INTERNATIONAL COVENANT AS *BOND*: ON FEDERALISM AND CONGRESS'S ABILITY TO PROMOTE NATIONAL INTERESTS VIA THE TREATY POWER

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INTRODUCTION

In *Missouri v. Holland*, the United States Supreme Court held that the Constitution permits Congress to pass legislation pursuant to its treaty power, even if that legislation could not otherwise have been passed without violating structural guarantees.[1] That holding left open the breadth of the treaty

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[1] Missouri v. Holland, 252 U.S. 416, 433 (1920) ("[T]here 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 . . . .").

power, and the *Holland* Court did not provide any helpful guidance with respect to the constitutional limitations constraining that power's exercise. Since then, courts and commentators have wrestled with how the treaty power can be cabined in a way that nonetheless affords the federal government adequate flexibility with respect to international relations. The Court had an opportunity in *Bond v. United States*[2] to begin to spell out some of those limitations, although those hoping for headway on these matters are likely disappointed. In part because of the facts of the case and in part because of the difficulties in formulating a coherent method of cabining the treaty power, the Court had relatively few realistic options insofar as it wished to promote federalism. It might have imposed a clear-statement-rule[3] when Congress seeks to override what would normally be thought a state prerogative[4] or, perhaps, might have imposed a requirement that Congress not make use of the treaty power to affect a run-around of existing structural limitations with respect to domestic regulation.[5] However, a robust limitation of the treaty power would have had no basis in the existing jurisprudence and might have hamstrung the federal government's ability to promote important national interests.

Part I of this Article focuses on *Holland* and the Court's discussion of how Congress can regulate certain matters through the use of its treaty power even if those matters would otherwise be left to state regulation. Part II discusses some of the Court's salient cases informing the reach and limitations of the treaty power. Part III discusses *Bond v. United States*[6] in particular, explaining why this was an unlikely candidate for limiting the treaty power as applied, although a possible vehicle for issuing a

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[2] 134 S. Ct. 2077 (2014).

[3] *See* Sossamon v. Texas, 131 S. Ct. 1651, 1661 (2011) ("[C]lear statement rules ensure Congress does not, by broad or general language, legislate on a sensitive topic inadvertently or without due deliberation." (quoting Spector v. Norwegian Cruise Line Ltd., 545 U.S. 119, 139 (2005) (plurality opinion))).

[4] *See Bond*, 134 S. Ct. at 2083 ("Because our constitutional structure leaves local criminal activity primarily to the States, we have generally declined to read federal law as intruding on that responsibility, unless Congress has clearly indicated that the law should have such reach.").

[5] *Cf. id.* ("The Chemical Weapons Convention Implementation Act . . . does not cover the unremarkable local offense at issue here.").

[6] 134 S. Ct. 2077 (2014).

warning that the power might be cabined in the future if the federal government seems to be overreaching when signing onto international covenants, even if that cabining would adversely affect the nation's ability to achieve national objectives. The Conclusion discusses the avenue the *Bond* Court took, suggesting that the Court resisted the temptation to promote federalism at the expense of both the Constitution and the welfare of the nation as a whole.

I. *HOLLAND*

Missouri v. Holland suggests that the treaty power is quite broad, although subject to some limitations. The Court did not spell out the degree to which Congress, via its treaty power, can regulate matters that would otherwise be left to the states, although the opinion is important because it highlights some of the considerations that would be relevant in any attempt to make headway in this area. *Holland* offers a cautionary note for those who would limit the treaty power too severely.

A. Background

In *Missouri v. Holland*,[7] the Court addressed the constitutionality of the Migratory Bird Treaty Act of 1918.[8] Missouri claimed that the treaty was "an unconstitutional interference with the rights reserved to the States by the Tenth Amendment."[9] The treaty was signed because "many species of birds in their annual migrations traversed certain parts of the United States and of Canada."[10] These birds "were of great value as a source of food and in destroying insects injurious to vegetation, but were in danger of extermination through lack of adequate protection."[11] The treaty "prohibited the killing, capturing or selling any of the migratory birds included in the

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[7] 252 U.S. 416 (1920).

[8] *Id.* at 430-31 (citing Migratory Bird Treaty Act of 1918, 16 U.S.C. §§ 703-712 (2012)).

[9] *Id.* at 431.

[10] *Id.*

[11] *Id.*

terms of the treaty except as permitted by [specified] regulations."[12]

Congress had attempted to protect migratory birds prior to the adoption of the treaty.[13] However, two district courts had struck down that attempt,[14] reasoning that Congress had exceeded its powers when so legislating.[15] The *Holland* Court refused to say whether those decisions would or should have been sustained on appeal,[16] instead suggesting that the rightness or wrongness of those decisions "cannot be accepted as a test of the treaty power."[17]

B. Limitations on Federal Powers as a General Matter

When examining whether the Senate had exceeded its power when ratifying the Migratory Bird Treaty, the *Holland* Court began by noting that one could not simply cite the Tenth Amendment to establish the treaty's unconstitutionality.[18] The Tenth Amendment reads, "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."[19] Because "the power to make treaties is delegated expressly" under Article II, Section 2 of the Constitution,[20] the Tenth Amendment on its face does not limit Congress's treaty power. Further, because "Article VI treaties made under the authority of the United States, along with the Constitution and laws of the United States made in

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[12] *Id.*

[13] *See id.* at 432 (discussing the "earlier act of Congress that attempted by itself and not in pursuance of a treaty to regulate the killing of migratory birds within the States").

[14] *See, e.g.*, United States v. Shauver, 214 F. 154, 155 (E.D. Ark. 1914) (discussing "part of the Appropriation Act for the Department of Agriculture, approved March 4, 1913 (37 Stat. 828, 847, c. 145), known as the 'migratory birds' provision").

[15] *See Holland*, 252 U.S. at 432 ("An earlier act of Congress . . . had been held bad in the District Court." (citing United States v. Shauver, 214 F. 154 (E.D. Ark. 1914); United States v. McCullagh, 221 F. 288 (D. Kan. 1915))).

[16] *Id.* at 433 (refusing to say "[w]hether the two cases cited were decided rightly or not").

[17] *Id.*

[18] *See infra* notes 19-21 and accompanying text (explaining why simply citing the Tenth Amendment would not suffice).

[19] U.S. CONST. amend. X.

[20] *Holland*, 252 U.S. at 432.

pursuance thereof, are declared the supreme law of the land,"[21] state law that conflicts with a valid treaty must give way.

A separate issue involved the constitutionality of the legislation passed by Congress implementing the Migratory Bird Treaty. But the Court spent very little time addressing that, instead simply noting that "[i]f the treaty is valid there can be no dispute about the validity of the statute under Article I, § 8, as a necessary and proper means to execute the powers of the Government."[22] While the Court did not explain in detail why the implementing legislation was obviously permissible under the Necessary and Proper Clause, the Court presumably believed that the statute was tied sufficiently closely to the treaty's purposes that the statute's constitutionality piggybacked on the treaty's constitutionality.[23]

The *Holland* Court distinguished between the constitutional limitations on Congress's power to enact domestic legislation when not conjoined with its treaty-making power and Congress's power to pass domestic law as required by treaty. With respect to the former, the Court explained that Congress's power to pass domestic legislation is limited. Such laws "are the supreme law of the land only when made in pursuance of the Constitution."[24] An act is not "made in pursuance of the Constitution" if its passage involves Congress's overreaching with respect to one of its enumerated powers or, perhaps, the Necessary and Proper Clause.[25]

A different standard is used when evaluating congressional approval of a treaty.[26] "[T]reaties are declared to be [the supreme law of the land] when made under the authority of the United States."[27] The *Holland* Court was not thereby suggesting that the

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[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.* at 433.

[25] *Cf.* United States v. Lopez, 514 U.S. 549, 551 (1995) ("We hold that the Act exceeds the authority of Congress '[t]o regulate Commerce . . . among the several States . . . .'" (quoting U.S. CONST. art. I, § 8, cl. 3.)).

[26] Congress might approve a treaty either by securing a majority vote in both houses or by securing a two-thirds vote in the Senate. *See* Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1239 (2008) (discussing these two methods).

[27] *Holland*, 252 U.S. at 433.

treaty power is plenary—treaties are only valid if made in accord with established procedures and, *perhaps*, meeting other criteria as well.[28] However, no additional criteria were specified and the Court instead suggested that those possible "qualifications to the treaty-making power . . . must be ascertained in a different way."[29]

Rather than specify the different way in which those qualifications might be ascertained, the *Holland* Court instead noted, "It 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 . . . ."[30] The Court seemed to have in mind a situation where there was an important national interest at stake but "where the States individually are incompetent to act,"[31] e.g., because cross-boundary cooperation and enforcement would be necessary. But where important national interests are at stake, "it is not lightly to be assumed that, in matters requiring national action, 'a power which must belong to and somewhere reside in every civilized government' is not to be found."[32]

Basically, the *Holland* Court implied that there are certain kinds of national interests that Congress must be able to protect or promote,[33] even if the protection or promotion of those interests does not clearly fall within an existing enumerated power.[34] Regrettably, the Court did not explain why this residual power to

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[28] *See id.* ("It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention."). Some commentators seem not to appreciate that the *Holland* Court reserved the questions whether there are substantive limits on the treaty power. *See, e.g.*, Michael P. Van Alstine, *Federal Common Law in an Age of Treaties*, 89 CORNELL L. REV. 892, 958 (2004) ("[T]he power to create federal law through treaties is plenary in substantive terms, as *Missouri v. Holland* definitively declared.") (footnote omitted).

[29] *Holland*, 252 U.S. at 433.

[30] *Id.*

[31] *Id.*

[32] *Id.* (quoting Andrews v. Andrews, 188 U.S. 14, 33 (1903)).

[33] *Cf.* Hartzel v. United States, 322 U.S. 680, 690 (1944) (Reed, J., dissenting) ("The constitutional power of Congress so to protect the national interest is beyond question." (citing Schenck v. United States, 249 U.S. 47 (1919))).

[34] *Cf.* Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685, 726 (1925) (discussing "Congress . . . as the guardian of the national interest").

protect or promote national interests was located in the treaty power rather than some other power.[35]

Professor Golove suggests that the treaty power may be exercised if the implicated national interests can only be promoted or protected via agreements with other nations.[36] A narrow reading of that approach suggests that the treaty power may be exercised where cooperation with other countries is *necessary* to achieve the desired ends. Thus, if the United States must modify local policy in order to induce another country to do the same and national interests could not be promoted unless that other country were willing to modify its policy, Congress would then be permitted to regulate that subject matter, even if it could not have reached that subject matter absent the need to cooperate with that other country.[37] Such an explanation offers a rationale for locating the power to protect certain national interests in the treaty power rather than elsewhere and allays *some* of the concern expressed in *Holland* that in certain circumstances the interests of the nation as a whole require that the federal government have the power to promote or protect national interests.[38]

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[35] In his concurring opinion in *Dennis v. United States*, Justice Jackson noted that "[i]t is not to be supposed that the power of Congress to protect the Nation's existence is more limited than its power to protect interstate commerce." 341 U.S. 494, 574 (1951) (Jackson, J., concurring). However, he did not link that power to a particular enumerated power.

[36] David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1287 (2000) ("[T]he object of the treaty power is to enable the federal government to protect and advance the national interests by obtaining binding promises from other states regarding their conduct.").

[37] *See id.* ("To be within the scope of the treaty power, therefore, the purpose of a treaty must be to advance those interests—that is, our foreign policy interests. This does not mean that treaties may not incidentally regulate domestic matters. That is often the price paid for obtaining equivalent concessions from the other side, and the Supremacy Clause specifically recognizes the necessity for permitting such concessions by making the obligations we undertake in treaties the supreme law of the land.").

[38] *Cf.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-37 (1952) (Jackson, J., concurring) ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power.") (footnote omitted).

Yet, if the treaty power can only be employed when international cooperation is required, there might then be a whole class of national interests that Congress could not promote because (1) their regulation did not fall within Congress's enumerated powers, and (2) international cooperation was not *required* to promote those interests. Thus, assume that there is an important national interest at stake and that "the States individually are incompetent to act" to achieve the desired result.[39] Suppose further, however, that it is not necessary to secure the cooperation of other countries to promote this national interest as long as all of the states cooperate with each other. In that event, the treaty power (if construed as only being triggered when cooperation with other countries is necessary) could not be employed.

A less narrow approach to the treaty power that likely better accounts for Professor Golove's view is that Congress may use that power as long as securing the cooperation of other countries promotes the national interest, even if international cooperation is not *required* to further that interest. Such an approach would presumably reduce the number of instances that Congress would be unable to act because the national interest at issue neither fell within Congress's enumerated domestic powers nor fell within the treaty power. Thus, while Professor Golove suggests that there are some unconstitutional uses of the treaty power, e.g., if the United States enters into a treaty purely to bring about desirable domestic changes,[40] he does not suggest that the power may only be used if there is no other way to achieve the national interests at stake. As long as some benefits are achieved by securing concessions from the various signatories to the treaty,[41] there is no requirement that the treaty be the only way that the desirable ends could be achieved.

The different constructions with respect to the limitations on the treaty power pointed to here[42] are analogous to the differing

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[39] Missouri v. Holland, 252 U.S. 416, 433 (1920).

[40] *See* Golove, *supra* note 36, at 1287-88 ("A treaty is unconstitutional if it does not serve a foreign policy interest or if it is concluded not to affect the conduct of other nations but to regulate our own.").

[41] *See id.* at 1287 (discussing the permissibility of using the treaty power whereby we obtain concessions from other countries but also make concessions ourselves).

[42] *See supra* notes 33-41 and accompanying text.

constructions of the Necessary and Proper Clause that were debated in *M'Culloch v. Maryland*.[43] One of the questions at issue was whether Congress had the power to incorporate a bank,[44] and the answer partly depended on whether the Clause should be given a narrow, rather than a broad, reading.

The *M'Culloch* Court discussed several of Congress's "great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies,"[45] although the Court expressly admitted that "[a]mong the enumerated powers, we do not find that of establishing a bank or creating a corporation."[46] That there was no express power to create a national bank was not dispositive, however. "To its enumeration of powers is added that of making '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 thereof.'"[47]

The Court then addressed whether the Necessary and Proper Clause empowered Congress to create a national bank. Maryland argued that the Necessary and Proper Clause limited what Congress could do.

> Congress is not empowered by it to make all laws, which may have relation to the powers conferred on the government, but such only as may be "*necessary and proper*" for carrying them into execution. The word "*necessary*," is considered as controlling the whole sentence, and as limiting the right to pass laws for the execution of the granted powers, to such as are indispensable, and without which the power would be nugatory. That it excludes the choice of means, and leaves to Congress, in each case, that only which is most direct and simple.[48]

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[43] 17 U.S. (4 Wheat.) 316 (1819).

[44] *Id.* at 401 ("The first question made in the cause is, has Congress power to incorporate a bank?").

[45] *Id.* at 407.

[46] *Id.* at 406.

[47] *Id.* at 411-12 (alteration in original) (quoting U.S. CONST. art. I, § 8, cl. 18).

[48] *Id.* at 413.

According to this interpretation, Congress is only permitted to adopt a means *necessary* to achieve those ends falling within Congress's enumerated powers. But such an interpretation of the Necessary and Proper Clause was very narrow, and the *M'Culloch* Court rejected an interpretation restricting "the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end."[49] Instead, the *M'Culloch* Court explained, "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[50] As the *Sebelius* Court noted, the Necessary and Proper Clause has traditionally been interpreted to afford "Congress great latitude in exercising its powers."[51] If the treaty power may be exercised as long as Congress thereby achieves foreign policy objectives or, perhaps, promotes the national interest by securing the cooperation of another country, then that power (perhaps in conjunction with the Necessary and Proper Clause) is subject to very few constraints.

Yet, the Court now seems less deferential with respect to what the Necessary and Proper Clause permits. For example, after discussing the Court's traditional deference to Congress, the *Sebelius* Court noted, "Our deference in matters of policy cannot, however, become abdication in matters of law."[52] The Court explained, "As our jurisprudence under the Necessary and Proper Clause has developed, we have been very deferential to Congress's determination that a regulation is 'necessary.' We have thus upheld laws that are 'convenient, or useful or conducive to the authority's beneficial exercise.'"[53] Nonetheless, the Court's "respect for Congress's policy judgments . . . can never extend so far as to disavow restraints on federal power that the Constitution carefully constructed."[54]

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[49] *Id.* at 415.

[50] *Id.* at 421.

[51] Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2579 (2012).

[52] *Id.*

[53] *Id.* at 2591-92 (quoting United States v. Comstock, 560 U.S. 126, 133-34 (2010)) (internal quotation marks omitted).

[54] *Id.* at 2579.

The *Sebelius* Court is correct that the Constitution's carefully constructed restraints on federal power must be respected, but the question at hand involves determining what those restraints are. The conditions under which Congress is permitted to regulate the states have undergone significant revision recently.[55] During the half-century between 1942 and 1995, the Supreme Court did not strike down any federal legislation as an invalid exercise of the commerce power.[56] More recently, however, the Court has struck down legislation passed pursuant to the commerce power,[57] and the Court has been described as having imposed "a new, unprecedented constitutional limitation on Congress' Commerce Power."[58] Precisely because the Court's understanding of the Constitution's limitations on congressional power seems to be in flux, it is difficult to describe what the Constitution's carefully constructed restraints on federal power are and thus difficult to predict what the Necessary and Proper Clause will be thought to allow.[59]

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[55] *See* Franita Tolson, *Reinventing Sovereignty?: Federalism as a Constraint on the Voting Rights Act*, 65 VAND. L. REV. 1195, 1250-51 (2012) (discussing "the 'federalism revolution' of the Rehnquist era, a series of cases in which the Court held that there are constitutional limitations to the exercise of federal authority over the states").

[56] *See* Naomi Harlin Goodno, *When the Commerce Clause Goes International: A Proposed Legal Framework for the Foreign Commerce Clause*, 65 FLA. L. REV. 1139, 1155-56 (2013) (noting that *Wickard* was decided in 1942 and gave the Congress extensive powers and that no legislation was struck down as an invalid exercise of the commerce power until 1995).

[57] *Cf.* United States v. Lopez, 514 U.S. 549 (1995) (striking down the Gun-Free School Zones Act as beyond Congress's power under the Commerce Clause); United States v. Morrison, 529 U.S. 598 (2000) (striking down Congress's power under the Commerce Clause to enact the civil remedy under the Violence Against Women Act); Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2608 (2012) (suggesting that Congress could not pass the individual mandate of the Patient Protection and Affordable Care Act under the commerce power, although Congress could do so under the taxing power).

[58] *See* David L. Sloss, Kiobel *and Extraterritoriality: A Rule Without a Rationale*, 28 MD. J. INT'L L. 241, 253 n.75 (2013).

[59] *Cf.* John C. Eastman, *Will Mrs. Bond Topple* Missouri v. Holland*?*, 2010-2011 CATO SUP. CT. REV. 185, 194 ("Justice Kennedy described the issue as follows: 'The ultimate issue of the statute's validity turns in part on whether the law can be deemed "necessary and proper for carrying into Execution" the President's Article II, § 2 Treaty Power.' By so framing the question in terms of one of the Constitution's enumerated powers (the Necessary and Proper Clause), Justice Kennedy has already signaled that the broader interpretation some courts and commentators have given to *Missouri v. Holland*—that provisions of a treaty can authorize legislation that Congress would not

Suppose that the Constitution were interpreted to preclude Congress from employing the treaty power to achieve national interests unless those interests could not be achieved without securing the cooperation of other nations. In that event, if the interests at issue could be achieved as long as the states cooperated with each other, then Congress could not supplant state law by making a treaty but, instead, might try to incentivize state cooperation through use of the spending power. As *Sebelius* illustrated, however, the federal government is limited with respect to the degree to which it can incentivize desired behaviors by the states.[60]

C. The Congressional Power to Protect Birds

After offering some general comments about the constitutional limitations on the treaty power versus limitations on congressional powers over purely domestic matters,[61] the *Holland* Court focused on whether Congress had the power to regulate the matter at hand via treaty. When focusing on the enactment at issue,[62] the Court first noted that "[t]he treaty in question does not contravene any prohibitory words to be found in the Constitution,"[63] and then tried to discern whether the treaty was "forbidden by some invisible radiation from the general terms of the Tenth Amendment."[64] When explaining why Congress had not exceeded its power, the Court noted that "a national interest of very nearly the first magnitude is involved,"[65] and that the interest could "be protected only by national action in concert with that of another power."[66] The Court could "see nothing in the Constitution that compels the Government to sit by while a food

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otherwise have the power to enact—is misplaced." (quoting Bond v. United States, 131 S. Ct. 2355, 2367 (2011))).

[60] *Cf. Sebelius*, 132 S. Ct. at 2605 (explaining that the "threatened loss of over 10 percent of a State's overall budget . . . is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion").

[61] Missouri v. Holland, 252 U.S. 416, 433 (1920) ("We are not yet discussing the particular case before us but only are considering the validity of the test proposed.").

[62] Migratory Bird Treaty Act of 1918, 16 U.S.C. §§ 703-712 (2012).

[63] *Holland*, 252 U.S. at 433.

[64] *Id.* at 434.

[65] *Id.* at 435.

[66] *Id.*

supply is cut off and the protectors of our forests and our crops are destroyed."[67]

The *Holland* Court was not persuaded that the states would provide sufficient protection for the birds,[68] although the decision was not predicated on that assessment of the states' abilities. Even "were it otherwise,"[69] i.e., even were the states able to protect the flocks, that would not resolve the constitutional issue, since "the question is whether the United States is forbidden to act."[70] After posing that question, the Court concluded that "the treaty and statute must be upheld."[71] Thus, the *Holland* Court suggested that the treaty power could be exercised even if securing the cooperation of another country was not a necessary means to fulfilling the federal objective. While in the instant case sufficient protection might not have been afforded even were the states more cooperative because their cooperation would not assure that Canada would also be cooperative in protecting the birds, *Holland* at least suggests that the exercise of the treaty power will be upheld as long as the means adopted is reasonably related to the promotion of important national interests.

II. OTHER ATTEMPTS TO DELIMIT THE TREATY POWER

The United States has long entered into treaties that had the effect of modifying state law, sometimes to the detriment of state coffers. While the Court has sometimes hinted that there may be limits on the treaty power,[72] the Court has nowhere specified the contents of those limits, at least insofar as potential conflicts with state powers are concerned.[73] Instead, the Court has made clear that treaties cannot abrogate rights guaranteed by the Bill of Rights.[74]

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[67] *Id.*

[68] *Id.* ("It is not sufficient to rely upon the States. The reliance is vain . . . .").

[69] *Id.*

[70] *Id.*

[71] *Id.* (citing Carey v. South Dakota, 250 U.S. 118 (1919)).

[72] *See* Maiorano v. Balt. & Ohio R.R. Co., 213 U.S. 268, 272 (1909) ("We do not deem it necessary to consider the constitutional limits of the treaty-making power.").

[73] *See* Johanna Kalb, *Dynamic Federalism in Human Rights Treaty Implementation*, 84 TUL. L. REV. 1025, 1030 (2010) ("As a doctrinal matter, federalism constraints do not currently place significant limits on the treaty power . . . .").

[74] *See* Eugene Kontorovich, *The Constitutionality of International Courts: The Forgotten Precedent of Slave-Trade Tribunals*, 158 U. PA. L. REV. 39, 56 (2009)

A. The Treaty Power and State Law

Traditionally, domestic relations and probate matters are left to the states[75] and thus would not seem to be the kinds of subjects upon which treaties would be based. Yet, as the Court explained in *Hines v. Davidowitz*,[76] "[o]ne of the most important and delicate of all international relationships, recognized immemorially as a responsibility of government, has to do with the protection of the just rights of a country's own nationals when those nationals are in another country."[77] The way that foreign nationals are treated in a particular country might make the difference between particular nations being at peace or at war. "Experience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government."[78] Precisely because maintaining peace is a matter of paramount national importance,[79] the federal government must be able to supplant state law in appropriate cases.[80]

At common law, while non-citizens could receive gifts of real estate, they could not inherit real estate by operation of law.[81] Yet,

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("[L]egislation pursuant to treaties cannot negate individual rights guaranteed in the Bill of Rights . . . .").

[75] *Cf.* Boggs v. Boggs, 520 U.S. 833, 861 (1997) (Breyer, J., dissenting) ("[T]he state law in question involves family, property, and probate—all areas of traditional, and important, state concern.").

[76] 312 U.S. 52 (1941).

[77] *Id.* at 64.

[78] *Id.*

[79] *Cf.* United States v. California, 332 U.S. 19, 35 (1947) ("[P]eace [is one of] the paramount responsibilities of the nation, rather than an individual state . . . .").

[80] *Cf.* Mark Strasser, *What if DOMA Were Repealed? The Confused and Confusing Interstate Marriage Recognition Jurisprudence*, 41 CAL. W. INT'L L.J. 249, 268 (2010) ("While the federal government can supplant state family law in certain circumstances, the government must establish that important federal interests will be significantly harmed unless state law is displaced."). It may well be that the Framers were sensitive to the federal government's need not to be constrained with respect to the possible subjects covered under treaties. *See* Robert Anderson IV, *"Ascertained in a Different Way": The Treaty Power at the Crossroads of Contract, Compact, and Constitution*, 69 GEO. WASH. L. REV. 189, 194 (2001) ("The Framers, however, considered including a subject-matter limitation on the Treaty Power—and rejected it.").

[81] Hauenstein v. Lynham, 100 U.S. 483, 484 (1880) ("By that law 'aliens are incapable of taking by descent or inheritance, for they are not allowed to have any inheritable blood in them.' But they may take by grant or devise though not by descent. In other words, they may take by the act of a party, but not by operation of law; and

as *Hines* suggests, probate cases could have international ramifications, precisely because the way that foreign nationals are treated in one country may affect the willingness of the respective countries involved to cooperate with each other on other matters.[82]

Hauenstein v. Lynham[83] involved Solomon Hauenstein, a Swiss national, who died intestate in Richmond, Virginia.[84] He had never married and did not have any children.[85] Local law provided that under these circumstances the decedent's property would escheat to the state.[86] However, there was a treaty between the United States and the Swiss Confederation providing that foreign nationals who were heirs of the deceased would be permitted to sell the real property and keep the proceeds to the same extent that they could have if they had been citizens of the country where the foreign national had died.[87] Because the treaty was federal law and federal law trumps state law by virtue of the Supremacy Clause,[88] the property did not escheat to the state but

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they may convey or devise to another, but such a title is always liable to be devested at the pleasure of the sovereign by office found." (quoting 2 WILLIAM BLACKSTONE, COMMENTARIES *249)).

[82] *See supra* notes 75-80 and accompanying text.

[83] 100 U.S. 483 (1880).

[84] *Id.* at 483.

[85] *Id.*

[86] *Id.*

[87] *See id.* at 485-86 ("The first part of the article is devoted to personal property, and gives to the citizens of each country the fullest power touching such property belonging to them in the other, including the power to dispose of it as the owner may think proper. It then proceeds as follows: — 'The foregoing provisions shall be applicable to real estate situate [sic] within the States of the American Union, or within the cantons of the Swiss Confederation, in which foreigners shall be entitled to hold or inherit real estate. But in case real estate situated within the territories of one of the contracting parties should fall to a citizen of the other party, who, on account of his being an alien, could not be permitted to hold such property in the State or in the canton in which it may be situated, there shall be accorded to the said heir, or other successor, such term as the laws of the State or canton will permit to sell such property; he shall be at liberty at all times to withdraw and export the proceeds thereof without difficulty, and without paying to the government any other charges than those which, in a similar case, would be paid by an inhabitant of the country in which the real estate may be situated.'").

[88] *See* U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . .").

was instead to be sold for the benefit of Hauenstein's Swiss relatives.[89]

A similar issue was raised in *De Geofroy v. Riggs*.[90] Riggs, a United States citizen, died intestate in the District of Columbia.[91] His nephews, French citizens, claimed an interest in the proceeds of the sale of the property at issue.[92] The United States Supreme Court interpreted an existing treaty between France and the United States to permit the nephews to share in the estate.[93]

The *De Geofroy* Court explained that "the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations."[94] Included among those proper subjects are "the protection which should be afforded to the citizens of one country owning property in another, and the manner in which that property may be transferred, devised, or inherited."[95] The Court explained that "the removal of their disability from alienage to hold, transfer, and inherit property, in such cases, tends to promote amicable relations."[96] The *De Geofroy* Court was not thereby suggesting that anything promoting amicable relations with another country could be the subject of a treaty. "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."[97] Constraints against the action of the government might be found in the Bill of Rights,[98] but the Court's example of what was

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[89] *See Hauenstein*, 100 U.S. at 483 ("[T]he plaintiffs in error, pursuant to a law of the State, filed their petition, setting forth that they were the heirs-at-law of the deceased, and praying that the proceeds of the sale of the property should be paid over to them.").

[90] 133 U.S. 258 (1890).

[91] *Id.* at 258 ("T. Lawrason Riggs, a citizen of the United States and a resident of the District of Columbia, died at Washington, intestate . . . .").

[92] *Id.* ("The complainants are citizens and residents of France, and nephews of the deceased.").

[93] *Id.* at 272-73 ("[T]he complainants are entitled to take by inheritance an interest in the real property in the District of Columbia of which their uncle died seised.").

[94] *Id.* at 266.

[95] *Id.*

[96] *Id.*

[97] *Id.* at 267.

[98] *See, e.g.*, Reid v. Covert, 354 U.S. 1, 18 (1957) (plurality opinion).

precluded by virtue of the nature of the state and federal governments is not of great help for present purposes. The Court noted that the treaty power does not permit the federal government to do what the Constitution expressly prohibits.[99] Nor can the treaty power be used to effect "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."[100]

The Court used a similar analysis in *Asakura v. City of Seattle*[101] to assess the validity of a treaty between Japan and the United States "establish[ing] the rule of equality between Japanese subjects while in this country and native citizens."[102] The Court explained that "[t]he treaty-making power of the United States is not limited by any express provision of the Constitution, and, though it does not extend 'so far as to authorize what the Constitution forbids,' it does extend to all proper subjects of negotiation between our government and other nations."[103] Affording protection to Japanese subjects living in the United States was an appropriate subject because "[t]he treaty was made to strengthen friendly relations between the two nations."[104]

At issue was whether a Seattle law precluding a Japanese national from being a pawnbroker[105] was in violation of the treaty

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[99] *De Geofroy*, 133 U.S. at 267 ("It would not be contended that it extends so far as to authorize what the constitution forbids . . . .").

[100] *Id.*; *see also* Duncan B. Hollis, *Executive Federalism: Forging New Federalist Constraints on the Treaty Power*, 79 S. CAL. L. REV. 1327, 1337 (2006) ("Nationalists even acknowledge some implicit constitutional restrictions protective of states' rights. . . . [T]hey agree that treaties cannot dismember a U.S. state, cede state territory, modify the republican character of a state's government, or abolish its militia.").

[101] 265 U.S. 332 (1924).

[102] *Id.* at 341.

[103] *Id.* (quoting *De Geofroy*, 133 U.S. at 267).

[104] *Id.*; *see also* Santovincenzo v. Egan, 284 U.S. 30, 40 (1931) ("The treaty-making power is broad enough to cover all subjects that properly pertain to our foreign relations, and agreement with respect to the rights and privileges of citizens of the United States in foreign countries, and of the nationals of such countries within the United States, and the disposition of the property of aliens dying within the territory of the respective parties, is within the scope of that power, and any conflicting law of the state must yield." (citing Hauenstein v. Lynham, 100 U. S. 483, 489 (1880))).

[105] *Asakura*, 265 U.S. at 339-40 ("The city passed an ordinance, which took effect July 2, 1921, regulating the business of pawnbroker, and repealing former ordinances on the same subject. It makes it unlawful for any person to engage in the business unless he shall have a license, and the ordinance provides 'that no such license shall be granted unless the applicant be a citizen of the United States.'").

between Japan and the United States.[106] The treaty required that each country would permit nationals of the other country, inter alia, "to carry on trade, wholesale and retail."[107] The Washington Supreme Court had held that the "business of pawnbroking cannot be held to be a right to 'carry on trade'" and thus did not fall within the sphere protected by the treaty.[108] The *Asakura* Court reversed[109] after noting that "[t]reaties are to be construed in a broad and liberal spirit, and, when two constructions are possible, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred."[110]

The dispute about the proper interpretation of the treaty may have masked a different disagreement—the Washington Supreme Court had hinted that lurking in the background was the "question of whether a treaty-making power can impair or destroy the police power of a sovereign state."[111] However, rather than address whether this particular treaty was unconstitutional because it infringed upon state sovereignty, the Washington Supreme Court rested its opinion on its interpretation of the treaty,[112] perhaps believing that it could thereby avoid a conflict between state and federal law. While the *Asakura* Court did not have to address the federalism issue directly because that was not the basis upon which the Washington court had made its decision, the *Asakura* Court did note that "[t]he rule of equality established by [the treaty] cannot be rendered nugatory in any part of the United States by municipal ordinances or state laws."[113] Further, the United States Supreme Court made clear in *Nielsen v.*

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[106] *Id.* at 340 ("He attacked the ordinance on the ground that it violates the treaty between the United States and the empire of Japan, proclaimed April 5, 1911 (37 Stat. 1504) . . . .").

[107] *Id.* (quoting Treaty of Commerce and Navigation, U.S.-Japan, art. I, Feb. 21, 1911, 37 Stat. 1504).

[108] Asakura v. City of Seattle, 210 P. 30, 32 (Wash. 1922), *rev'd*, 265 U.S. 332 (1924) ("[W]e are content to rest our decision on this phase of the case upon the language of the treaty itself, which guarantees only to the subject of Japan residing in the United States the right to 'carry on trade' upon the same terms as our own citizens.").

[109] *Asakura*, 265 U.S. at 344.

[110] *Id.* at 342 (citing Hauenstein v. Lynham, 100 U.S. 483, 487 (1880)).

[111] *Asakura*, 210 P. at 32.

[112] *See supra* note 108 and accompanying text.

[113] *Asakura*, 265 U.S. at 341.

Johnson[114] that there was no need to interpret treaties in a way that would minimize conflicts with state law.

The *Nielsen* Court addressed the permissibility of imposing a greater tax on the estate of Anders Anderson, who had died intestate in Iowa,[115] because his mother was a nonresident alien.[116] His estate was relatively small,[117] and it would not have been subject to any tax if his mother had been an Iowa citizen.[118] Denmark and the United States had entered into a treaty precluding the imposition of higher estate taxes merely because the decedent was a citizen of the other country.[119] Because "the treaty-making power is independent of and superior to the legislative power of the states, the meaning of treaty provisions so construed is not restricted by any necessity of avoiding possible conflict with state legislation and when so ascertained must prevail over inconsistent state enactments."[120] The Court held that the treaty precluded imposition of the tax in question,[121] notwithstanding that intestacy law is traditionally a matter of state rather than federal concern.[122]

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[114] 279 U.S. 47, 52 (1929).

[115] *Id.* at 49 ("Anders Anderson, the intestate, a citizen of the kingdom of Denmark residing in Iowa, died there February 9, 1923 . . . .").

[116] *Id.* at 50 ("[A]n estate of less than $15,000, as was decedent's, passing to a parent who is not such a nonresident alien is tax free.").

[117] *Id.* at 49 (discussing "his net estate of personal property, aggregating $3,006.37").

[118] *Id.* at 50.

[119] *See id.* ("Article 7. The United States and his Danish Majesty mutually agree, that no higher or other duties, charges, or taxes of any kind, shall be levied in the territories or dominions of either party, upon any personal property, money, or effects, of their respective citizens or subjects, on the removal of the same from their territories or dominions reciprocally, either upon the inheritance of such property, money, or effects, or otherwise, than are or shall be payable in each state, upon the same, when removed by a citizen or subject of such state respectively." (quoting General Convention of Friendship, Commerce, and Navigation, U.S.-Den., art. 7, Apr. 26, 1826, 8 Stat. 340, 342)) (alteration in original).

[120] *Id.* at 52.

[121] *Id.* at 58 ("[T]he treaty provisions extend explicitly to the withdrawal of such property by the alien heir upon inheritance and, as already pointed out, protect him in his right to receive his inheritance undiminished by a tax which is not imposed upon citizens of the other contracting party.").

[122] *See* Alycia Kennedy, Note, *Social Security Survivor Benefits: Why Congress Must Create a Uniform Standard of Eligibility for Posthumously Conceived Children*, 54 B.C. L. REV. 821, 847 (2013) ("[F]amily relationships and intestacy are traditionally state issues . . . .").

The *Nielsen* Court was making two distinct points. First, because treaties involve federal law, they trump state law.[123] Second, there is no presumption that treaties should be construed to avoid conflicts with state law.[124] As the *Asakura* Court made clear, the operating presumption should instead be that treaties are protective of rights.[125]

B. Other Treaty Cases Suggesting Limitations on that Power

Several other cases provide some guidance with respect to the limitations on the federal government's foreign relations power. Consider *United States v. Curtiss-Wright Export Corp.*,[126] which involved the local sale[127] of machine guns to Bolivia in violation of federal law.[128] Bolivia was engaged in armed conflict with Paraguay in the Chaco region.[129] Congress adopted a joint resolution, which read:

> *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That if the President finds that the prohibition of the sale of arms and

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[123] *Nielsen*, 279 U.S. at 52; *see also* U.S. CONST. art. VI, cl. 2 ("[A]ll Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land . . . .").

[124] *Nielsen*, 279 U.S. at 52.

[125] Asakura v. City of Seattle, 265 U.S. 332, 342 (1924) (citing Hauenstein v. Lynham, 100 U.S. 483, 487 (1880)).

[126] 299 U.S. 304 (1936).

[127] David Schultz, *Don't Know Much About History: Constitutional Text, Practice, and Presidential Power*, 5 U. ST. THOMAS J.L. & PUB. POL'Y 114, 120 (2010) ("In *Curtiss-Wright*, Congress had passed a joint resolution empowering the President to embargo the shipment of articles of war to countries engaged in armed conflict when, in his judgment, such action would be in the interest of the resolution, which applied to sales within the United States.").

[128] *Curtiss-Wright*, 299 U.S. at 311 ("On January 27, 1936, an indictment was returned in the court below, the first count of which charges that appellees, beginning with the 29th day of May, 1934, conspired to sell in the United States certain arms of war, namely, fifteen machine guns, to Bolivia, a country then engaged in armed conflict in the Chaco, in violation of the Joint Resolution of Congress approved May 28, 1934, and the provisions of a proclamation issued on the same day by the President of the United States pursuant to authority conferred by section 1 of the resolution.").

[129] Fred L. Borch, *The Cease-Fire on the Korean Peninsula: The Story of the Judge Advocate Who Drafted the Armistice Agreement that Ended the Korean War*, ARMY LAW., Aug. 2013, at 1, 2 n.9 ("From 1932 to 1935, Bolivia and Paraguay fought a territorial war over the Gran Chaco region, an area over which both countries claimed ownership.").

> munitions of war in the United States to those countries now engaged in armed conflict in the Chaco may contribute to the reestablishment of peace between those countries, and if after consultation with the governments of other American Republics and with their cooperation, as well as that of such other governments as he may deem necessary, he makes proclamation to that effect, it shall be unlawful to sell, except under such limitations and exceptions as the President prescribes, any arms or munitions of war in any place in the United States to the countries now engaged in that armed conflict, or to any person, company, or association acting in the interest of either country, until otherwise ordered by the President or by Congress.[130]

President Franklin Delano Roosevelt then declared that the prohibition of arm sales to either of the warring parties might indeed contribute to peace,[131] which meant that the penalty prescribed by Congress would be put into effect.[132] There was no discussion about how promoting peace in the region would benefit the United States in particular, although it might have been thought unnecessary to state how peace in the hemisphere would benefit the United States.[133] In any event, President Roosevelt included within his declaration that he had conferred with other leaders of nations in the region,[134] as Congress had required.[135]

Securing the cooperation of nations in the region would be beneficial for two reasons. First, the efficacy of an arms embargo

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[130] *Curtiss-Wright*, 299 U.S. at 312 (quoting H.R.J. Res. 347, 73d Cong. (1934) (enacted)).

[131] *Id.* (quoting Proclamation No. 2087, 48 Stat. 1744, 1745 (1934)).

[132] *Id.* ("Sec. 2. Whoever sells any arms or munitions of war in violation of section 1 shall, on conviction, be punished by a fine not exceeding $10,000 or by imprisonment not exceeding two years, or both." (quoting H.R.J. Res. 347, 73d Cong. (1934) (enacted))).

[133] *Cf.* C. Todd Piczak, Comment, *The Helms-Burton Act: U.S. Foreign Policy Toward Cuba, the National Security Exception to the GATT and the Political Question Doctrine*, 61 U. PITT. L. REV. 287, 289 (1999) ("That the Monroe Doctrine has endured for so long and has been reaffirmed and modified by American presidents into the twentieth century indicates how essential the United States considers Latin America to be to its security interests.").

[134] *Curtiss-Wright*, 299 U.S. at 312 ("I have consulted with the governments of other American Republics . . . ." (quoting Proclamation No. 2087, 48 Stat. 1744, 1745 (1934))).

[135] *See id.* (requiring "consultation with the governments of other American Republics and . . . their cooperation" (quoting H.R.J. Res. 347, 73d Cong. (1934) (enacted))).

by the United States might be severely undercut if nations in the region did not pursue a similar policy.[136] Second, it would not be surprising if cooperation on this issue with countries in the region might engender cooperation on other issues as well.[137]

One of the points at issue in *Curtiss-Wright* was whether Congress had delegated too much power to the President with respect to whether the sale of arms to one of the warring countries should be criminalized.[138] For purposes here, though, the focus is not on whether Congress rather than the President has particular powers with respect to the conduct of foreign relations, but on whether the federal government as a whole[139] is authorized to enter into international agreements about matters that would otherwise be subject to state control. The *Curtiss-Wright* Court made a number of comments that speak to the conditions under which the federal government can intrude on what might otherwise be thought to be a matter that the Constitution has left to the states.

The Court began its analysis by "first consider[ing] the differences between the powers of the federal government in respect of foreign or external affairs and those in respect of

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[136] *Cf. id.* (requiring that the President secure "their cooperation" (quoting H.R.J. Res. 347, 73d Cong. (1934) (enacted))).

[137] *Cf.* Matthew Turk, Note, *Bargaining and Intellectual Property Treaties: The Case for a Pro-Development Interpretation of TRIPS but not TRIPS Plus*, 42 N.Y.U. J. INT'L L. & POL. 981, 1025-26 (2010) ("Health crises in the developing world, such as the HIV/AIDS epidemic, are highly salient international problems; U.S. cooperation on these issues will have positive reputational effects, possibly making developing countries more willing to enter into U.S. trade agreements in the future.").

[138] *See* Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 420 (2012) ("In *United States v. Curtiss-Wright Export Corp.*, for example, the Supreme Court upheld a congressional delegation of authority to the President to criminalize arms sales to countries involved in a conflict in Latin America, based in part on the fact that Congress had already established a pattern of delegating broad authority to the President in the foreign affairs area.").

[139] *See* Dames & Moore v. Regan, 453 U.S. 654, 668 (1981) ("Justice Jackson's concurring opinion elaborated in a general way the consequences of different types of interaction between the two democratic branches in assessing Presidential authority to act in any given case. When the President acts pursuant to an express or implied authorization from Congress, he exercises not only his powers but also those delegated by Congress."); *see also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.").

domestic or internal affairs. That there are differences between them, and that these differences are fundamental, may not be doubted."[140] Precisely because these differences are fundamental, it was important to characterize those differences. The Court explained that "[t]he broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs."[141] But, as numerous cases involving probate-affecting treaties illustrate, what might otherwise count as purely internal may also involve external elements when treatment of foreign nationals under state law is at issue. An additional point should be considered. The Court has frequently noted that certain treaties are likely to promote good international relations and has implied that the promotion of better relations is itself an appropriate goal of a treaty. But if the promotion of amicable relations between countries also suffices to make something not solely an internal affair, then the Constitution's categorical limits on congressional action with respect to domestic or internal affairs does relatively little work when the treaty power is at issue. Thus, the national interest promoted by a particular treaty should not be construed narrowly in terms of the other nation's particular performance,[142] but in terms of other kinds of goals and aspirations that might not be the subject of this particular treaty but other treaties instead.[143]

The *Curtiss-Wright* Court explained the constitutional limitation on federal powers "applies only to powers which the states had."[144] Because "the states severally never possessed international powers, such powers could not have been carved from the mass of state powers [and transferred to the federal government] but obviously were transmitted to the United States

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[140] *Curtiss-Wright*, 299 U.S. at 315.

[141] *Id.* at 315-16.

[142] *See* Anderson, *supra* note 80, at 202 ("The international concern of an agreement is determined entirely by each parties' interest in the other's performance . . . .").

[143] *Cf.* David Golove, *Human Rights Treaties and the U.S. Constitution*, 52 DEPAUL L. REV. 579, 593 (2002) ("The purpose of treaties, then, is to enable the national government to make internationally binding promises as a means of obtaining the cooperation of other nations in ways that advance our legitimate national goals and aspirations.").

[144] *Curtiss-Wright*, 299 U.S. at 316.

from some other source."[145] For example, "[t]he powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality."[146] The standard to determine whether a particular subject matter is appropriate for a treaty is not to be determined in light of the Constitution's structural guarantees related to federalism (since the states never had the power to enter into treaties),[147] but instead in light of the treaty-making power enjoyed by nations as a general matter. "As a member of the family of nations, the right and power of the United States in that field are equal to the right and power of the other members of the international family. Otherwise, the United States is not completely sovereign."[148] The Court explained that "in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—[must] be avoided [so that] success for our aims [can be] achieved."[149] But serious embarrassment and the undermining of national interests might occur if Congress were precluded from reaching matters under the treaty power merely because those matters under other circumstances would have been left to the states. As the *Holland* Court explained, "No doubt the great body of private relations usually fall within the control of the State, but a treaty may override its power."[150]

Through the years, the Court has adopted a forgiving standard of review when examining the constitutionality of treaties. In *United States v. Belmont*,[151] the Court suggested, "Within the field of its powers, whatever the United States rightfully undertakes, it necessarily has warrant to

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[145] *Id.*

[146] *Id.* at 318.

[147] Some commentators seem not to appreciate this point. *See* Gary Lawson & Guy Seidman, *The Jeffersonian Treaty Clause*, 2006 U. ILL. L. REV. 1, 3 ("[T]he treaty power can only be used to implement or carry into effect other federal powers granted by the Constitution, and any such implementational use of the federal treaty power must be proportionate, measured, and respectful of background principles concerning rights and governmental structure.").

[148] *Curtiss-Wright*, 299 U.S. at 318.

[149] *Id.* at 320.

[150] Missouri v. Holland, 252 U.S. 416, 434 (1920).

[151] 301 U.S. 324 (1937).

consummate."[152] Further, when the courts are asked to decide whether a particular exercise of the treaty power falls within constitutional parameters, "State Constitutions, state laws, and state policies are irrelevant to the inquiry and decision" because "[i]t is inconceivable that any of them can be interposed as an obstacle to the effective operation of a federal constitutional power."[153]

The facts of *Belmont* are somewhat complicated. Petrograd Metal Works had deposited a sum of money with a New York banker, August Belmont, prior to 1918.[154] In 1918, the Soviet government nationalized the company and appropriated its assets, including the money deposited with Belmont.[155] In 1933, the Soviet government assigned those of its assets held by American nationals to the United States government.[156] However, the Soviet government was to be given an accounting of all funds collected,[157] apparently because the amount collected was to play some role in the settlement of accounts between the two countries.[158] But this meant that the failure of the United States to collect funds might lower its standing in the eyes of another country.[159]

The court below had held that because ordering the transfer of the money would give effect to what amounted to a

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[152] *Id.* at 331-32.

[153] *Id.* at 332.

[154] *Id.* at 325-26 (stating that the case involved "a sum of money deposited by a Russian corporation (Petrograd Metal Works) with August Belmont, a private banker doing business in New York City under the name of August Belmont & Co.").

[155] *Id.* at 326 ("In 1918, the Soviet government duly enacted a decree by which it dissolved, terminated, and liquidated the corporation (together with others), and nationalized and appropriated all of its property and assets of every kind and wherever situated, including the deposit account with Belmont.").

[156] *Id.* ("[T]he deposit became the property of the Soviet government, and so remained until November 16, 1933, at which time the Soviet government released and assigned to petitioner all amounts due to that government from American nationals, including the deposit account of the corporation with Belmont.").

[157] *See id.* (noting "the understanding that the Soviet government was to be duly notified of all amounts realized by the United States from such release and assignment").

[158] *See id.* at 326-27 ("The assignment and requirement for notice are parts of the larger plan to bring about a settlement of the rival claims of the high contracting parties.").

[159] *Id.* at 327 ("The continuing and definite interest of the Soviet government in the collection of assigned claims is evident; and the case, therefore, presents a question of public concern, the determination of which well might involve the good faith of the United States in the eyes of a foreign government.").

confiscation,[160] and because the controlling public policy of New York precluded confiscation,[161] the money transfer would not be ordered. Reversing, the United States Supreme Court explained that the public policy of New York simply was not relevant, because federal law (including federal law established by treaty) trumps state law.[162] The Court further noted that the United States government had not only recognized the Soviet government but had established diplomatic relations with that government.[163] By doing so, the United States government retroactively validated the acts of the Soviet government,[164] and the Court was unwilling to reexamine the acts of the Soviet government so as to make an independent assessment of their validity, because that might imperil international relations.[165]

The *Belmont* Court distinguished between internal and external affairs. "Governmental power over internal affairs is distributed between the national government and the several states. Governmental power over external affairs is not distributed, but is vested exclusively in the national government."[166] The Court reasoned that "the external powers of the United States are to be exercised without regard to state laws or policies"[167] and cited *Holland* for the proposition that state laws

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[160] *Id.* ("[T]he nationalization decree, if enforced, would put into effect an act of confiscation.").

[161] *Id.* (holding "that a judgment for the United States could not be had, because, in view of that result, it would be contrary to the controlling public policy of the state of New York").

[162] *Id.* ("[N]o state policy can prevail against the international compact here involved.").

[163] *Id.* at 330 ("We take judicial notice of the fact that coincident with the assignment set forth in the complaint, the President recognized the Soviet government, and normal diplomatic relations were established between that government and the government of the United States, followed by an exchange of ambassadors.").

[164] *Id.* ("The effect of this was to validate, so far as this country is concerned, all acts of the Soviet government here involved from the commencement of its existence.").

[165] *See id.* at 328 ("To permit the validity of the acts of one sovereign state to be reexamined and perhaps condemned by the courts of another would very certainly 'imperil the amicable relations between governments and vex the peace of nations.'" (quoting Oetjen v. Cent. Leather Co., 246 U.S. 297, 304 (1918))).

[166] *Id.* at 330.

[167] *Id.* at 331.

and policies cannot stand in the way of the enforcement of a valid treaty.[168]

The Court explained *Holland* more fully in *Reid v. Covert*.[169] At issue was the constitutionality of an executive agreement between the United States and Great Britain, which gave military courts jurisdiction to hear cases involving civilian dependents of military personnel.[170]

The government argued that the content of the treaty could "be sustained as legislation which is necessary and proper to carry out the United States' obligations under the international agreements made with those countries."[171] However, the Court rejected that contention because "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."[172] Yet, the Court was not thereby overruling *Holland*, instead suggesting that the two opinions were quite compatible.[173] The Court reasoned that the treaty at issue in *Holland* "was not inconsistent with any specific provision of the Constitution,"[174] reaffirming that "[t]o the extent that the United States can validly make treaties, the people and the States have delegated their power to the National Government and the Tenth Amendment is no barrier."[175] However, the *Reid* Court found that

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[168] *Id.* at 332 ("And when judicial authority is invoked in aid of such consummation, State Constitutions, state laws, and state policies are irrelevant to the inquiry and decision. It is inconceivable that any of them can be interposed as an obstacle to the effective operation of a federal constitutional power." (citing Missouri v. Holland, 252 U.S. 416 (1920); Asakura v. City of Seattle, 265 U.S. 332, 341 (1924))); *see also* United States v. Pink, 315 U.S. 203, 230-31 (1942) ("[S]tate law must yield when it is inconsistent with or impairs the policy or provisions of a treaty or of an international compact or agreement.").

[169] 354 U.S. 1 (1957) (plurality opinion).

[170] *Id.* at 15 ("At the time of Mrs. Covert's alleged offense, an executive agreement was in effect between the United States and Great Britain which permitted United States' military courts to exercise exclusive jurisdiction over offenses committed in Great Britain by American servicemen or their dependents.").

[171] *Id.* at 16.

[172] *Id.*

[173] *Id.* at 18 ("There is nothing in State of Missouri v. Holland which is contrary to the position taken here.") (citation omitted).

[174] *Id.*

[175] *Id.*; *see also* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 204 (1999) ("Although States have important interests in regulating wildlife and natural resources within their borders, this authority is shared with the Federal

the treaty at issue in that case did not comport with Fifth and Sixth Amendment guarantees,[176] and thus the treaty was beyond Congress's power.[177] The Necessary and Proper Clause, relied on by the *Holland* Court when justifying the Migratory Bird Treaty's constitutionality,[178] could not overcome the bulwark presented by Fifth and Sixth Amendment guarantees in *Reid*.[179]

At least one way to reconcile *Reid* and *Holland* is to suggest that the federal government can regulate a broad range of subjects under the treaty power[180] but cannot infringe upon individual rights guaranteed by the Constitution.[181] This broad range includes "matters of international concern,"[182] where international concern is understood to encompass not only matters of war and peace but any of the subjects traditionally the subject of international agreements. Precisely because international cooperation on certain matters might facilitate agreement on other issues of national concern and precisely because such negotiations might require both delicacy and the need for

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Government when the Federal Government exercises one of its enumerated constitutional powers, such as treaty making." (citing U.S. CONST. art. VI, cl. 2; Missouri v. Holland, 252 U.S. 416 (1920))).

[176] *See Reid*, 354 U.S. at 19 ("Since their court-martial did not meet the requirements of . . . the Fifth and Sixth Amendments we are compelled to determine if there is anything *within* the Constitution which authorizes the military trial of dependents accompanying the armed forces overseas.") (emphasis in original).

[177] *Id.* at 40-41 ("And under our Constitution courts of law alone are given power to try civilians for their offenses against the United States.").

[178] *Holland*, 252 U.S. at 432 ("If the treaty is valid there can be no dispute about the validity of the statute under Article I, § 8, as a necessary and proper means to execute the powers of the Government.").

[179] *Reid*, 354 U.S. at 21 ("Having run up against the steadfast bulwark of the Bill of Rights, the Necessary and Proper Clause cannot extend the scope of Clause 14.").

[180] *See* United States v. Lue, 134 F.3d 79, 83 (2d Cir. 1998) ("[T]he United States may make an agreement on any subject suggested by its national interests in relations with other nations.").

[181] *Cf.* Oneida Indian Nation of N.Y. v. New York, 860 F.2d 1145, 1163 (2d Cir. 1988) ("Under the Constitution, the treaty power cannot override constitutional limitations respecting individual rights, though the relation of this power to state prerogatives is less certain." (citing Reid v. Covert, 354 U.S. 1, 16-17 (1957) (plurality opinion); Missouri v. Holland, 252 U.S. 416 (1920))).

[182] *See Lue*, 134 F.3d at 83 ("Contrary to what was once suggested, the Constitution does not require that an international agreement deal only with 'matters of international concern.'" (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 302 cmt. c (1987))).

discretion,[183] the treaty power cannot be cabined in the same ways that purely domestic powers might be.[184] Further, if state law were permitted to subvert a treaty, the negative effects associated with such a subversion would likely be felt nationally rather than merely in the state with the conflicting law.[185]

In order for domestic federal legislation to be valid, Congress must act in light of an enumerated power,[186] although the Necessary and Proper Clause might provide the basis upon which a congressional act is upheld[187] and "[t]he scope of the Necessary and Proper Clause is broad."[188] That said, if Congress is attempting to regulate certain activity by invoking its Commerce Clause power, and that power does not allow Congress to reach

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[183] *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936) ("[The President] has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results.").

[184] *See id.* ("[T]he President [requires] a degree of discretion and freedom from statutory restriction [in matters involving international relations] which would not be admissible were domestic affairs alone involved."); *see also* Golove, *supra* note 143, at 590 ("The treaty power is a separate and additional delegation of subject matter authority to the national government. Hence, it can properly touch on subjects appropriate for treaty-making, even if those subjects do not fall within the subject matter scope of the legislative powers delegated to Congress. The Tenth Amendment limits the treaty power not by reference to Congress's enumerated legislative powers but by reference to the nature and purposes of the treaty power itself."); Carlos Manuel Vázquez, *Treaties and the Eleventh Amendment*, 42 VA. J. INT'L L. 713, 720 (2002) ("*Missouri* simply recognized that the Treaty Power is a separate head of federal legislative power. The Court in *Missouri* treated the Treaty Power in exactly the same way as Congress's other legislative powers. In no other context are the limits of one power applicable to another power.").

[185] *Cf.* United States v. Pink, 315 U.S. 203, 232 (1942) ("If state action could defeat or alter our foreign policy, serious consequences might ensue. The nation as a whole would be held to answer if a State created difficulties with a foreign power.").

[186] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2577 (2012) ("If no enumerated power authorizes Congress to pass a certain law, that law may not be enacted, even if it would not violate any of the express prohibitions in the Bill of Rights or elsewhere in the Constitution.").

[187] *See, e.g.*, United States v. Kebodeaux, 133 S. Ct. 2496, 2500 (2013) ("We conclude that the Necessary and Proper Clause grants Congress adequate power to enact SORNA [Sex Offender Registration and Notification Act, 42 U.S.C. §§ 16901-16929] and to apply it here.").

[188] *Id.* at 2502.

the activity in question, then the congressional enactment may well be struck down.[189]

The *Holland* Court suggested that Congress may be able to reach certain activity via the treaty power that it could not otherwise reach.[190] The Court has recently reaffirmed that the *Holland* view is an accurate representation of the Constitution,[191] although it is of course a separate question whether the particular enactment at issue in *Bond* passes constitutional muster. While the federal government has not been given carte blanche with respect to the treaties to which it can commit the United States,[192] it is somewhat difficult to draw the line determining what is permitted and what is not[193] and *Bond* is not the best case to

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[189] *See, e.g.*, United States v. Lopez, 514 U.S. 549, 551 (1995) ("We hold that the Act exceeds the authority of Congress '[t]o regulate Commerce . . . among the several States . . . .'" (quoting U.S. CONST. art. I, § 8, cl. 3)).

[190] Missouri v. Holland, 252 U.S. 416, 433 (1920) ("It 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 . . . .").

[191] United States v. Lara, 541 U.S. 193, 201 (2004) ("But, as Justice Holmes pointed out, treaties made pursuant to that power can authorize Congress to deal with 'matters' with which otherwise 'Congress could not deal.'" (quoting *Holland*, 252 U.S. at 433)).

[192] *See, e.g.*, Amaya v. Stanolind Oil & Gas Co., 158 F.2d 554, 556 (5th Cir. 1946) ("The treaty-making power does not extend 'So far as to authorize what the constitution forbids.'" (quoting De Geofroy v. Riggs, 133 U.S. 258, 267 (1890))) (alteration in original); *see also* Golove, *supra* note 36, at 1083 ("It has been understood from the beginning—and has been repeatedly affirmed by the Supreme Court before, after, and even in *Missouri*—that treaties, like all other governmental acts, are subject to the Constitution. This means that a provision in a treaty that contravenes any of the specific prohibitions on governmental conduct contained in the Bill of Rights, the Fourteenth Amendment, or elsewhere is unconstitutional and void as a matter of domestic law.").

[193] *Compare* Igartúa v. United States, 626 F.3d 592, 604 n.12 (1st Cir. 2010) ("[T]he dissent suggests that Congress is not limited by Article I when it implements a treaty obligation, citing *Missouri v. Holland*, 252 U.S. 416 (1920). Neither plaintiff nor the Commonwealth make this argument. But even if the argument were not waived, *Holland* does not sweep so broadly. That decision held that Congress may legislate beyond its Commerce Clause power to implement a treaty. *Holland*, 252 U.S. at 432-33. It did not hold that Congress may disregard Article I's structural provisions governing the election of Representatives, not to mention similar provisions in Article II and the Fourteenth Amendment.") (citations omitted), *with* United States v. Cardales-Luna, 632 F.3d 731, 748 (1st Cir. 2011) (Torruella, J., dissenting) ("[U]nder current Supreme Court doctrine, legislation enacted pursuant to treaty obligations entered into by the United States, can allegedly trump structural constitutional constraints, but not express limitations of congressional power, such as individual rights guaranteed in the Bill of Rights.").

illustrate the possible limitations on the treaty power.[194]

III. *BOND*

Bond provided the Court with an opportunity to revisit the breadth of the treaty power, although the facts did not make the case a good candidate for expressly limiting the treaty power. Rather, because the kind of behavior at issue is a core concern of the family of nations, the most obvious approach to strike this application (if indeed it should have been struck down) was to say that the treaty was not intended to reach the behavior at issue rather than that it could not have reached it.[195] By adopting this approach, the Court signaled that it is unsympathetic to the view that the treaty power is plenary, without at the same time having to expressly formulate the limitations governing the use of that power, especially in the context of the control of chemical weapons.

A. Background on Bond

United States v. Bond[196] involved an individual, Carol Anne Bond, who was accused of violating the Chemical Weapons Convention Implementation Act of 1998,[197] which was passed to implement the 1993 Chemical Weapons Convention.[198] Bond learned that her husband had impregnated Myrlinda Haynes, her (former) friend.[199] Intent on revenge,[200] Bond stole some

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[194] *See infra* notes 220-50 and accompanying text (describing why *Bond* is not a good candidate for limiting the treaty power).

[195] *See* Bond v. United States, 134 S. Ct. 2077, 2092 (2014) ("[T]he 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.").

[196] 134 S. Ct. 2077 (2014).

[197] 18 U.S.C. § 229 (2012).

[198] Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, *opened for signature* Jan. 13, 1993, 32 I.L.M. 800.

[199] United States v. Bond (*Bond II*), 681 F.3d 149, 151 (3d Cir. 2012), *rev'd*, 134 S. Ct. 2077 (2014) ("[W]hile Bond was employed by the chemical manufacturer Rohm and Haas, she learned that her friend Myrlinda Haynes was pregnant and that Bond's own husband was the baby's father.").

[200] *Id.* ("Bond became intent on revenge.").

dangerous chemicals from her chemical manufacturer employer[201] and purchased other chemicals via the internet.[202] Bond then "applied those chemicals to Haynes's mailbox, car door handles, and house doorknob."[203] Minimal topical exposure to these chemicals could cause significant harm.[204] Further, Bond applied these chemicals several times, increasing the likelihood both that her intended victim and that other unintended victims would suffer adverse consequences resulting from the exposure.[205]

The Act provided that "it shall be unlawful for any person knowingly . . . to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon."[206] Chemical weapons included toxic chemicals, and a toxic chemical was defined as "any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals."[207] Congress "limit[ed] the sweep of the Act by excluding from the definition of 'chemical weapon' any chemicals and precursors 'intended for a purpose not prohibited under this chapter as long as the type and quantity is consistent with such a purpose.'"[208] The permitted purposes included "[a]ny peaceful purpose related to an industrial, agricultural, research, medical, or pharmaceutical activity or other activity."[209]

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[201] *Id.* (noting that "Bond was employed by the chemical manufacturer Rohm and Haas" and that "she set about acquiring highly toxic chemicals, stealing 10-chlorophenoxarsine from her employer").

[202] *Id.* (noting that she "purchas[ed] potassium dichromate over the Internet").

[203] *Id.*

[204] *See* United States v. Bond (*Bond I*), 581 F.3d 128, 131-32 (3d Cir. 2009), *rev'd*, 131 S. Ct. 2355 (2011) ("These chemicals have the rare ability to cause toxic harm to individuals through minimal topical contact.").

[205] *Id.* at 132 ("Bond attempted to poison Haynes with the chemicals at least 24 times over the course of several months. She often would spread them on Haynes's home doorknob, car door handles, and mailbox. Haynes noticed the chemicals and usually avoided harm, but on one occasion sustained a chemical burn to her thumb.").

[206] *Bond II*, 681 F.3d at 153 (quoting 18 U.S.C. § 229(a)(1) (2012)).

[207] *Id.* at 153-54 (quoting 18 U.S.C. § 229F(8)(A) (2012)).

[208] *Id.* at 154 (quoting 18 U.S.C. § 229F(1)(A) (2012)).

[209] *Id.* (quoting 18 U.S.C. § 229F(7)(A) (2012)).

B. The Third Circuit Decisions

When the Third Circuit first considered this case,[210] it held that "a private party lacks standing to claim that the federal Government is impinging on state sovereignty in violation of the Tenth Amendment, absent the involvement of a state or its officers as a party or parties."[211] When that holding was reversed on appeal,[212] the United States Supreme Court expressly declined to address the merits of Bond's appeal.[213]

Nonetheless, the Court took the opportunity to extol the virtues of federalism.

> Federalism secures the freedom of the individual [by] allow[ing] States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power.[214]

Here, the Court seemed to be discussing the freedom of the individual to participate politically within the state rather than or in addition to participating in "the political processes that control a remote central power."[215] The Court also suggested that federalism is liberty-enhancing "by ensuring that laws enacted in excess of delegated governmental power cannot direct or control [persons'] actions,"[216] although it was not clear that the Court meant that individuals will have the freedom to do more things. Instead, "federalism protects the liberty of the individual from arbitrary power."[217] Federalism "den[ies] any *one* government complete jurisdiction over all the concerns of public life,"[218] but a separate question is the degree to which particular areas of life

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[210] *See* United States v. Bond (*Bond I*), 581 F.3d 128, 131-32 (3d Cir. 2009), *rev'd*, 131 S. Ct. 2355 (2011).

[211] *Id.* at 137.

[212] *Bond*, 131 S. Ct. at 2360 (noting "this Court now reverses that determination").

[213] *Id.* ("The merits of petitioner's challenge to the statute's validity are to be considered, in the first instance, by the Court of Appeals on remand and are not addressed in this opinion.").

[214] *Id.* at 2364.

[215] *Id.*

[216] *Id.*

[217] *Id.*

[218] *Id.* (emphasis added).

are free from any regulation. In the instant case, Bond had violated both state and federal law, so the question was not whether she was subject to punishment but, instead, the severity of the punishment that she might receive.[219]

When addressing whether the Treaty violated federalism guarantees on remand, the Third Circuit noted that "[o]ne need not be a student of modern warfare to have some appreciation for the devastation chemical weapons can cause and the corresponding impetus for international collaboration to take steps against their use."[220] The court was confident that "the Convention is valid under any reasonable conception of the Treaty Power's scope,"[221] and noted that "the Convention falls within the Treaty Power's core."[222] Indeed, Bond accepted the validity of the treaty.[223]

What then of the implementing legislation? As Judge Rendell noted in his concurring opinion, "the Act . . . faithfully tracks the language of the Convention."[224] But, in the words of *Holland*, "[i]f the treaty is valid there can be no dispute about the validity of the statute under Article I, § 8, as a necessary and proper means to execute the powers of the Government,"[225] assuming that Judge Rendell is correct that the implementing legislation "tracks the language of the Convention in all material respects."[226]

Bond argued that the implementing legislation should be construed not to apply to the acts she committed, i.e., to "conduct that no signatory state could possibly engage in—such as using

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[219] *Cf. id.* at 2366 ("[P]etitioner argues that under Pennsylvania law the expected maximum term of imprisonment she could have received for the same conduct was barely more than a third of her federal sentence.").

[220] United States v. Bond (*Bond II*), 681 F.3d 149, 161-62 (3d Cir. 2012).

[221] *Id.* at 162.

[222] *Id.* at 166.

[223] *Id.* at 159 ("Bond does not argue that the Convention itself is constitutionally infirm. On the contrary, she admits 'that a treaty restricting chemical weapons is a proper subject[] of negotiations between our government and other nations.'") (citation and internal quotation marks omitted); *see also id.* at 166-67 (Rendell, J., concurring) ("As to the first question, nothing 'wrong' occurred at the moment Congress passed the Act. As the Majority has thoroughly discussed, the Convention itself is valid—indeed, Ms. Bond unequivocally concedes that point.").

[224] *Id.* at 167 (Rendell, J., concurring).

[225] Missouri v. Holland, 252 U.S. 416, 432 (1920).

[226] *Bond II*, 681 F.3d at 167 (Rendell, J., concurring) (quoting United States v. Lue, 134 F.3d 79, 84 (2d Cir. 1998)).

chemicals in an effort to poison a romantic rival."[227] Although sympathetic to the charge that the Act was rather broad,[228] the court nonetheless rejected that the Act was unconstitutionally overbroad,[229] a holding that was not appealed.[230]

The *Bond II* court seemed tempted to apply a limiting construction to the Act,[231] if only because of doubts that Congress had intended the statute to cover this kind of infraction.[232] Nonetheless, the court noted that "the language itself does cover Bond's criminal conduct,"[233] and found that the kind of activity in which Bond had engaged was exactly the kind of activity that the law was designed to prevent.[234] But that meant that Bond's convictions on the federal counts under the Act[235] could only be set aside if either the treaty or the implementing legislation were held unconstitutional.[236]

Before addressing whether *Holland* permits Congress to reach "an effort to poison a romantic rival,"[237] it may be helpful to consider a little more closely what Bond had actually done. She put poison on a mailbox, which might have endangered any person delivering mail or anyone else who might have been putting something in that mailbox. She also repeatedly put the poison on a

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[227] *See id.* at 154 (quoting Defendant-Appellant's Opening Supplemental Brief at 40, United States v. Bond (*Bond II*), 681 F.3d 149 (3d Cir. 2012) (No. 08-2677)).

[228] *See id.* (discussing "the Act's remarkably broad language").

[229] *See id.* at 154 n.7 ("[W]e concluded that the Act was not unconstitutionally overbroad.").

[230] *Id.* ("Bond did not challenge that determination.").

[231] *Id.* at 155 (noting that "it would be better, if possible, to apply a limiting construction to the Act").

[232] *See id.* ("[O]ne may well question whether Congress envisioned the Act being applied in a case like this . . . .").

[233] *Id.*

[234] *Id.* at 154 ("Bond's behavior 'clearly constituted unlawful possession and use of a chemical weapon under § 229.'" (quoting United States v. Bond (*Bond I*), 581 F.3d 128, 139 (3d Cir. 2009), *rev'd on other grounds*, 131 S. Ct. 2355 (2011))).

[235] *See Bond I*, 581 F.3d at 132 ("A grand jury in the Eastern District of Pennsylvania charged Bond with two counts of possessing and using a chemical weapon, in violation of 18 U.S.C. § 229(a)(1), a criminal statute implementing the treaty obligations of the United States under the 1993 Chemical Weapons Convention."); *id.* at 133 ("Bond pled guilty to all charges, reserving her right to appeal.").

[236] *See Bond II*, 681 F.3d. at 155 ("[G]iven the clarity of the statute, we cannot avoid the constitutional question presented.").

[237] *See id.* at 154 (quoting Defendant-Appellant's Opening Supplemental Brief at 40, United States v. Bond (*Bond II*), 681 F.3d 149 (3d Cir. 2012) (No. 08-2677)).

doorknob, which would have endangered not only Haynes and her child,[238] but friends or anyone else who might have touched the doorknob to access Haynes's home. She put poison on a car handle, which would have endangered anyone who might have touched that handle, including those who might open the door to put something such as a book or other small item into the car and those authorized to drive or enter the car, such as someone who might be helping to start or fix the car. Even if it was true that Haynes was the only person who actually came in contact with the poison,[239] that does not somehow negate the risk created by Bond for a whole host of people.

Suppose that Bond had injured several people after having put them in harm's way. While Judge Rendell suggested that Bond's acts were not terrorist in nature,[240] that would depend upon how one defines a terrorist act. Certainly, Bond was not attempting "(i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping."[241] However, if "terrorist activity" is construed more broadly to include "[t]he use of any—(a) biological agent, chemical agent, or nuclear weapon or device, or (b) explosive, firearm, or other weapon or dangerous device . . . with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property,"[242] then it is not so clear how to characterize Bond's actions. In any event, she put numerous people at risk and might have caused a great deal more harm to many more individuals than she actually caused, and the seriousness of her crime should not be minimized.

Suppose that an individual named Mond believed that numerous individuals at her husband's workplace were rivals for his affections. Would poisoning the water supply at the place of

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[238] *See Bond I*, 581 F.3d at 139 ("Any one of her attacks could have delivered a lethal chemical dose to Haynes or her then-infant child.").

[239] *See id.* at 132 ("Haynes . . . on one occasion sustained a chemical burn to her thumb.").

[240] *See Bond II*, 681 F.3d at 168 (Rendell, J., concurring) ("The fact that the Act, which properly implements a valid treaty, reaches non-terrorist uses of chemical weapons leaves us powerless to excise such an individual instance.").

[241] 18 U.S.C. § 2331(5)(B)(i)-(iii) (2012).

[242] 8 U.S.C. § 1182(a)(3)(B)(iii)(V)(a)-(b) (2012).

employment be beyond the reach of federal law because it was merely an attempt to injure romantic rivals? Would the federal government's ability to criminalize the activity under treaty-implementing legislation depend upon how many individuals were employed at the workplace? How many people would have to be endangered or, perhaps, at how many different sites would individuals have to be at risk before the federal government could appropriately regulate the activity?

Any attempt to cabin the reach of the implementing act would require much care. Else, individuals seeking to avenge actual or perceived rivals would be immune from federal prosecution, notwithstanding their causing great harm to large numbers of individuals.

C. Does the Treaty Power Permit Congress to Reach Bond*'s Actions?*

Because the Act[243] under which Bond was charged was passed to implement a convention to which the United States was a signatory,[244] the Third Circuit examined whether *Missouri v. Holland* controlled and, if so, whether *Holland* required that the federal act be upheld. The *Bond II* court noted that *Holland* "is sometimes cited for the proposition that the Tenth Amendment has no bearing on Congress's ability to legislate in furtherance of the Treaty Power in Article II, § 2 of the Constitution,"[245] although the appellate court was unwilling to go so far. Because "of the widening scope of issues taken up in international agreements, as well as the renewed vigor with which principles of federalism have been employed by the Supreme Court in scrutinizing assertions of federal authority,"[246] the circuit court believed that there must be some federalism limitations on the congressional treaty power.[247] Nonetheless, because it is in the national interest to reduce the use of chemical weapons in the world and signing and enforcing a Chemical Weapons Treaty is a reasonable way to help bring about

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[243] Chemical Weapons Convention Implementation Act of 1998, 18 U.S.C. § 229 (2012).

[244] *See Bond II*, 681 F.3d at 150-51.

[245] *Id.* at 151.

[246] *Id.*

[247] *Id.* (noting that "treaty-implementing legislation ought not, by virtue of that status alone, stand immune from scrutiny under principles of federalism").

that legitimate end,[248] the *Bond II* court upheld the constitutionality of both the treaty and the implementing statute.[249]

Even if there are or should be some limitations to the treaty power, control of chemical weapons is such a core international concern[250] that the Chemical Weapons Treaty cannot plausibly be thought to be beyond Congress's power. Further, this application of the implementing statute to Bond's actions, which themselves put numerous people at risk, cannot plausibly be thought unconstitutional. Were the Court to hold otherwise, it would severely undermine the federal government's power to promote crucial interests of the international community.

D. The Bond *Court Rules*

The *Bond* Court focused on the harm actually caused rather than on the potential for harm.[251] In addition, the Court was likely persuaded that the crime at issue was not particularly serious because the intended harm was to cause a skin rash rather than death.[252] Characterizing the crime at issue as "a local assault with a chemical irritant [rather than] as the deployment of a chemical weapon"[253] and thus as not within the reach of the implementing

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[248] *Cf.* Golove, *supra* note 143, at 593 ("The purpose of treaties, then, is to enable the national government to make internationally binding promises as a means of obtaining the cooperation of other nations in ways that advance our legitimate national goals and aspirations. Legitimate goals include the advancement of our interests narrowly conceived—for example, our military or security or our economic, political, or diplomatic interests.").

[249] *See Bond II*, 681 F.3d at 165 ("[B]ecause the Convention falls comfortably within the Treaty Power's traditional subject matter limitation, the Act is within the constitutional powers of the federal government under the Necessary and Proper Clause and the Treaty Power, unless it somehow goes beyond the Convention."); *id.* at 166 ("[W]e cannot say that the Act disrupts the balance of power between the federal government and the states, regardless of how it has been applied here." (citing Gonzales v. Raich, 545 U.S. 1, 23 (2005))).

[250] *Id.* at 166.

[251] *See* Bond v. United States, 134 S. Ct. 2077, 2085 (2014) ("The chemicals that Bond used are easy to see, and Haynes was able to avoid them all but once. On that occasion, Haynes suffered a minor chemical burn on her thumb, which she treated by rinsing with water.").

[252] *Id.* ("It is undisputed, however, that Bond did not intend to kill Haynes. She instead hoped that Haynes would touch the chemicals and develop an uncomfortable rash.").

[253] *Id.* at 2093.

legislation, the Court did not need to address an issue receiving substantial attention, namely, whether the federal government had the power to reach this kind of conduct pursuant to its power to make treaties.[254]

In his concurrence in the judgment, Justice Scalia thought it obvious that the federal law reached the action at issue and the only question was whether the Act passed constitutional muster.[255] He argued that it did not.[256] If indeed the Court was attempting to avoid the constitutional question by engaging in a little sleight of hand,[257] that was presumably because the Court would otherwise have been forced to try to draw a line that would have been difficult if not impossible to draw.[258]

CONCLUSION

Bond was a complicated, high-profile case involving federalism, which has been a divisive issue on the Court for almost two decades.[259] Its facts are open to very different characterizations, which might range from merely a lover's quarrel to a series of actions that put a substantial number of people at risk. The use of chemical weapons and agents is a

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[254] *Id.* at 2087 ("[I]n this Court the parties have devoted significant effort to arguing whether section 229, as applied to Bond's offense, is a necessary and proper means of executing the National Government's power to make treaties." (citing U.S. CONST. art. II, § 2, cl. 2)).

[255] *Id.* at 2098 (Scalia, J., concurring) ("Since the Act is clear, the *real* question this case presents is whether the Act is constitutional as applied to petitioner.").

[256] *See id.* at 2102 ("All this to leave in place an ill-considered *ipse dixit* that enables the fundamental constitutional principle of limited federal powers to be set aside by the President and Senate's exercise of the treaty power. We should not have shirked our duty and distorted the law to preserve that assertion; we should have welcomed and eagerly grasped the opportunity—nay, the obligation—to consider and repudiate it.").

[257] *Id.* at 2095 ("The Court does not think the interpretive exercise so simple. But that is only because its result-driven antitextualism befogs what is evident.").

[258] *Cf. id.* at 2110 (Thomas, J., concurring) ("I acknowledge that the distinction between matters of international intercourse and matters of purely domestic regulation may not be obvious in all cases.").

[259] *See* Jennifer R. Hagan, Comment, *Can We Lose the Battle and Still Win the War?: The Fight Against Domestic Violence After the Death of Title III of the Violence Against Women Act*, 50 DEPAUL L. REV. 919, 952 n.243 (2001) ("This concern for state rights has been a divisive issue for the Supreme Court since the *Lopez* decision.").

matter of grave concern, although some commentators will likely reject that Bond did anything so nefarious.[260]

The *Bond* Court had several options. It could have affirmed the Third Circuit, perhaps while issuing warnings about the importance of the federal government's respecting state sovereignty. However, because permitting the federal convictions to stand was something that a majority of the Court seemed unable to countenance, the Court chose to offer a limiting construction of the implementing act,[261] which made clear that the kind of act at issue here was not what Congress intended to cover. The Court offered its narrow holding,[262] presumably because it did not want to unduly limit the federal government's ability to prosecute individuals who use chemical or biological agents to harm others in the United States or unduly handcuff the federal government's ability to engage in foreign relations or promote national interests.

It is not only *Holland* that protects the treaty power but a long line of cases recognizing the importance of the federal government's ability to enter into agreements to promote national and international goals. Ignoring the wisdom embodied in those cases would have had no basis in constitutional law and might have severely undermined the interests of the nation as a whole. While the Court might have upheld the conviction in light of the jurisprudence and statutory language, especially when considering that Bond put several people at risk, the Court having construed the federal statute as not reaching the act in question

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[260] *Compare* Sharon G. Finegan, Scott A. Keller, Sean O'Neill & Ryan Paulsen, *United States Supreme Court Update*, 24 APP. ADVOC. 61, 112 (2011) ("Carol Bond spread caustic chemicals in places the woman was likely to touch causing the woman to suffer a minor chemical burn on her thumb."), *with* Aziz Z. Huq, *Standing for the Structural Constitution*, 99 VA. L. REV. 1435, 1461 (2013) ("Carol Bond, a microbiologist . . . had attempted to poison her husband's alleged lover with 10-chloro10H-phenoxarsine, a chemical with 'the rare ability to cause toxic harm to individuals through minimal topical contact.'" (quoting United States v. Bond (*Bond I*), 581 F.3d 128, 131-32 (3d Cir. 2009))).

[261] *See Bond*, 134 S. Ct. at 2093 ("This case is unusual, and our analysis is appropriately limited.").

[262] *See id.* at 2102 (Scalia, J., concurring) ("We have here a supposedly 'narrow' opinion which, in order to be 'narrow,' sets forth interpretive principles never before imagined that will bedevil our jurisprudence (and proliferate litigation) for years to come.").

was a much better result than might otherwise have occurred.