty. But perhaps, if called to do so, the Court would adopt a doctrine similar to the *City of Boerne* congruence-and-proportionality doctrine,<sup>147</sup> under which the subject matter of the implementing legislation could not substantially exceed the treaty's subject matter.

In any event, there are good arguments to impose additional limits on Congress's power to implement treaties, and thus to reject Justice Holmes's statement. In his 2005 *Harvard Law Review* article *Executing the Treaty Power*, Professor Nicholas Rosenkranz deftly presented both textual and structural arguments for additional limits on Congress's power to implement treaties.<sup>148</sup> As a textual matter, Rosenkranz returned to the actual words of the Constitution by grammatically combining the Treaty Clause with the Necessary and Proper Clause: "The Congress shall have Power . . . To make

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<sup>142</sup> See, e.g., Rosenkranz, *supra* note 13 (arguing for limits on Congress's powers to implement treaties).

<sup>143</sup> *Missouri v. Holland*, 252 U.S. 416, 432 (1920).

<sup>144</sup> U.S. CONST. art. I, § 8, cl. 18.

<sup>145</sup> 514 U.S. 549 (1995).

<sup>146</sup> *United States v. Morrison*, 529 U.S. 598 (2000).

<sup>147</sup> *City of Boerne v. Flores*, 521 U.S. 507 (1997).

<sup>148</sup> Rosenkranz, *supra* note 13.

all Laws which shall be necessary and proper for carrying into Execution . . . [the President's] Power, by and with the Advice and Consent of the Senate, to make Treaties."<sup>149</sup> He then reasoned that a "Law[] . . . for carrying into Execution . . . [the] Power . . . to make treaties" would cover, for example, "laws appropriating money for the negotiation of treaties."<sup>150</sup> But it would not include "the implementation of treaties already made."<sup>151</sup> As Rosenkranz correctly noted, "a treaty and the 'Power . . . to make Treaties' are not the same thing."<sup>152</sup>

In other words, Congress can pass laws that give the President the resources to exercise his executive power to negotiate and make treaties, but this authority does not necessarily give Congress the power to implement a treaty already made. Perhaps another one of Congress's enumerated powers — such as the Commerce Clause — might happen to give Congress that authority. But the Necessary and Proper Clause combined with a treaty would not, under Rosenkranz's textual argument.

Besides this textual argument, there is an even more potent, structural argument for limits on Congress's power to implement treaties. It largely tracks the structural argument for limits on the President's power to make treaties.<sup>153</sup> Congress's powers are explicitly enumerated in Article I of the Constitution, a major check and balance created by the Framers. Yet under Justice Holmes's view, "the legislative powers of Congress are not fixed by the Constitution, but rather may be increased by treaty."<sup>154</sup> It would be a remarkable evasion of limited constitutional government if a foreign nation's agreement, with the President and two-thirds of the Senate, could allow Congress to exercise powers otherwise reserved to the states. Put another way, when the people acted in their sovereign capacity and created the Constitution, they did not give the federal government all powers. Instead, they reserved the unenumerated powers to the states. There would be no reserved state powers if agreements with foreign nations could increase Congress's authority beyond its enumerated powers.

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<sup>149</sup> *Id.* at 1882 (alteration in original) (quoting U.S. CONST. art. I, § 8, art. II, § 2) (internal quotation marks omitted).

<sup>150</sup> *Id.* (alteration in original) (quoting U.S. CONST. art. I, § 8, art. II, § 2) (internal quotation marks omitted).

<sup>151</sup> *Id.* at 1885.

<sup>152</sup> *Id.* (alteration in original) (quoting U.S. CONST. art. I, § 8, art. II, § 2) (internal quotation marks omitted).

<sup>153</sup> See, e.g., *United States v. Comstock*, 130 S. Ct. 1949, 1967–68 (2010) (Kennedy, J., concurring in the judgment) ("It is of fundamental importance to consider whether essential attributes of state sovereignty are compromised by the assertion of federal power under the Necessary and Proper Clause . . ."); *Printz v. United States*, 521 U.S. 898, 924 (1997) (finding that exercises of federal power that "violate[] the principle of state sovereignty" cannot be "proper for carrying into Execution" the federal government's enumerated powers). (emphasis omitted).

<sup>154</sup> Rosenkranz, *supra* note 13, at 1893.

In fact, the Supreme Court recognized this structural argument favoring limits on Congress's power to implement treaties long before *Missouri v. Holland*. In 1836, the Court explained: "The government of the United States . . . is one of limited powers. It can exercise authority over no subjects, except those which have been delegated to it. Congress cannot, by legislation, enlarge the federal jurisdiction, nor can it be enlarged under the treaty-making power."<sup>155</sup>

And a few years later, Justice Story, writing for the Supreme Court, reasoned that the Necessary and Proper Clause did not give Congress carte blanche power to implement treaties: "[A]lthough the power is given to the executive, with the consent of the senate, to make treaties, the power is nowhere in positive terms conferred upon Congress to make laws to carry the stipulations of treaties into effect."<sup>156</sup>

With these precedents on the books, Justice Holmes's single line from *Missouri v. Holland* seems quite out of place. At the very least, the opinion should have grappled with these precedents if it was going to make broad pronouncements about Congress's ability to implement treaties. As Rosenkranz has noted, Missouri never argued that a treaty could not expand Congress's power; rather, Missouri only argued that the Migratory Bird Treaty itself was invalid.<sup>157</sup> Consequently, "the issue of Congress's power to legislate pursuant to treaty received no analysis whatsoever, either in the district court opinions or in the Supreme Court in *Missouri v. Holland*."<sup>158</sup>

Others have tried to rehabilitate *Missouri v. Holland*'s statement about the Necessary and Proper Clause with a competing structural argument.<sup>159</sup> According to this argument, Congress must have the power to implement treaties, or else the President could enter into agreements with foreign nations and have no power to enforce these agreements.<sup>160</sup> This result, though, is "not absurd."<sup>161</sup> As Rosenkranz highlighted, "[a]ll non-self-executing treaties rely on the subsequent acquiescence of the House of Representatives — something that our trea-

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<sup>155</sup> *Id.* at 1900 (emphasis omitted) (quoting *Mayor of New Orleans v. United States*, 35 U.S. (10 Pet.) 662, 736 (1836).) (internal quotation marks omitted).

<sup>156</sup> *Id.* at 1892 (emphasis omitted) (quoting *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 619 (1842)).

<sup>157</sup> *Id.* at 1873–74, 1879.

<sup>158</sup> *Id.* at 1880.

<sup>159</sup> Years after *Missouri v. Holland*, one professor tried to use the Necessary and Proper Clause's drafting history to show that Congress had the power to implement treaties. *Id.* at 1912. According to that professor, "The 'necessary and proper' clause originally contained expressly the power 'to enforce treaties' but it was stricken as superfluous." *Id.* (emphasis omitted) (quoting HENKIN, *supra* note 102, at 190). As Rosenkranz has shown, though, that contention is factually inaccurate, because the words "enforce treaties" were struck from the preceding Militia Clause in Article I, Section 8, and not the Necessary and Proper Clause. *Id.* at 1917.

<sup>160</sup> *See id.* at 1920.

<sup>161</sup> *Id.* at 1925.

ty partners can never be certain will be forthcoming.”<sup>162</sup> So when a foreign nation enters into a non-self-executing treaty with the United States, there is always a possibility that the treaty will not be implemented in the United States even if Congress had the authority — under the Commerce Clause or another of its enumerated powers — to pass the implementing statute. Stated differently: just because the President enters into an agreement with Senate approval, it does not follow that the treaty will be implemented, so the inability to implement certain treaties is wholly consistent with the nature of non-self-executing treaties.

This competing structural argument also assumes a doubtful premise: that the federal government must have unlimited powers to implement treaties it believes are in the public interest. Some have said that we should not fear such broad power to implement treaties, because political actors in the Senate — the body most reflective of state sovereignty — sufficiently protect state interests.<sup>163</sup> In many ways, this line of thinking is consistent with the view that courts should not enforce limits on Congress’s enumerated powers, but should rather be content that the political process can safeguard federalism and the separation of powers.<sup>164</sup>

The people, however, did not give the federal government all powers to act in the public interest; they gave the federal government only enumerated powers. And they also created a judicial branch to check the legislative and executive branches. The Constitution did not specify which branch should be the final arbiter of interpreting the Constitution, but that question has been settled for centuries — the judicial branch has the power of judicial review under *Marbury v. Madison*.<sup>165</sup> Judicial review should not apply only to those provisions of the Constitution favored by liberal academics. Failing to judicially enforce the limits on federal government power, and the power held by individual branches, is tantamount to ignoring the sovereign will of the people who created government in the first place.

As with limits on the President’s Treaty Clause power, the best arguments in favor of expansive congressional power to implement treaties involve wartime hypotheticals about peace-treaty concessions.<sup>166</sup> Many of those concerns have already been discussed. But it bears mentioning that one could imagine a middle position that avoids some

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<sup>162</sup> *Id.* at 1924.

<sup>163</sup> See, e.g., Martin S. Flaherty, *Are We to Be a Nation? Federal Power vs. “States’ Rights” in Foreign Affairs*, 70 U. COLO. L. REV. 1277, 1308–09 (1999).

<sup>164</sup> See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550–54 (1985) (discussing the role of constitutional structure and congressional legislation in preserving state interests).

<sup>165</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

<sup>166</sup> See Lawson & Seidman, *supra* note 133, at 63.

of the deleterious consequences of limiting the President's Treaty Clause power. One might argue that, even if the President lacks authority to enter into a self-executing treaty displacing state sovereignty, Congress may have Necessary and Proper Clause authority to implement a non-self-executing treaty if a foreign nation has engaged in or threatened war. Under this view, the President could enter into a non-self-executing treaty to cede state territory, and then Congress would have the power to implement that treaty in light of war concerns. In many ways, this arrangement would resemble the exception Professors Lawson and Seidman recognized regarding the President's Treaty Clause power,<sup>167</sup> but it would just require Congress to act in conjunction with the President.

At its core, the validity of Justice Holmes's assertion in *Missouri v. Holland*, that Congress has plenary power to implement any treaty, turns on whether the federal government is one of limited, enumerated powers. If Justice Holmes was correct, then the President and Senate could agree with a foreign nation to undo the checks and balances created by the people who founded our nation. That proposition runs counter to our entire constitutional structure.

#### IV. SHOULD *MISSOURI V. HOLLAND* BE OVERRULED?

Just because Justice Holmes's reasoning in *Missouri v. Holland* was problematic does not necessarily mean that the Supreme Court must overrule the case's holding. The Court rejected a facial challenge to the Migratory Bird Treaty Act<sup>168</sup>; Missouri had argued only that the President's power to make treaties was limited by the Tenth Amendment, such that a treaty could not address subject matter outside the limits of Congress's enumerated legislative powers.<sup>169</sup> Justice Holmes erroneously asserted that the President's treaty power extended to subjects not expressly enumerated in the Constitution and, in dicta, that Congress had plenary power under the Necessary and Proper Clause to implement a treaty. But even with a proper understanding of the limits on these treaty powers, the Court still could have rejected a facial challenge to the Migratory Bird Treaty or its implementing Act.

Under the framework set forth in this Essay, the President may have had the Treaty Clause power to make the Migratory Bird Treaty, because it was a non-self-executing treaty. Because the Treaty im-

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<sup>167</sup> See *supra* pp. 111–12.

<sup>168</sup> 16 U.S.C. §§ 703–711 (2006).

<sup>169</sup> See *Missouri v. Holland*, 252 U.S. 416, 432, 434 (1920) (noting that Missouri's challenge was a “general one,” *id.* at 432, on “general grounds,” *id.* at 434); Rosenkranz, *supra* note 13, at 1878–79 (noting that Missouri barely touched the question of whether an expansive executive treaty power would give Congress constitutional authority to pass enacting legislation that fell outside its enumerated powers).

posed no domestic obligations of its own force, the mere creation of the Treaty could not necessarily have displaced state sovereignty protected by the Tenth Amendment.

And Congress may have had Commerce Clause authority to implement the Treaty legislatively, at least insofar as the Treaty covered migratory birds moving interstate or between countries. Perhaps such an implementing statute would be unconstitutional as applied to birds that remain intrastate (if those birds would even be migratory or covered by the statute), because Congress's enumerated powers might not extend that far.<sup>170</sup> But the Court's subsequent doctrine on facial challenges clarifies that, outside the free speech context, the Court cannot invalidate a statute in whole unless the statute is unconstitutional in all of its applications.<sup>171</sup> The Court in *Missouri v. Holland*, therefore, could have correctly rejected a facial challenge to Congress's implementation of the Migratory Bird Treaty.

That said, *Missouri v. Holland* probably would have to be overruled if one believes that Congress lacked the Commerce Clause authority to implement the Treaty legislatively. The Necessary and Proper Clause, combined with the Treaty, would not be sufficient to displace state sovereignty under the Tenth Amendment, according to this Essay's framework. *Missouri v. Holland* treated the Tenth Amendment as essentially an unenforceable ink blot<sup>172</sup> — or rather, an “invisible” ink blot.<sup>173</sup> Likewise, the *Reid v. Covert* plurality distinguished *Missouri v. Holland* by citing to the case that perniciously declared that the Tenth Amendment was “but a truism.”<sup>174</sup> However, the Rehnquist Court's revitalization of structural constitutional limits to federal authority — in *Lopez*, *Morrison*, *New York*, *Printz*, and other cases — rejects the view that this Amendment can be read out of the Constitution. The Roberts Court, too, has continued to enforce structural limits on the balance of power between the federal and state governments.<sup>175</sup> These developments may very well render *Missouri v.*

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<sup>170</sup> See *Holland*, 252 U.S. at 435 (“The subject-matter is only transitorily within the State and has no permanent habitat therein.”); *id.* at 434 (“The whole foundation of the State's rights is the presence within their jurisdiction of birds that yesterday had not arrived, tomorrow may be in another State and in a week a thousand miles away.”).

<sup>171</sup> See *e.g.*, *United States v. Salerno*, 481 U.S. 739, 745 (1987) (“A facial challenge to a legislative Act . . . must establish that no set of circumstances exists under which the Act would be valid.”).

<sup>172</sup> Cf. Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary, 100th Cong. 249 (1989) (statement of J. Robert H. Bork) (describing the Ninth Amendment as an ink blot).

<sup>173</sup> *Holland*, 252 U.S. at 433–34 (“The only question is whether [the Migratory Bird Treaty Act] is forbidden by some invisible radiation from the general terms of the Tenth Amendment.”).

<sup>174</sup> *United States v. Darby*, 312 U.S. 100, 124 (1941); see also *Reid v. Covert*, 354 U.S. 1, 18 n.35 (1957) (plurality opinion) (citing *Darby*, 312 U.S. at 124–25).

<sup>175</sup> See, *e.g.*, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

*Holland* a “doctrinal anachronism” that stare decisis should not save.<sup>176</sup>

### V. RESOLVING *BOND*

Having established the proper framework and doctrines for considering challenges to presidential and congressional treaty powers, we can return to how the Supreme Court should resolve *Bond v. United States*. Unlike *Missouri v. Holland*, *Bond* presents the Court with an as-applied challenge. *Bond* will have to resolve whether the Chemical Weapons Convention Implementation Act of 1998 can be applied to Bond’s particular local conduct in the midst of a domestic dispute. The Court might invoke the canon of constitutional avoidance to hold that Bond’s conduct is not covered by the Act as a matter of statutory interpretation, an argument Bond has pressed. But if the Court does not do that, then it must resolve weighty treaty questions.

Under this Essay’s framework, the President may have had the Treaty Clause power to make the Chemical Weapons Convention. The Chemical Weapons Convention is a non-self-executing treaty, just as the Migratory Bird Treaty was in *Missouri v. Holland*. As discussed above, non-self-executing treaties create no domestic obligations on the states or individuals,<sup>177</sup> so they cannot directly displace state sovereignty protected by the Tenth Amendment. The United States agreed in the Convention, however, to enact domestic laws addressing chemical weapons.<sup>178</sup> And Congress purported to enact such laws through the Chemical Weapons Convention Implementation Act of 1998. But regardless of whether Congress had that authority, the President had the Treaty Clause power to make the treaty, even if he knew that the promise of U.S. participation could never be kept.

The President thus may have had power to make the Chemical Weapons Convention, but Congress almost certainly did not have the power to enact a statute criminalizing Bond’s wholly local conduct pertaining to a domestic dispute. This Essay has argued that the Necessary and Proper Clause alone does not give Congress power to implement treaties in a way that contravenes the structural limitations on the federal government’s powers. Thus, the Chemical Weapons Convention Implementation Act of 1998, as applied to Bond, would only be constitutional if it were consistent with Congress’s enumerated powers.

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<sup>176</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 855 (1992).

<sup>177</sup> *See supra* section III.B.1, pp. 106–09; *see also* *Medellin v. Texas*, 552 U.S. 491, 504–06 (2008).

<sup>178</sup> *See* Chemical Weapons Convention, *supra* note 53, art. VII.

The Third Circuit in *Bond* considered the government's Necessary and Proper Clause claim only, declining to reach any arguments about other enumerated powers like the Commerce Clause.<sup>179</sup> But it is worth briefly considering the Commerce Clause, because since 1937, the Commerce Clause has been the enumerated power most often used to justify congressional acts. As the Court has reminded us in the past two decades, there are still limits on this power. In *Morrison*, the Court invalidated part of the Violence Against Women Act of 1994 on the basis that it would have usurped the states' police power to implement criminal laws for wholly local conduct.<sup>180</sup> The parallels between *Morrison* and *Bond* are striking. Both involve the application of a federal statute to a wholly local assault covered by state criminal law. If Congress has the power to create a federal criminal code that reaches domestic disputes like the one in *Bond*, then it is unclear how the states retain any police power that cannot be exercised by the federal government. Under *Morrison*, therefore, the Commerce Clause did not give Congress authority to criminalize Bond's acts through the Chemical Weapons Convention Implementation Act of 1998. Consequently, the Supreme Court should reverse Bond's conviction.

## VI. CONCLUSION

Sovereignty should be the touchstone of any debate over the limits on the treaty power. The President should not be able to make any treaty — and Congress should not be able to implement any treaty — in a way that displaces the sovereignty reserved to the states or to the people. To hold otherwise would be to undermine the constitutional structure created at the nation's founding. This principle was most clearly enshrined in the Tenth Amendment. But even before the Bill of Rights was created, the Constitution painstakingly enumerated the limited powers of the federal government on the basis that states would retain authority in a system of dual sovereignty. Because “we must never forget that it is a *constitution* we are expounding,” the Court must remember the Constitution's “great outlines” and “important objects.”<sup>181</sup> The Framers' genius in dividing sovereign authority between the federal and state governments certainly qualifies as one of the great outlines and important objects that Chief Justice Marshall deemed necessary for interpreting the Constitution. Dual sovereignty therefore properly constrains the federal government's treaty power.

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<sup>179</sup> United States v. Bond, 681 F.3d 149, 162 n.14 (3d Cir. 2012), *cert. granted*, 133 S. Ct. 978 (2013).

<sup>180</sup> United States v. Morrison, 529 U.S. 598, 617–19, 627 (2000).

<sup>181</sup> McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).