

# *BOND V. UNITED STATES: DECIPHERING MISSOURI V. HOLLAND AND THE APPROPRIATE SCOPE OF CONGRESS'S POWERS WHEN IMPLEMENTING A NON-SELF- EXECUTING TREATY*

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## I. INTRODUCTION

Congress's legislative authority is normally limited to its enumerated powers under Article I of the Constitution. However, the Supreme Court's decision in *Missouri v. Holland*<sup>1</sup> muddled the limitations imposed by Article I when Congress passes legislation implementing a federal treaty. In *Bond v. United States*,<sup>2</sup> the Supreme Court will revisit *Holland* and have the opportunity to definitively dictate Congress's powers when implementing a valid federal treaty.

Decided over ninety years ago, *Missouri v. Holland*, is the seminal case on the extent of the Congressional treaty power. It involved a challenge to the constitutionality of the Migratory Bird Treaty Implementation Act (MBTA).<sup>3</sup> The MBTA was passed by Congress to meet the United States' obligations to protect migratory birds in the United States and Canada.<sup>4</sup> The MBTA accomplished this by making it unlawful to kill, capture, or sell any migratory birds protected by the Act.<sup>5</sup>

In *Holland*, the State of Missouri challenged the constitutionality

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1. 252 U.S. 416 (1920).

2. No. 12-158 (U.S. argued Nov. 10, 2013).

3. See Migratory Bird Treaty Act, 16 U.S.C.A. §§ 703-710 (West 2013).

4. Convention between the United States and Great Britain for the Protection of Migratory Birds, U.S.-Gr. Brit., Aug. 16, 1916, 39 Stat. 1702.

5. 16 U.S.C.A. § 703(a) (West 2013).

of the MBTA by claiming that it infringed on rights reserved to the states under the Tenth Amendment.<sup>6</sup> To decide whether or not the MBTA's restrictions violated states' rights, the Court had to look beyond the Tenth Amendment because "by Article 2, Section 2, the power to make treaties is delegated expressly, and by Article 6 treaties . . . are declared the supreme law of the land."<sup>7</sup> Therefore, the Court stated that if a treaty "is valid there can be no dispute about the validity of the statute under Article I, Section 8, as a necessary and proper means to execute the powers of the Government."<sup>8</sup>

The Court found that the underlying treaty did not violate any express provision of the Constitution, and then sought to determine whether the underlying treaty was "forbidden by some invisible radiation" from the Tenth Amendment.<sup>9</sup> In rejecting Missouri's argument, the Court found that the states alone could not adequately protect migratory birds.<sup>10</sup> Instead, the Court found that the protection of migratory birds was indeed a "national interest of . . . the first magnitude" and held the underlying treaty valid and thus the MBTA constitutional.<sup>11</sup>

Nearly one hundred years later, *Bond v. United States* raises an important and unanswered constitutional question after *Holland*: What exactly is the limit to Congress's powers when implementing a non-self-executing treaty?

## II. FACTUAL AND PROCEDURAL BACKGROUND

On January 13, 1993, the United States entered into a treaty that sought to achieve "effective progress towards general and complete disarmament under strict and effective international control."<sup>12</sup> The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and their Destruction (the Convention) was a non-self-executing treaty that hoped to achieve either the prohibition or elimination of all weapons of mass

6. 252 U.S. 416, 431 (1920). The Tenth Amendment states "[t]he 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." U.S. CONST. amend. X.

7. *Holland*, 252 U.S. at 431.

8. *Id.* at 432.

9. *Id.* at 434.

10. *Id.* at 435.

11. *Id.*

12. United Nations: Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and their Destruction, Preamble, Jan. 13, 1993, 32 I.L.M. 800 [hereinafter *the Convention*].

destruction.<sup>13</sup> As such, the Convention forbade all parties to it from creating, using, or encouraging the use of chemical weapons.<sup>14</sup> In particular, the Convention included a Verification Annex that listed a variety of prohibited toxic chemicals.<sup>15</sup>

Accordingly, Congress passed the Chemical Weapons Act, § 229 of which made it illegal for any person to “develop, produce . . . use, or threaten to use, any chemical weapon.”<sup>16</sup>

Sixteen years after the United States entered into the Convention, Carol Anne Bond discovered that her best friend, Myrlinda Haynes, was pregnant and that Bond’s husband was the baby’s father.<sup>17</sup> Bond sought revenge.<sup>18</sup> She stole 10–chloro10H–phenoxarsine from Rohm & Haas, the chemical manufacturer where she was employed as a microbiologist, and also ordered potassium dichromate over the Internet.<sup>19</sup> Both chemicals can cause physical harm through minimal topical contact.<sup>20</sup>

Over the next several months, Bond spread the chemicals over Haynes’ car and mailbox making 24 attempts to poison Haynes overall.<sup>21</sup> For the most part, Haynes was able to avoid touching the chemicals, with the exception of once suffering a burn to her thumb.<sup>22</sup> Finally, Haynes informed the local police about the situation.<sup>23</sup> The police merely advised her to wipe the substances off.<sup>24</sup> Unsatisfied with the police’s response, Haynes reported the matter to the local postal carriers, who then referred the matter to the United States Postal Inspection Service (USPIS).<sup>25</sup>

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13. *Id.* Non-self-executing treaties grant Congress the power to make changes in domestic law in order to implement the provisions of the treaty, while self-executing treaties do not require any enforcing legislation. Jeffrey L. Friesen, *The Distribution of Treaty-Implementing Powers in Constitutional Federations: Thoughts on the American and Canadian Models*, 94 COLUM. L. REV. 1415, 1450 n.3 (1994). The Convention is a non-self-executing treaty because it has been assumed that a treaty creating a federal crime requires Congress to enact legislation before any individual could be punished. Restatement (Third) of Foreign Relations Law § 111 cmt. f (1987).

14. *The Convention*, *supra* note 12 at art. I.

15. *Id.* at annex.

16. 18 U.S.C.A. § 229(a)(1) (West 2013).

17. *United States v. Bond*, 581 F.3d 128, 131 (3d Cir. 2009).

18. *Id.*

19. *Id.*

20. *Id.* at 131–32.

21. *Id.* at 132.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

The USPIS placed surveillance cameras throughout Haynes' property, which caught Bond planting the chemicals.<sup>26</sup> Bond was arrested and a grand jury in the Eastern District of Pennsylvania indicted her on two counts of possessing and using a chemical weapon in violation of § 229 of The Chemical Weapons Act.<sup>27</sup>

Bond claimed that § 229 violated principles of federalism and moved to dismiss the charges.<sup>28</sup> The district court denied Bond's motions, and she pled guilty to all charges. Bond was sentenced to six years in prison,<sup>29</sup> but she reserved her right to appeal.<sup>30</sup> On appeal to the Third Circuit, Bond again argued that § 229 violated the Constitution by allowing the federal government to legislate in areas of law reserved to the states under the Tenth Amendment.<sup>31</sup> Before reaching Bond's federalism argument, however, the Third Circuit held that Bond lacked standing to bring a Tenth Amendment challenge because her suit lacked any representation by a state or its officers.<sup>32</sup> The Third Circuit then affirmed the District Court's sentence.<sup>33</sup>

On appeal, the Supreme Court solely confronted the standing issue and stated that "[a]n individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States . . . . Fidelity to principles of federalism is not for the States alone to vindicate."<sup>34</sup> Thus finding that Bond had standing, the Court remanded the case to the Third Circuit.<sup>35</sup>

On remand, Bond again argued that § 229, as applied to her, was an unconstitutional violation of the Tenth Amendment because it allowed the federal government to intrude on a state's right to punish assaults.<sup>36</sup> In denying Bond's claims, the Third Circuit relied heavily on *Holland's* holding that if a treaty "is valid there can be no dispute about the validity of the [implementing] statute under Article 1, Section 8, as a necessary and proper means to execute the powers of the Government."<sup>37</sup> The Third Circuit said that *Holland* stands for the

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26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 133.

31. *Id.* at 134.

32. *Id.* at 137.

33. *Id.* at 142.

34. *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011).

35. *Id.* at 2367.

36. *United States v. Bond*, 681 F.3d 149, 153 (3d Cir. 2012).

37. 252 U.S. 416, 432 (1920).

proposition that “when there is a valid treaty, Congress has [the] authority to enact implementing legislation under the Necessary and Proper Clause, even if it might otherwise lack the ability to legislate in the domain in question.”<sup>38</sup> The Third Circuit then held the Convention to be a valid treaty because it dealt with a matter of international concern.<sup>39</sup>

Although the Third Circuit followed *Holland* in noting that a valid treaty grants Congress powers under the Necessary and Proper Clause to enact it, this did not end the inquiry.<sup>40</sup> The court noted that § 229 must still meet the “Necessary and Proper Clause’s general requirement that legislation implemented under that Clause be ‘rationally related to the implementation of a constitutionally enumerated power.’”<sup>41</sup> The court found such rational relation, observing that § 229 closely follows the language of the Convention and did not disrupt the balance between federal and state authority.<sup>42</sup> The Third Circuit then re-affirmed Bond’s sentence,<sup>43</sup> and the Supreme Court granted certiorari.<sup>44</sup>

### III. LEGAL BACKGROUND

The *Holland* Court held that Congress may use the Necessary and Proper Clause to implement a treaty even if the implementing legislation would otherwise be beyond Congress’s Article I powers.<sup>45</sup> With its second holding, *Holland* created confusion concerning the breadth of the Necessary and Proper Clause when used by Congress to pass legislation implementing a federal treaty.

The Necessary and Proper Clause states that Congress has the power “to make all laws which shall be necessary and proper for carrying into the execution . . . all . . . powers vested by this Constitution.”<sup>46</sup> In *McCulloch v. Maryland*, the Supreme Court held that laws are “necessary and proper” as long as the end is legitimate and within the scope of the Constitution and the means are plainly

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38. *Bond*, 681 F.3d at 157.

39. *Id.* at 161–62.

40. 252 U.S. at 432.

41. *Bond*, 681 F.3d at 157 (quoting *United States v. Comstock*, 560 U.S. 126 (2010)).

42. *Id.* at 165–66.

43. *Id.* at 166.

44. *Bond v. United States*, No. 12-158 (U.S. argued Nov. 10, 2013).

45. *Holland*. 252 U.S. at 432.

46. U.S. CONST. Art. I, § 8.

adapted to reach that end.<sup>47</sup> In determining whether the *McCulloch* test is met, courts look to whether a statute is “rationally related to the implementation of a constitutionally enumerated power.”<sup>48</sup> Therefore, when the Court held in *Holland* that if a treaty “is valid there can be no dispute about the validity of the statute under Article I, Section 8, as a necessary and proper means to execute the powers of the Government,”<sup>49</sup> the implication was that a statute implementing a valid treaty automatically passes the *McCulloch* test. Consequently, courts have sometimes cited *Holland* as standing for the proposition that the Tenth Amendment is not a barrier to Congress’ powers when implementing a valid treaty.<sup>50</sup> For example, in *United States v. Lue*, the Second Circuit stated that “[i]f the Hostage Taking Convention is a valid exercise of the Executive’s treaty power, there is little room to dispute that the legislation passed to effectuate the treaty is valid under the Necessary and Proper Clause.”<sup>51</sup>

Recent decisions of the Supreme Court have pushed back interpreting *Holland* as standing for the proposition that Congress has unfettered powers when implementing a valid federal treaty. For example, in *Reid v. Covert*, the Court stated that “no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution.”<sup>52</sup> Despite the Court’s statements in *Reid*, the lower courts have refused to “reject the broader interpretation that has been given to *Missouri v. Holland*” and instead dismiss any constitutional issues “by noting that the challenged act of Congress was enacted as a ‘necessary and proper’ means of giving effect to a treaty.”<sup>53</sup> Such was the district court’s position in *Bond* when it denied Bond’s motions and agreed with the government’s argument that the Chemical Weapons Act was a valid constitutional exercise of

47. 17 U.S. 316, 421 (1819).

48. *United States v. Comstock*, 560 U.S. 126, 134 (2010).

49. 252 U.S. 416, 432 (1920).

50. *Supreme Court Grants Certiorari in Case Implicating Missouri v. Holland*, 107 AM. J. INT’L L. 432, 433 (2013).

51. 134 F.3d 79 (2d Cir. 1998); *see also* *United States v. Ferreira*, 275 F.3d 1020, 1028 (11th Cir. 2001) (“We agree with the Second Circuit’s analysis and conclusion that ‘the Hostage Taking Convention is well within the boundaries of the Constitution’s treaty power,’ and similarly conclude that Congress had authority under the Necessary and Proper Clause to enact the Hostage Taking Act.”).

52. 354 U.S. 1, 16 (1957).

53. John C. Eastman, *Will Mrs. Bond Topple Missouri v. Holland?*, CATO SUP. CT. REV., 185, 200 (2010–11).

Congress' authority under the Necessary and Proper Clause.<sup>54</sup>

Academics have also joined the debate concerning the proper interpretation of *Holland* and Congress's powers when implementing a valid federal treaty. Professor Nicholas Rosenkranz provided a unique outlook when he combined the language of the Treaty Clause with the Necessary and Proper Clause to read as follows: "[t]he Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution . . . [the President's] Power, by and with the Advice and Consent of the Senate, to make Treaties."<sup>55</sup> Using this reading of the Treaty Clause and the Necessary and Proper Clause, Rosenkranz argued that the Necessary and Proper Clause simply grants Congress the power to "make treaties."<sup>56</sup> Rosenkranz contended that the term of art "make treaties" does not include the power to give existing treaties domestic legal effect,<sup>57</sup> but rather allows Congress to create laws that would assist the national government in entering into treaties.<sup>58</sup> For example, the power to "make treaties" would certainly include "laws appropriating money for the negotiation of treaties"<sup>59</sup> or it could grant Congress the power to implement legislation that would "ensure the wise use" of the treaty power.<sup>60</sup> Therefore, Rosenkranz determined that *Holland's* statement that if a treaty "is valid there can be no dispute about the validity of the statute under Article I, Section 8, as a necessary and proper means to execute the powers of the Government"<sup>61</sup> is wrong and thus *Holland* should be overruled.<sup>62</sup>

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54. *United States v. Bond*, 681 F.3d 149, 152 (2012).

55. Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867, 1882 (2005) (quoting U.S. CONST. art. I, § 8, cl. 18; U.S. CONST. art. II, § 2, cl. 2).

56. *Id.* at 1884.

57. *Id.*

58. *Id.*

59. *Id.* at 1882.

60. *Id.* at 1883.

61. 252 U.S. 416, 432 (1920).

62. Rosenkranz, *supra* note 55, at 1868.

## IV. ARGUMENTS

A. *Petitioner's Arguments*

## 1. The Treaty Power Does Not Grant a Federal Police Power

Bond first argues that Congress does not have the power to criminalize every malicious use of a chemical under 18 U.S.C.A. § 229.<sup>63</sup> Allowing Congress to do so would create a federal police power antithetical to the Article I, § 8 enumerated powers.<sup>64</sup> Bond argues that the Constitution reserved the police power to the states,<sup>65</sup> and that the federal government's lack of a police power is a bedrock principle of federalism that protects state sovereignty and individual liberty.<sup>66</sup> Part of maintaining an appropriate balance between state and federal powers, Bond argues, means assuring that Congress cannot regulate criminal conduct that is not of a national or international concern.<sup>67</sup> Allowing the Third Circuit's reading of *Holland* to stand would thus create a "loophole through which Congress can circumvent the limits on its enumerated powers."<sup>68</sup> Therefore, Bond argues that the government's reading of *Holland* that "any legislation rationally implementing a valid treaty is a valid exercise of the Necessary and Proper Clause"<sup>69</sup> "cannot be the law."<sup>70</sup>

Additionally, Bond asserts that the Third Circuit's reading of *Holland* is not only constitutionally impermissible, but that it also contradicts the Court's opinion in *Holland*.<sup>71</sup> Bond notes that in deciding the constitutionality of the MBTA, the *Holland* Court balanced relevant state and national interests before deeming the national interests paramount.<sup>72</sup> This weighing of national and state interests would have been "largely beside the point if federalism principles were simply irrelevant when the federal government acts pursuant to the treaty power."<sup>73</sup> Therefore, Bond argues that *Holland*

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63. Brief for Petitioner at 20, *Bond v. United States*, No. 12-258 (U.S. May 8, 2013).

64. *Id.*

65. *Id.*

66. *Id.* at 21.

67. *Id.* at 22.

68. Petition for Writ of Certiorari at 33, *Bond v. United States*, No. 12-158 (U.S. Aug. 1, 2012).

69. Brief for Petitioner, *supra* note 63, at 28.

70. Petition for Writ of Certiorari, *supra* note 68, at 24.

71. *Id.* at 24–25.

72. *Id.* at 25.

73. Brief for Petitioner, *supra* note 63, at 29.



is consistent with the proposition that the Treaty Power is subject to federalism restrictions.<sup>74</sup>

## 2. The Third Circuit's Holding Undermines the Existence of Non-self-executing Treaties

Bond contends that the government's theory that "any valid treaty necessarily expands Congress's plenary power is also difficult to reconcile with the critical distinction between self-executing and non-self-executing treaties."<sup>75</sup> A self-executing treaty's validity would be the proper focus of inquiry by the Third Circuit because if it were valid, the Supremacy Clause renders it the supreme law of the land without any further action by Congress.<sup>76</sup>

A non-self-executing treaty, on the other hand, is "different."<sup>77</sup> Bond argues that the Senate ratifies a non-self executing treaty when: (1) state law can assure that the United States is in compliance with the treaty, or (2) "with the understanding that state and federal laws" are currently sufficient to deal with the United States' obligations under the treaty.<sup>78</sup> Accordingly, Bond argues that the President and the Senate enter into non-self-executing treaties precisely because they are wary of the federalism implications and purposely preserve the States' role in helping to ensure that treaty obligations are met.<sup>79</sup> Thus, the Third Circuit's interpretation of *Holland* that "any legislation that rationally implements a valid treaty is equally valid" is wrong because it would undermine not only the Constitution, but also the very existence of non-self-executing treaties.<sup>80</sup>

Finally, Bond states that if *Holland* does stand to eliminate federalism as a check on the Treaty Power, it should be overruled.<sup>81</sup>

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74. *Id.*

75. *Id.* at 31.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 32.

81. *Id.* at 33.

### 3. Section 229 Does Not Need to Include Bond's Actions

Bond asserts that constitutional avoidance is a “cardinal principle” of statutory construction demanding that when one interpretation of a statute raises serious constitutional issues, the court should construe the statute to avoid those constitutional issues unless it would be contrary to Congress’s intent.<sup>82</sup> Accordingly, Bond argues that a broad reading of “chemical weapon” under § 229 would make it a “federal crime to possess bleach or insect repellent while harboring a bad intent.”<sup>83</sup> Bond argues that this outcome demonstrates how a broad reading of § 229 could dangerously intrude on a state’s police power.<sup>84</sup> Therefore, Bond contends the constitutional avoidance principle of statutory interpretation should be applied with more force regarding § 229 because it addresses the delicate balance of power between the state and federal government.<sup>85</sup>

Bond then claims that Congress did not intend to disrupt the balance of power between the states and national government when passing § 229.<sup>86</sup> Instead, Congress intended for § 229 to punish “acts of terrorism” by nation-states and “not every malicious use of chemicals.”<sup>87</sup> As Bond points out, “[n]o one thinks that petitioner’s conduct implicated concerns of the Convention.”<sup>88</sup>

Rather, Bond contends that the best way to interpret § 229 to coincide with Congress’s intent would be to read the “peaceful purpose” provision as limiting the statute’s application to non-warlike activities.<sup>89</sup> This definition of “peaceful purpose” would mean that any non-terrorist and non-warlike use of chemicals, like in Bond’s case, would fall outside § 229’s scope.<sup>90</sup> This interpretation of § 229 would avoid unintentional consequences by Congress and prevent § 229 from exceeding the Convention’s goals.<sup>91</sup> Bond supports this proposition by demonstrating that this definition of “peaceful purpose” coincides with its contextual placement in the statute and in the Convention, and it also coincides with its natural meaning.<sup>92</sup>

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82. *Id.* at 42.

83. *Id.* at 45.

84. *Id.* at 46.

85. *Id.* at 43.

86. *Id.* at 46.

87. *Id.* at 47.

88. *Id.* at 49.

89. *Id.* at 51.

90. *Id.* at 57.

91. *Id.* at 51.

92. *Id.* at 52–53.

Further, Bond argues that a non-warlike construction of “peaceful purpose” would render § 229 constitutional, and ensure that Bond’s use of the chemicals to poison Haynes falls outside § 229’s scope.<sup>93</sup>

### *B. Respondent’s Arguments*

#### 1. Bond Violated § 229

Respondent, the United States, disagrees with Bond’s definition of “peaceful purpose” and instead states that Bond violated the statute because Bond’s use of chemicals was not peaceful, but for the specific intent of harming Haynes.<sup>94</sup> Respondent argues that a natural and plain reading of “peaceful purpose” demonstrates that the use of a toxic chemical to injure someone is not a “peaceful purpose” but the use of a chemical as a “weapon.”<sup>95</sup>

Respondent also directly confronts Bond’s argument that § 229’s prohibitions should extend to conduct that would violate the Convention only if undertaken by a state party.<sup>96</sup> Respondent argues that even if a state party performed non-warlike revenge acts, the state party’s malicious use of a toxic chemical to injure another would still be prohibited by the Convention.<sup>97</sup>

Further, Respondent counters Bond’s claim that her conduct falls outside of § 229 because it was not “warlike” or “terrorist” by stating that any interpretation of § 229 that limits its prohibitions to “warlike” or “terrorist” activities is foreclosed by its plain text.<sup>98</sup> Rather, Respondent argues that § 229 is purposefully broad and that it includes exemptions precisely so that any innocent activities are excluded from its reach.<sup>99</sup>

Moreover, Respondent asserts that, unlike Bond’s claims, the history of the Convention demonstrates it was intended to go beyond warlike and terrorist activities.<sup>100</sup> Rather, the Convention and § 229 were intended to prohibit “*all* malicious use of chemical weapons.”<sup>101</sup>

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93. *See id.* at 56–57 (discussing why defining peaceful purpose as non-warlike will help further Congress’s intent and noting that Congress did not mean to regulate the malicious actions of a romantic rival).

94. Brief for Respondent at 13, *Bond v. United States*, No. 12-258 (U.S. Aug. 9, 2013).

95. *Id.* at 13.

96. *Id.* at 14.

97. *Id.*

98. *Id.* at 11.

99. *Id.* at 12.

100. *Id.* at 15.

101. *Id.* at 16 (emphasis added).

Thus, Respondent argues, prohibiting any party, including Bond, from using toxic chemicals to injure is entirely consistent with the Convention's goals.<sup>102</sup>

## 2. Section 229 is within Congress's Power to Implement Treaties

Respondent concludes by arguing that § 229 is also a proper application of Congress's power to implement treaties.<sup>103</sup> Congress has the authority to prohibit the malicious use of toxic chemicals, and by definition Bond's conduct, under the Necessary and Proper Clause.<sup>104</sup> Respondent argues that *Holland* "makes clear" that § 229 is a "necessary and proper effectuation of U.S. treaty obligations."<sup>105</sup> Further, Respondent highlights that all of Bond's arguments attempting to remove local conduct from within the Treaty Power's realm have been made and all have failed.<sup>106</sup>

Respondent maintains that procedural safeguards, like the requirement that treaties be ratified by two-thirds of the Senate, have assured that the delicate balance between state and federal power is not disrupted.<sup>107</sup> Furthermore, the Senate has always been cognizant of federalism concerns and therefore frequently imposes conditions on treaties.<sup>108</sup> Lastly, Respondent highlights that the Supreme Court has never invalidated legislation implementing a treaty due to federalism concerns.<sup>109</sup>

## V. ANALYSIS

The following subsections detail the different routes that the Supreme Court can take when reviewing *Bond*, and then analyzes each routes' strengths and weaknesses.

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102. *See id.* ("State Parties agreed to enact legislation that would prohibit individuals from 'undertaking any activity prohibited to a State Party under this Convention.'").

103. *Id.* at 26.

104. *Id.*

105. *Id.* at 39.

106. *Id.* at 9.

107. *Id.*

108. *Id.* at 47.

109. *Id.* at 42.

*A. The Court can Uphold the Third Circuit's Interpretation of Holland and Affirm Bond's Conviction*

*Bond v. United States* presents an as-applied challenge to the Chemical Weapons Act.<sup>110</sup> Although Haynes only sustained a chemical burn to her thumb,<sup>111</sup> Bond's actions could have seriously injured Haynes and her baby. Therefore, it would be morally unattractive to let Bond escape punishment just because her actions do not implicate international issues. At oral argument, Justice Kagan in particular seemed hesitant to let the severity of Bond's actions pass as a "peaceful purpose" under § 229.<sup>112</sup> Justice Kagan illustrated this concern by asking what if a chemist released Sarin gas through the ducts of his neighbor's house and ended up killing everyone in the house?<sup>113</sup> Justice Kagan's hypothetical, where the neighbor's use of Sarin gas is also completely domestic and does not implicate any international concerns, emphasizes the moral unattractiveness of letting Bond's actions go unpunished. This concern weighs in favor of upholding the Third Circuit's interpretation of *Holland*. If upheld, then § 229 would be constitutionally valid as applied to Bond.

Would this line of reasoning mean, as Chief Justice Roberts questioned, that Congress's powers "to intrude upon the police power" of the states would be "unlimited" when passing legislation to implement a treaty?<sup>114</sup> Yes. If *Holland* is allowed to stand as the Third Circuit interprets it, the Treaty Power could be used to "undo the carefully wrought edifice of a limited government assigned only certain enumerated powers."<sup>115</sup> Congress could essentially legislate in any area of law when implementing a non-self-executing treaty because the legislation will most likely pass the loose rational basis scrutiny of the Necessary and Proper Clause. This would effectively grant Congress a police power that contradicts our Constitution's delegation of "few and defined" powers to the federal government but "numerous and definite" powers to the states.<sup>116</sup>

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110. *United States v. Bond*, 681 F.3d 149 (3d Cir. 2012).

111. *United States v. Bond*, 581 F.3d 128, 132 (3d Cir. 2009).

112. Transcript of Oral Argument at 14, *Bond v. United States*, No. 12-158 (U.S. Nov. 5, 2013).

113. *Id.* at 14-15.

114. *Id.* at 43.

115. John C. Eastman, *Will Mrs. Bond Topple Missouri v. Holland?*, 2011 CATO SUP. CT. REV. 185, 202 (2010-11).

116. John R. Crook, ed., *Supreme Court Grants Certiorari in Case Implicating Missouri v. Holland*, 107 AM. J. INT'L L. 432, 434 (2013) (quoting THE FEDERALIST NO. 45 (James Madison)).

Nonetheless, the massive potential expansion of federal power to the derogation of states' rights, and the lukewarm reception of three justices to this prospect, means the Court will most likely reject the Third Circuit's interpretation of *Holland* but affirm Bond's conviction.

### *B. The Court Can Avoid the Constitutional Question All Together*

The facts of *Bond* distinctly pose the question of whether Congress can act beyond its enumerated powers when implementing a valid non-self-executing treaty.<sup>117</sup> Although the Supreme Court could tackle this difficult question, the Court can also avoid it by taking one of two routes.

#### 1. Bond's Actions Constituted a "Peaceful Purpose"

First, the Court can hold that § 229 does not apply to Bond. Section 229 makes it illegal to "develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon."<sup>118</sup> Section 229F then defines chemical weapon as "a toxic chemical and its precursors, except where intended for *a purpose not prohibited under this chapter*."<sup>119</sup> A toxic chemical is "any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals."<sup>120</sup> The term "purpose not prohibited under this chapter" includes peaceful purposes that are defined as any purpose "related to an industrial, agricultural, research, medical, or pharmaceutical activity or other activity."<sup>121</sup>

Bond stole the 10-chloro10H-phenoxarsine to poison Haynes from Rohm & Haas, a chemical manufacturer.<sup>122</sup> Presumably, at the time Bond stole the chemicals, Rohm & Haas was manufacturing them for a scientific purpose. Therefore, the Court can rule that Bond's actions fall under the "peaceful purpose" provision of §229F(7)(a). However, this analysis may prove too much because the moment that Bond used the 10-cholor10H-phenoxarsine to poison

117. See Eastman, *supra* note 115, at 201.

118. 18 U.S.C.A. § 229(a)(1) (West 2013).

119. 18 U.S.C.A. § 229F(1)(a) (West 2013) (emphasis added).

120. § 229F(8)(a).

121. § 229F(7)(a).

122. United States v. Bond, 581 F.3d 128, 131 (3d Cir. 2009).

Haynes,<sup>123</sup> she was clearly using the chemical to harm to Haynes. Since the 10-cholor10H-phenoxarsine had the ability to harm Haynes,<sup>124</sup> it was clearly a “toxic chemical” as defined under § 229F.<sup>125</sup> Bond’s attempts at poisoning Haynes,<sup>126</sup> therefore, would easily qualify as a “use” of a chemical weapon under § 229.<sup>127</sup> Quite simply, the language of the Chemical Weapons Act is very broad and finding a loophole for Bond’s actions would be difficult if not impossible.

## 2. Clear Statement Requirement

Second, the Court can employ a clear statement rule and hold that § 229 does not apply to Bond. The clear statement rule demands that if Congress intends to disrupt the constitutional balance between the states and the federal government, it must make itself unmistakably clear in doing so.<sup>128</sup> Therefore, if Congress is not absolutely clear that it has intended to preempt traditional state power, the Court will read the statute as not disrupting the balance between state and federal power.<sup>129</sup>

Here, the Treaty’s Annex lists three “Schedules” of chemicals that are absolutely prohibited by the Treaty.<sup>130</sup> These listed chemicals are not exclusive, however, because the Convention also provides information to help place a non-listed chemical into the appropriate Schedule.<sup>131</sup> Nonetheless as Justice Breyer noted during oral argument, “once you depart from the annexes in defining the chemicals, you throw into it a list a thousand miles long.”<sup>132</sup> Justice Breyer also noted that reading § 229 to include chemicals not listed in the Annex, like the chemicals Bond used to poison Haynes, can encroach on a state’s power to punish its citizens.

Therefore, the Court can find that § 229 is not clear enough when preempting a state’s right to punish its citizen for its “garden variety”

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123. *Id.*

124. *Id.*

125. See § 229F(8)(a) (West 2013) (A toxic chemical is “any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals.”).

126. *Bond*, 581 F.3d at 131.

127. See U.S.C.A. § 229(a)(1) (West 2013); see also § 229F(1)(a).

128. *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991).

129. *Id.*

130. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and their Destruction, *supra* note 12, at annex.

131. *Id.* at annex, part IV.

132. Transcript of Oral Argument, *supra* note 112, at 48.

crimes and it can decide to apply a clear statement requirement. The Court can read § 229 as only being concerned with the chemicals specified in the Treaty's Annex.<sup>133</sup> Since the chemicals that Bond used to poison Haynes are not on this list,<sup>134</sup> the Court can hold that § 229 does not apply to Bond and reverse her conviction. Justice Breyer seemed to favor this argument when he said that limiting § 229 to the chemicals listed in the Annex is an "easy way" to determine § 229's scope.<sup>135</sup>

### *C. The Court Can Impose Limitations on Congress's Powers When Implementing a Non-self-Executing Treaty*

Although the Court can take one of the two routes discussed above,<sup>136</sup> the Court can also decisively end the debate concerning *Holland's* holding and dictate the appropriate scope of Congress's powers when implementing a non-self-executing treaty.

When the *Holland* Court held that when a treaty "is valid there can be no dispute about the validity of the statute under Article I, Section 8, as a necessary and proper means to execute the powers of the Government,"<sup>137</sup> it may not have foreseen one particular scenario: Congress deviating greatly from a treaty when passing the implementing legislation.

*Holland* dealt with the constitutionality of the MBTA that was passed by Congress to implement the Convention between the United States and Great Britain for the Protection of Migratory Birds (the Migratory Bird Convention).<sup>138</sup> The Migratory Bird Convention's mission was to preserve migratory birds and to save them "from indiscriminate slaughter."<sup>139</sup> The MBTA then made it illegal to "pursue, hunt, take, capture, kill . . . ship, export, import" or to attempt to do the foregoing to "any migratory bird."<sup>140</sup> The rest of the MBTA specified the ways in which it was illegal to commit such actions, listed exceptions, and included detailed procedures for punishing those who

133. Petition for Writ of Certiorari, *supra* note 68 **Error! Bookmark not defined.**, at 26.

134. See *United States v. Bond*, 581 F.3d 128, 131 (3d Cir. 2009); Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and their Destruction, *supra* note 12, at art. 1.

135. Transcript of Oral Argument, *supra* note 112, at 35.

136. See *supra* Part V.B.1–2.

137. 252 U.S. 416, 432 (1920).

138. *Id.*

139. Convention between the United States and Great Britain for the Protection of Migratory Birds, *supra* note 4.

140. 16 U.S.C.A. § 703 (West 2013).



have committed such crimes.<sup>141</sup> The MBTA, therefore, only penalized what was specifically stated in the Bird Convention.

By contrast, § 229 deviates significantly from the Convention. The Convention specifically states that its obligations are that each *state party* must promise never:

To develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone;

To use chemical weapons;

To engage in any military preparations to use chemical weapons;

To assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.<sup>142</sup>

The reason for these restrictions is spelled out in the Preamble: each *State Party* is interested in “achieving effective progress towards general and complete disarmament.”<sup>143</sup> Clearly, the Convention was aimed at making sure each sovereign nation involved would refrain from any sort of chemical warfare. Section 229 deviates from this focus on *state parties* and instead makes it unlawful for “any person” to “develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon.”<sup>144</sup> Section 229’s focus on individuals goes beyond the Convention’s international peacekeeping concerns, and in doing so, it heavily encroaches on a state’s right to punish its citizens for their crimes.

The MBTA’s close conformity to its respective treaty is likely indicative of treaty legislation at the time *Holland* was decided. The *Holland* Court probably did not take into account the ever-expanding latitude that Congress would later bestow upon itself when passing legislation to implement non-self-executing treaties. Therefore, the Court should not uphold the Third Circuit’s interpretation of *Holland*. Instead, the Court should determine the true meaning of *Holland*’s holding and also either: (1) create a new nexus test to limit Congress’s powers when passing treaty-implementing legislation; or (2) impose a subject matter limitation on Congress when passing treaty-

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141. Migratory Bird Treaty Act, 16 U.S.C.A. §§ 703–710 (West 2013).

142. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and their Destruction, *supra* note 12, at art. 1.

143. *Id.* at pmb1.

144. 18 U.S.C.A. § 229(a) (West 2013) (emphasis added).

implementing legislation.

### 1. The Court Can Overrule the Third Circuit by Creating a New Nexus Test

Justice Kennedy noted that Bond's case turns on the breadth of the Necessary and Proper Clause when he stated that "[t]he 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."<sup>145</sup> By pointing to the Necessary and Proper Clause, Justice Kennedy signaled that the broad interpretation given to *Holland* by the Third Circuit is misplaced.<sup>146</sup> What, then, is the potential solution? A more radical, yet efficient, solution would be for the Court to uphold *Holland* and create a different nexus test for Congress when it uses the Necessary and Proper Power in conjunction with the Treaty Power.

Under current law, the Necessary and Proper Clause grants Congress the authority to enact a particular statute as long as that statute is "rationally related to the implementation of a constitutionally enumerated power."<sup>147</sup> The Necessary and Proper Clause, in conjunction with the Third Circuit's interpretation of *Holland*, allows Congress to pass any legislation as long as it is rationally related to a valid treaty. This is a very loose standard that grants Congress a large amount of discretion when passing treaty-implementing legislation.

If the Court wanted to protect federalism and simultaneously maintain the benefit of *Holland*, which grants Congress powers beyond those enumerated to it in the Constitution when implementing a treaty, the Court can tighten the nexus test when Congress uses the Necessary and Proper Clause to implement a non-self-executing treaty. Deciphering the new nexus test would not only be unprecedented, it would also be very difficult. How tightly would the treaty-implementing legislation need to relate to the Convention? How closely would a treaty-implementing statute need to track its respective treaty? These questions the Court would need to answer.

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145. *Bond v. United States*, 131 S. Ct. 2355, 2367 (2011) (quoting U.S. CONST. art. I, § 8).

146. *See Eastman*, *supra* note 115, at 194.

147. *United States v. Comstock*, 50 U.S. 126, 134 (2010).

Although this solution was not proposed during oral arguments, tightening the nexus for the Necessary and Proper Clause when used to implement a non-self-executing treaty is a great solution. First, it maintains the benefit of *Holland* and allows Congress to legislate beyond its enumerated powers when implementing a treaty. Second, it would avoid the trouble of having to overrule *Holland*, which has persisted for decades. Third, it would require Congress to more tightly connect treaty-implementing legislation to the respective treaty and therefore protect states' rights by diminishing the likelihood that Congress encroaches on state authority.

Fourth, a tighter standard would help avoid overbroad treaty implementing statutes that lead to absurd results. For example, Justice Alito pointed out during oral argument that “pouring a bottle of vinegar in [a] friend’s goldfish bowl” would be illegal under § 229 and expose a person to several years in federal prison.<sup>148</sup> Section 229’s overbroad language can penalize a variety of actions that were not targeted by the Convention. This is a direct consequence of *Holland* because treaty implementing legislation only needs to meet deferential rational basis review. A tighter nexus test when Congress uses its Necessary and Proper Power to implement a non-self-executing treaty, on the other hand, would require Congress to more narrowly tailor treaty-implementing legislation to its respective treaty. Under the new nexus test, Congress would be required to pass legislation to implement a treaty but Congress could not go any further than what is necessary to implement the treaty.

Here, a tighter nexus test would result in overruling the Third Circuit’s interpretation of *Holland’s* holding. Also, it would most probably mean that § 229 is unconstitutional as applied to Bond and Bond’s conviction would need to be reversed. This would all depend, however, on what the Court would determine is an appropriate nexus between a treaty and its implementing legislation and whether the Chemical Weapons Act is appropriately related to the Convention.

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148. Transcript of Oral Argument at 29, *Bond v. United States*, 131 S. Ct. 2355 (2011) (No. 09-1227).

## 2. The Court Can Overrule the Third Circuit by Creating a Subject Matter Limitation

Second, the Court can impose a subject matter limitation on Congress's powers when used in conjunction with the Treaty Power. Under this solution if Congress wanted to pass legislation implementing a treaty that would exceed the treaty's scope, it would only be allowed to do so if it was still regulating a matter of international concern. This solution, like the tighter nexus test proposed above,<sup>149</sup> would protect states' rights by diminishing the opportunity for Congress to encroach on traditional state power.

However, the subject matter limitation also has its setbacks. First, imposing a subject matter limitation would go against the ideals of the Framers who desired a broad and substantive Treaty Power.<sup>150</sup> Second, in today's world almost any issue "can plausibly be labeled 'international'"<sup>151</sup> and the definition of an "international" issue will "undoubtedly vary over time, as world conditions and relationships between nations change."<sup>152</sup> Therefore, placing a subject matter limitation on treaty-implementing legislation may prove to be more difficult than it seems.

Nonetheless, this solution would mean that the Third Circuit's interpretation of *Holland* would need to be overruled. Further, it would mean that § 229 is unconstitutional as applied to Bond because Bond's prosecution does not implicate international concerns. Bond's prosecution is not of concern to the Convention's parties, and if the United States had not prosecuted Bond, it would not have been in violation of the Convention. Therefore, under this solution, the Chemical Weapons Act would be unconstitutional to the extent that it criminalizes purely domestic behavior that does not affect the United States' obligations under the Convention.

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149. See *supra* Part V.C.1.

150. Oona A. Hathaway, Spencer Amdur, Celia Choy, Samir Deger-Sen, John Paredes, Sally Pei, & Haley Nix Proctor, *The Treaty Power: Its History, Scope, and Limits*, 98 CORNELL L. REV. 239, 245 (2013).

151. Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 451–52 (1998).

152. *Id.* at 454.

*D. The Court Can Overrule Holland and Confine Congress's Powers*

The last, and least likely route that the Court can take is to overrule *Holland*. The Court can hold that non-self-executing treaties can only regulate domestically to the extent that Congress has the constitutional authority to do so. The Treaty Power, therefore, would not confer on Congress any additional regulatory powers.<sup>153</sup> This would be a radical step toward protecting the federalist principles the Framers adamantly sought to preserve. This is very unlikely, however, because this approach is a “novel proposition” with “few adherents and little legal support.”<sup>154</sup> Further, this option did not garner a lot of support during oral argument.<sup>155</sup>

If the Court did take this route, it could rule § 229 unconstitutional as exceeding Congress's Constitutional authority and Bond's conviction would be reversed. On the other hand, if the Court considers § 229 constitutional, then Bond's conviction would be affirmed.

## VI. CONCLUSION

A five-page opinion published over ninety years ago has spurred a tremendous amount of debate concerning the scope of Congress's powers when implementing valid non-self-executing treaties. *Bond v. United States* provides an ideal set of facts that nicely present the Supreme Court with an opportunity to definitively dictate Congress's powers when implementing a non-self-executing treaty and therefore to decisively end the debate concerning *Holland*.<sup>156</sup>

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153. *Id.* at 456.

154. Oona et al., *supra* note 150, at 283.

155. *See generally* Transcript of Oral Argument, *supra* note 112.

156. 581 F.3d 128 (3d Cir. 2009).