



2013

## ***Bond v. United States: Can the President Increase Congress's Legislative Power by Entering into a Treaty?***


Nicholas Quinn Rosenkranz  
Georgetown University Law Center, [nqr@law.georgetown.edu](mailto:nqr@law.georgetown.edu)

This paper can be downloaded free of charge from:  
<https://scholarship.law.georgetown.edu/facpub/1379>  
<http://ssrn.com/abstract=2500250>

---

8 N.Y.U. J.L. & Liberty 228-259 (2013)

This open-access article is brought to you by the Georgetown Law Library. Posted with permission of the author.  
Follow this and additional works at: <https://scholarship.law.georgetown.edu/facpub>

 Part of the [Constitutional Law Commons](#), [Jurisprudence Commons](#), [Legislation Commons](#), and the [President/Executive Department Commons](#)



**BOND V. UNITED STATES:  
CAN THE PRESIDENT INCREASE  
CONGRESS'S LEGISLATIVE POWER BY  
ENTERING INTO A TREATY?\***

**Nicholas Quinn Rosenkranz\*\***

On November 5, 2013, the Supreme Court heard oral argument in *Bond v. United States*,<sup>1</sup> and as we go to press, the case is still pending before the Court. This is a terrific case, first because it has such lurid facts. Mrs. Bond discovered that her husband had impregnated her best friend,<sup>2</sup> so she did what anyone would do. She acquired some chemicals and spread them on the friend's doorknob, car door, and mailbox.<sup>3</sup>

---

\* This is an introduction to an amicus curiae brief supporting the petitioner in *Bond v. United States*, filed on behalf of the Cato Institute, Center for Constitutional Jurisprudence, and Atlantic Legal Foundation. The brief is reprinted *infra* at 233.

\*\* Professor of Law at the Georgetown University Law Center and a Senior Fellow in Constitutional Studies at the Cato Institute.

<sup>1</sup> See Transcript of Oral Argument at 1, *Bond v. United States*, No. 12-158 (U.S. argued Nov. 5, 2013).

<sup>2</sup> Brief for Respondent at 4, *Bond v. United States*, No. 12-158 (U.S. argued Nov. 5, 2013).

<sup>3</sup> *Id.* at 4-5.

This conduct is, of course, all sorts of state crime.<sup>4</sup> But Mrs. Bond was not prosecuted for these state crimes. Instead, she was prosecuted by an ambitious Assistant United States Attorney, for violating the federal Chemical Weapons Convention Implementation Act.<sup>5</sup>

Now to be fair, this statute is written extremely broadly;<sup>6</sup> on its face, it would appear to reach all sorts of purely local conduct like Mrs. Bond's—conduct that hardly seems to be of national, let alone international, concern.<sup>7</sup> And so the question in the case is: did Congress have the power to enact such a broad statute?<sup>8</sup>

The government's primary argument<sup>9</sup> is that Congress does have such power, because this statute was enacted to implement a treaty.<sup>10</sup> The government argues, in other words, that—even assuming Congress would lack the power to enact this statute ordinarily—it has the power in this case, because the United States has entered into a treaty concerning chemical weapons.<sup>11</sup> That is the big issue in the case: *can a treaty increase the legislative power of Congress?*

Now the great Paul Clement, arguing on behalf of Mrs. Bond, offered the Court several ways to rule in favor of his client without reaching this big issue.<sup>12</sup> In particular, he suggested that the Court

---

<sup>4</sup> Brief for Petitioner at 20–23, *Bond v. United States*, No. 12-158 (U.S. argued Nov. 5, 2013).

<sup>5</sup> *See id.* at 7.

<sup>6</sup> *See generally* Chemical Weapons Convention Implementation Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681–856 (2000) (codified at 18 U.S.C. §§ 229 *et. seq.*).

<sup>7</sup> *See* Brief for Petitioner, *supra* note 4, at 46–50.

<sup>8</sup> *Id.* at i–ii; Brief for Respondent, *supra* note 2, § I.

<sup>9</sup> The Government expressly waived any reliance on the Commerce Clause earlier in the litigation, *see* Joint Appendix at 31, *Bond v. United States*, No. 12-158 (U.S. argued Nov. 5, 2013) (“Section 229 was not enacted under the interstate commerce authority.”), but it nevertheless attempts to resuscitate the Commerce Clause argument at the Supreme Court. *See* Brief for Respondent, *supra* note 2, at 17–26.

<sup>10</sup> *See* Brief for Respondent, *supra* note 2, at 26–27.

<sup>11</sup> *See id.*

<sup>12</sup> *See* Transcript of Oral Argument, *supra* note 1, at 12, 18–24.

might construe the statute narrowly; hold that it actually does not reach Mrs. Bond's conduct; and thus avoid the difficult constitutional question of whether a treaty can increase the power of Congress.<sup>13</sup> Clement was savvy to offer the Court this option: Justice Breyer, at least, seemed tempted by it at oral argument,<sup>14</sup> and it might well win the day.

But we as amici, took a different approach.<sup>15</sup> From our perspective, this is a perfect case in which to answer the big question. And it is well worth answering, because an erroneous chestnut of a case<sup>16</sup> and an erroneous foreign affairs treatise<sup>17</sup> have left the erroneous impression, for almost a century, that a treaty can, in fact, increase the legislative power of Congress. In our view, that conclusion is in deep tension with the basic constitutional axiom of limited federal power.

At first glance, this issue might seem an odd fit for this Journal. This case is about a deep principle of constitutional structure, and

---

<sup>13</sup> See *id.* at 12, 18–22, 24; Brief for Petitioner, *supra* note 4, at 42–57.

<sup>14</sup> See Transcript of Oral Argument, *supra* note 1, at 35 (Justice Breyer said to General Verrilli: "There's an easy way out of [deciding the constitutional question]. All we do is say the chemicals involved are the chemicals in the annex."); *id.* at 48–49 (Justice Breyer also said to General Verrilli: "in principle your position constitutionally would allow the President and the Senate, not the House, to do anything through a treaty that is not specifically within the prohibitions of the rights protections of the Constitution. . . . Isn't there an easier way to deal with this case?").

<sup>15</sup> See generally Brief for Cato Institute et al. as Amici Curiae Supporting Petitioner, *Bond v. United States*, No. 12-158 (U.S. argued Nov. 5, 2013).

<sup>16</sup> See *Missouri v. Holland*, 252 U.S. 416, 432–34 (1920) ("If the treaty is valid there can be no dispute about the validity of the statute under Article 1, Section 8, as a necessary and proper means to execute the powers of the Government.").

<sup>17</sup> See LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 481 n.111 (2nd ed. 1996) ("The 'necessary and proper' clause originally contained expressly the power 'to enforce treaties' but it was stricken as superfluous."); LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 408 n.105 (1st ed. 1972) (same). But see Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867, 1875, 1912–18 (2005) ("The words 'enforce treaties' never appeared in the Necessary and Proper Clause.").

thus, one might think, only tangentially related to individual liberty. But nothing could be further from the truth. Matters of constitutional structure are inextricably bound up with matters of individual liberty. The deep structural themes of the Constitution—federalism and separation of powers—are ultimately the Constitution's most powerful safeguards of liberty. Indeed, the Court saw this point clearly, in the prior iteration of this very case, in a passage that could be an apt epigraph for this new journal. The Court wrote:

Federalism secures the freedom of the individual. . . . By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power. When government acts in excess of its lawful powers, that liberty is at stake.<sup>18</sup>

For this reason, this structural issue is actually a perfect fit for the *New York University Journal of Law and Liberty*. If a treaty could increase the legislative power of Congress, then the constitutional axiom of limited federal power would be a sham.<sup>19</sup> Our constitutional structure—and the liberty that it exists to preserve—would be subject to change at the whim of the President, the Senate, and Zimbabwe.<sup>20</sup>

Unfortunately, the Court may not reach the big question in *Bond*. But we reach it here, in our amicus brief, in which we argue only the simple and crucial point: *a treaty cannot increase the legisla-*

---

<sup>18</sup> *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011).

<sup>19</sup> Brief for Cato Institute, *supra* note 15, at 6–7.

<sup>20</sup> *Id.* at 21–22. See also Transcript of Oral Argument, at 32–33, *Golan v. Holder*, 132 S. Ct. 873 (2012) (No. 10-545) (Justice Scalia said “I don’t think that powers that Congress does not have under the Constitution can be acquired by simply obtaining the agreement of the Senate, the President and Zimbabwe. I do not think a treaty can expand the powers of the Federal Government.”).

*tive power of Congress.*<sup>21</sup> The brief is essentially a distillation of an article that I wrote in 2005,<sup>22</sup> and we are grateful to the Harvard Law Review for permission to, in effect, reprint substantial sections of that article. We are grateful, too, to the *Journal of Law and Liberty* for choosing to showcase this brief.

---

<sup>21</sup> See generally Brief for Cato Institute, *supra* note 15, at 21–22.

<sup>22</sup> See generally Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867 (2005).



## *BOND V. UNITED STATES*

Brief of Amici Curiae

The Cato Institute,<sup>I</sup> The Center for Constitutional Jurisprudence,<sup>II</sup>  
& The Atlantic Legal Foundation<sup>III</sup>

Nicholas Quinn Rosenkranz<sup>IV</sup>

*Counsel of Record*

Ilya Shapiro,<sup>V</sup> John C. Eastman,<sup>VI</sup> Martin S. Kaufman,<sup>VII</sup> &  
Edwin Meese III,<sup>VIII</sup>

*Co-Counsel*

---

<sup>I</sup> The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government.

<sup>II</sup> The Center for Constitutional Jurisprudence was established in 1999 as the public interest arm of the Claremont Institute, the mission of which is to restore the principles of the American Founding to their rightful and preeminent authority in our national life.

<sup>III</sup> The Atlantic Legal Foundation is a nonprofit, nonpartisan public interest law firm with a history of advancing the rule of law in courts and before administrative agencies by advocating limited and efficient government, free enterprise, individual liberty, school choice and sound science.

<sup>IV</sup> Professor of Law at the Georgetown University Law Center and a Senior Fellow in Constitutional Studies at the Cato Institute.

<sup>V</sup> Senior fellow in constitutional studies at the Cato Institute.

<sup>VI</sup> Henry Salvatori Professor of Law & Community Service at Chapman University School of Law and Director of the Center of Constitutional Jurisprudence.

<sup>VII</sup> Senior Vice President and General Counsel of Atlantic Legal Foundation.

<sup>VIII</sup> Seventy-fifth Attorney General of the United States under the Reagan Administration in 1985-1988.

### SUMMARY OF ARGUMENT

The court below held that the Chemical Weapons Convention increased the power of Congress, empowering it to enact 18 U.S.C. § 229. It held, in other words, that Congress is not limited to those powers enumerated in the Constitution; rather, those powers may be increased by treaty. The Third Circuit believed that it was bound to reach this conclusion by a single, conclusory sentence in *Missouri v. Holland*: “If the treaty is valid there can be no dispute about the validity of the [implementing] statute under Article I, Section 8, as a necessary and proper means to execute the powers of the Government.<sup>1</sup> But the Third Circuit was obviously uneasy with this conclusion: “with practically no qualifying language in *Holland* to turn to, we are bound to take at face value” that single sentence.<sup>2</sup> “[I]t may be that there is more to say about the uncompromising language used in *Holland* than we are able to say, but that very direct language demands from us a direct acknowledgement of its meaning, even if the result may be viewed as simplistic. If there is nuance that has escaped us, it is for the Supreme Court to elucidate.”<sup>3</sup>

Judge Ambro was even more explicit in concurrence:

I write separately to urge the Supreme Court to provide a clarifying explanation of its statement in . . . *Holland*. . . . I hope that the Supreme Court will soon flesh out “[t]he most important sentence in the most important case about the constitutional law of foreign affairs,” and, doing so, clarify (indeed curtail) the contours of federal power to enact laws

---

<sup>1</sup> *Missouri v. Holland*, 252 U.S. 416, 432 (1920).

<sup>2</sup> *Bond v. United States*, 681 F.3d 149, 162 (3d Cir 2012).

<sup>3</sup> *Id.* at 164–65 (footnote omitted).



that intrude on matters so local that no drafter of the Convention contemplated their inclusion in it.<sup>4</sup>

That one conclusory sentence from *Holland* implies that if a treaty commits the United States to enact some legislation, then Congress automatically obtains the power to enact that legislation, even if it would otherwise lack such power. It implies, in other words, that Congress's powers are not constitutionally fixed, but rather may be expanded by treaty.

In *Holland*, Justice Holmes provided neither reasoning nor citation for this proposition. It appears in that one conclusory sentence, in a five-page opinion that is primarily devoted to a different question. And this Court has never elaborated. The most influential argument supporting this proposition appears not in the *United States Reports* but in the leading foreign affairs treatise. This argument has largely short-circuited jurisprudential debate on the question. But recent scholarship has shown that the historical premise of this academic argument is simply, demonstrably false.

The proposition that treaties can increase the power of Congress is inconsistent with the text of the Treaty Clause, the Necessary and Proper Clause, and the Tenth Amendment. It is inconsistent with the fundamental structural principle that "[t]he powers of the legislature are defined, and limited."<sup>5</sup> It implies, insidiously, that that the President and the Senate can increase their own power by treaty. And it implies, bizarrely, that the President alone—or a foreign government alone—can decrease Congress's power and render federal statutes unconstitutional. Finally, it creates a doubly perverse incentive: an incentive to enter into foreign entanglements simply to increase domestic legislative power.

---

<sup>4</sup> *Id.* at 170 (Ambro, J., concurring) (quoting Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867, 1868 (2005)).

<sup>5</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

*Holland* is wrong on this point and it should be overruled. This Court should hold that treaties cannot vest Congress with additional legislative power.

## ARGUMENT

### I. HOLLAND IS INCONSISTENT WITH CONSTITUTIONAL STRUCTURE

#### A. CONGRESS'S LEGISLATIVE POWER CAN BE INCREASED ONLY BY CONSTITUTIONAL AMENDMENT, NOT BY TREATY

Under *Holland*, some statutes are beyond Congress's power to enact absent a treaty, but within Congress's power given a treaty. This implication runs counter to the textual and structural logic of the Constitution, because it means that Congress's powers are not constitutionally fixed.<sup>6</sup> Under *Holland*, the legislative power is not limited to the subjects enumerated in the Constitution; it can extend to all of those subjects, plus any others that may be addressed by treaty. And according to the Restatement (Third) of the Foreign Relations Law of the United States:

[T]he Constitution does not require that an international agreement deal only with "matters of international concern." The references in the Constitution presumably incorporate the concept of treaty and of other agreements in international law. International law *knows no limitations on the purpose or subject matter of international agreements*, other than that they may not conflict with a peremptory norm of international law. States may enter into an agreement on *any matter of concern to them*, and international law does not

---

<sup>6</sup> See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, §4-4, at 645-46 (3d ed. 2000). ("By negotiating a treaty and obtaining the requisite consent of the Senate, the President . . . may endow Congress with a source of legislative authority independent of the powers enumerated in Article I.")

look behind their motives or purposes in doing so. Thus, the United States may make an agreement on *any subject suggested by its national interests* in relations with other nations.<sup>7</sup>

If this is so, then Congress's legislative powers are not merely *somewhat* expandable by treaty; they are expandable *virtually without limit*. The President could, for example, enter into a treaty to regulate guns near schools – and then Congress could re-enact Gun Free School Zones Act, despite *United States v. Lopez*.<sup>8</sup> Indeed, that is the tip of the iceberg. “The Commerce Clause is not a general license to regulate an individual from cradle to grave,”<sup>9</sup> but under *Holland*, a treaty could be just such a license. The President might, ostensibly to foster better relations with another country, simply exchange reciprocal promises to regulate the citizenry so as to maximize the collective welfare. If *Holland* means what it seems to say, then such a treaty would confer upon Congress plenary legislative power.

That proposition is, of course, flatly inconsistent with the basic constitutional scheme of enumerated powers; it is in deep tension with the Tenth Amendment's premise of reserved powers; and it stands contradicted by countless canonical statements that Congress's powers are fixed and defined. It is axiomatic that “the Constitution[] confer[s] upon Congress . . . not all governmental powers, but only discrete, enumerated ones.”<sup>10</sup> And, of course, “enumeration presupposes something not enumerated.”<sup>11</sup> In Chief Justice Marshall's words: “[t]he powers of the legislature are *defined*,

---

<sup>7</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 302 cmt. c (1987).

<sup>8</sup> 514 U.S. 549 (1995).

<sup>9</sup> Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2591 (2012).

<sup>10</sup> Printz v. United States, 521 U.S. 898, 919 (1997).

<sup>11</sup> Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 195 (1824).

and limited; and that those limits may not be mistaken, or forgotten, the constitution is written."<sup>12</sup>

Indeed, in this very case, this Court explained: "By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power."<sup>13</sup> This would be no protection at all if the legislative power were readily expandable by treaty. All of these propositions, from *Marbury* to *Bond*, are flatly inconsistent with *Holland*.

B. CONGRESS ONLY POSSESSES THE "LEGISLATIVE POWERS HEREIN GRANTED."

The point is reinforced by the juxtaposition of the three Vesting Clauses. Article II, Section 1, provides that "[t]he executive Power shall be vested in a President of the United States of America"<sup>14</sup>, and Article III, Section 1, provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."<sup>15</sup> By contrast, Article I, Section 1, provides: "All legislative Powers herein granted shall be vested in a Congress of the United States."<sup>16</sup>

There is a simple explanation for this difference in the Vesting Clauses. Congress is the first mover in the mechanism of U.S. law. It "make[s] . . . Laws."<sup>17</sup> By contrast, the executive branch subsequently "execute[s]" the laws made by Congress, and the judicial branch

<sup>12</sup> *Marbury*, 5 U.S. (1 Cranch) at 176 (emphasis added).

<sup>13</sup> *United States v. Bond*, 131 S. Ct. 2355, 2364 (2011).

<sup>14</sup> U.S. CONST. art. II, § 1 (emphasis added).

<sup>15</sup> U.S. CONST. art. III, § 1 (emphasis added).

<sup>16</sup> U.S. CONST. art. I, § 1 (emphasis added).

<sup>17</sup> U.S. CONST. art. I, § 8, cl. 18 (emphasis added).

interprets those laws. The scope of the executive and judicial power, therefore, is *contingent* on acts of Congress.

For example, the Constitution provides that the President “shall take Care that the Laws be faithfully executed.”<sup>18</sup> By passing a new statute, Congress may expand the President’s powers by giving him a new law to execute. As Justice Jackson explained, “[w]hen 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.*”<sup>19</sup> In other words, the scope of the executive power is not fixed; it is contingent on acts of Congress.

The judicial power is contingent in just the same way. Indeed, it is expressly contingent, not only on statutes but also on treaties. Article III provides that the judicial power shall “extend” to certain sorts of cases and controversies.<sup>20</sup> The verb “to extend” suggests today just what it signified in 1789: stretching, enlarging.<sup>21</sup> And, in particular, “[t]he judicial Power shall *extend* to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and *Treaties made, or which shall be made, under their Authority.*”<sup>22</sup> This clause expressly provides that the scope of the judicial power may be expanded by treaty. A new (self-executing) treaty, like a new statute, can give the judiciary something new to do, thus expanding its jurisdiction. Thus, it would not have made sense to limit the federal courts to the powers “herein granted,” because the

---

<sup>18</sup> U.S. CONST. art. II, § 3.

<sup>19</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (emphasis added).

<sup>20</sup> See U.S. CONST. art. III, § 2, cl. 1.

<sup>21</sup> See, e.g., SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (W. Strahan et al., 4th ed. 1773) (“To EXTEND . . . 1. *To stretch out* towards any part. . . . 5. *To enlarge*; to continue. . . . 6. *To encrease in force or duration.* . . . 7. *To enlarge the comprehension of any position.* . . . 9. *To seize by a course of law.*” (emphases added)).

<sup>22</sup> U.S. CONST. art. III, § 2, cl. 1 (emphases added).

scope of the judicial power may be expanded, not only by statute but also by treaty.

But, crucially, Article I has no such provision. The *legislative* power does *not* “extend . . . to Treaties made, or which shall be made.”<sup>23</sup> Indeed, the legislative power does not “extend” at all. Rather, the only legislative powers in the Constitution are those that are enumerated, those that the document says are “herein granted.” The scope of the legislative power—unlike the scope of the executive and judicial powers—does not change with the passage of statutes or the ratification of treaties. The legislative power alone is fixed rather than contingent, and so it alone is limited to an enumeration of powers “herein granted.”

Indeed, this structural fact—reflected in the textual dichotomy between the Vesting Clause of Article I and those of Articles II and III—coheres perfectly with the underlying theory of separation of powers. To create a tripartite government of limited powers, it is logically necessary that at least one of the branches have *fixed* powers—powers that cannot be increased by the other branches. As one would expect, that branch is Congress. Congress is the first branch of government, the first mover in American law, the fixed star of constitutional power.<sup>24</sup> Congress can increase the President’s power, *but the President cannot increase Congress’s power in return*. If he could, the federal government as a whole would cease to be one of limited powers.

Moreover, to the extent that the jurisdiction of any branch may be increased, it is naturally left to *different* political actors to work the expansion. To entrust Congress to expand the jurisdiction of the

---

<sup>23</sup> *Id.*

<sup>24</sup> See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1443 n.71 (1987) (“Congress remained in many ways *primus inter pares*. Schematically, Article I precedes Articles II and III. Structurally, Congress must exercise the legislative power before the executive and judicial powers have a statute on which to act.”).

executive and the judiciary is consistent with the theories of Montesquieu and Madison, because Congress has no incentive to over-extend the powers of the other branches at its own expense.<sup>25</sup>

But it is quite another matter to entrust treaty-makers—the President and Senate—to expand the power of lawmakers—the President and Senate, plus the House. Here, there is no ambition to counteract ambition; here, instead, ambition is handed the keys to power.<sup>26</sup> As Henry St. George Tucker III wrote in his treatise on the treaty power five years before *Holland*, “[s]uch interpretation would clothe Congress with powers beyond the limits of the Constitution, with no limitations except the uncontrolled greed or ambition of an unlimited power.”<sup>27</sup>

### C. HOLLAND ENABLES THE CIRCUMVENTION OF ARTICLE V.

Another way to put the point is that *Holland* permits evasion of Article V’s constitutional amendment mechanism. As a general rule,

---

<sup>25</sup> See 1 WILLIAM BLACKSTONE, COMMENTARIES \*142 (“[W]here the legislative and executive authority are in distinct hands, the former will take care not to entrust the latter with so large a power, as may tend to the subversion of [its] own independence, and therewith of the liberty of the subject.”).

<sup>26</sup> See CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS bk. XI, ch. IV, at 161 (photo. reprint 1991) (J.V. Prichard ed., Thomas Nugent trans., G. Bell & Sons 1914) (1748) (“[E]very man invested with power is apt to abuse it, and to carry his authority as far as it will go.”); *INS v. Chadha*, 462 U.S. 919, 947 (1983) (“[T]he profound conviction of the Framers that the powers conferred on Congress were the powers to be most carefully circumscribed.”); THE FEDERALIST NO. 48, at 306 (James Madison) (Clinton Rossiter ed., 1961) (“The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex.”); THE FEDERALIST NO. 49, at 313–14 (James Madison) (Clinton Rossiter ed., 1961) (“[T]he tendency of republican governments is to an aggrandizement of the legislative at the expense of the other departments.”).

<sup>27</sup> HENRY ST. GEORGE TUCKER, LIMITATIONS ON THE TREATY-MAKING POWER § 113, at 130 (1915).

the legislative power can be increased only by constitutional amendment. This expansion has happened several times.<sup>28</sup>

The process provided by the Constitution for its own amendment is of course far more elaborate than the process for making treaties.<sup>29</sup> But if *Holland* means what it seems to say, then treaties “may endow Congress with a source of legislative authority independent of the powers enumerated in Article I.”<sup>30</sup> In other words, the legislative power of Congress may be increased not just by constitutional amendment but also by treaty.

This Court rejected an analogous implication in *City of Boerne v. Flores*:

If Congress could define its own powers by altering the Fourteenth Amendment’s meaning, no longer would the Constitution be “superior paramount law, unchangeable by ordinary means.” It would be “on a level with ordinary legislative acts, and, like other acts, . . . alterable when the legislature shall please to alter it.” Under this approach, it is difficult to conceive of a principle that would limit congressional power. Shifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V.<sup>31</sup>

*Holland* achieves under the Necessary and Proper Clause exactly what *City of Boerne* rejected under Fourteenth Amendment. Read literally, *Holland* renders the Necessary and Proper Clause expandable by the political branches with the ratification of each new treaty. It thus allows the President and Senate to work an expansion of

---

<sup>28</sup> See U.S. CONST. amend. XIII, § 2; amend. XIV, § 5; amend. XV, § 2; amend. XIX, cl. 2; amend. XXIII, § 2; amend. XXIV, § 2; amend. XXVI, § 2.

<sup>29</sup> Compare U.S. CONST. art. II, § 2, cl. 2, with U.S. CONST. Art. V.

<sup>30</sup> TRIBE, *supra* note 6.

<sup>31</sup> 521 U.S. 507 (1997).



legislative power—which “effectively circumvent[s] the difficult and detailed amendment process contained in Article V.”<sup>32</sup> This cannot be right:

It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights—let alone alien to our entire constitutional history and tradition—to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions. In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V.<sup>33</sup>

D. IF *HOLLAND* WERE CORRECT, THEN THE PRESIDENT—OR A FOREIGN SOVEREIGN—COULD DECREASE CONGRESS’S POWER AND RENDER U.S. STATUTES UNCONSTITUTIONAL

If it is strange to think that the legislative power can be *expanded*, not only by constitutional amendment, but also by an action of the President with the consent of the Senate, it is surely stranger still to think that the legislative power may be *contracted* by the President alone. Yet this too is an implication of *Holland*.

As a general matter, “[i]f [a] statute is unconstitutional, it is unconstitutional from the start.”<sup>34</sup> And, conversely, if a statute is constitutional when enacted, it generally can be *rendered* unconstitutional only by a constitutional amendment. In other words, “[a]

---

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 529 (citations omitted) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); see also *Reid v. Covert*, 354 U.S. 1, 17 (1957) (plurality opinion)).

<sup>34</sup> The Attorney General’s Duty to Defend and Enforce Constitutionally Objectionable Legislation, 4A Op. Off. Legal Counsel 55, 59 (1980).

statute . . . must be tested by powers possessed at the time of its enactment."<sup>35</sup>

*Holland* is inconsistent with that fundamental principle. Under *Holland*, some exercises of legislative power derive their authority not from the Constitution but from specific treaties.<sup>36</sup> If so, then when such treaties are terminated, their implementing statutes presumably *become* unconstitutional.<sup>37</sup> Such statutes are suddenly *rendered* unconstitutional—not by constitutional amendment but by the mere abrogation of a treaty. This is paradoxical. “The peculiar circumstances of the moment may render a measure more or less wise, but cannot render it more or less constitutional.”<sup>38</sup>

And if it is strange to think of a statute *becoming* unconstitutional, surely it is stranger still to think that the President may render a statute unconstitutional *unilaterally and at his sole discretion*. Yet this is what follows from *Holland*. The Executive Branch takes the position that the President has power to abrogate treaties unilaterally.<sup>39</sup> If so, then the President, by renouncing a treaty, could unilaterally render an implementing act of Congress unconstitutional.

This result is inconsistent with the basic proposition that “repeal of statutes, no less than enactment, must conform with [Article] 1.”<sup>40</sup> This Court did not hesitate to strike down a statute that “au-

---

<sup>35</sup> *Newberry v. United States*, 256 U.S. 232, 254 (1921)

<sup>36</sup> See *TRIBE*, *supra* note 6 (treaties “may endow Congress with a source of legislative authority independent of the powers enumerated in Article I”).

<sup>37</sup> See LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 408 n.105 (1st ed. 1972) (“[I]n principle legislation to implement a treaty might cease to be valid if the treaty lost its effect.”).

<sup>38</sup> *NFIB*, 132 S. Ct. at 2579 (quoting Chief Justice John Marshall, *A Friend of the Constitution*, *Alexandria Gazette*, July 5, 1819, *reprinted in John Marshall’s Defense of McCulloch v. Maryland* 190–191 (Gerald Gunther ed., 1969)).

<sup>39</sup> See *Validity of Congressional-Executive Agreements That Substantially Modify the United States’ Obligations Under an Existing Treaty*, 20 Op. O.L.C. 389, 395 n.14 (1996).

<sup>40</sup> *INS v. Chadha*, 462 U.S. 919, 954 (1983).

thorize[d] the President himself to effect the repeal of laws, for his own policy reasons, without observing the procedures set out in Article I, § 7.”<sup>41</sup> The reason was simple: “[t]here is no provision in the Constitution that authorizes the President . . . to repeal statutes.”<sup>42</sup> Yet under *Holland*, legislation that reaches beyond enumerated powers to implement treaties is, in effect, subject to a different rule. Here, in essence, the President has a unilateral power “to effect the repeal of laws, for his own policy reasons.”<sup>43</sup> Whenever he chooses, he may abrogate a treaty and thus render any implementing legislation unconstitutional.

And that is not the worst of it. The President is not the only one who can terminate a treaty. Our treaty partners can likewise renounce treaties.<sup>44</sup> Under *Holland*, therefore, it is not only the President who can, at his own discretion, render certain statutes unconstitutional by renouncing treaties. *Foreign governments can do this too*. Surely the Framers would have been surprised to learn that a federal statute—duly passed by both Houses of Congress and signed by the President—may, under some circumstances, be rendered unconstitutional at the discretion of, for example, the King of England. After all, ending the King’s capricious control over American legislation was the very first reason given on July 4, 1776, for the Revolution.<sup>45</sup>

---

<sup>41</sup> *Id.* at 529 (citations omitted) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

<sup>42</sup> *Id.* at 438.

<sup>43</sup> *Clinton*, 524 U.S. at 445.

<sup>44</sup> See LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 204 (2d ed. 1996) (“[A treaty] is not law of the land if it . . . has been terminated or destroyed by breach (whether by the United States or by the other party or parties).” (emphasis added)).

<sup>45</sup> See *THE DECLARATION OF INDEPENDENCE* paras. 2–4 (U.S. 1776).

All these paradoxes can be resolved only if Congress's legislative power is, in fact, fixed by the Constitution and cannot be expanded by treaty.

E. HOLLAND CREATES DOUBLY PERVERSE INCENTIVES—INCENTIVES FOR MORE INTERNATIONAL ENTANGLEMENTS, WHICH IN TURN INCREASE DOMESTIC LEGISLATIVE POWER

The Framers were profoundly concerned about the tendency of legislative power to expand.<sup>46</sup> The Framers were also deeply wary of international entanglements.<sup>47</sup> If the Framers feared expanding legislative power and feared international entanglements, then *Holland* would have been their worst nightmare. Under *Holland*, treaty-makers—the President and Senate—are given a wish-for-more-wishes power. They can increase their own legislative power (plus that of the House). All they need is a willing head of state, anywhere on the globe, and a new entangling alliance.

This constitutes a powerfully perverse incentive for the President and Senate to enter into treaties that reach beyond enumerated

---

<sup>46</sup> See *The Federalist No. 48*, *supra* note 26, at 306 (“The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex.”); *The Federalist No. 49*, *supra* note 26, at 313–14 (“[T]he tendency of republican governments is to an aggrandizement of the legislative at the expense of the other departments.”); see also *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 131 (1996) (Dellinger, Assistant Attorney General) (“Although the founders were concerned about the concentration of governmental power in any of the three branches, their primary fears were directed toward congressional self-aggrandizement.” (citing *Mistretta v. United States*, 488 U.S. 361, 411 n.35 (1989))).

<sup>47</sup> See, e.g., THOMAS JEFFERSON, *First Inaugural Address* (Mar. 4, 1801), in WRITINGS 1136–39 (Merrill D. Peterson, ed. 1984) (calling for “peace, commerce, and honest friendship with all nations, entangling alliances with none”); GEORGE WASHINGTON FAREWELL ADDRESS, S. Doc. No. 106–21, at 27 (2000) (“It is our policy to steer clear of permanent alliances with any portion of the foreign world.”).

powers. After all, it is they themselves (plus the House of Representatives) who will be the beneficiaries of the increased domestic legislative power. Indeed, the treaty-makers apparently succumbed to just this temptation in *Holland* itself, as even its most ardent defenders concede: "If ever the federal government could be charged with bad faith in making a treaty, this had to be the case."<sup>48</sup>

The Constitution should not be construed to create this doubly perverse incentive—an incentive to enter foreign entanglements merely to attain the desired side effect of increased domestic legislative power. The Constitution should not be interpreted to encourage this sort of bad faith.

## II. HOLLAND IS A DOCTRINAL ANOMALY

*Holland* is thus inconsistent with fundamental principles of constitutional structure. But it is also anomalous, even in relation to its closest doctrinal cousins. To see the doctrinal anomaly, it is useful to restate the general question. If a non-self-executing treaty promises that Congress will do something that it otherwise lacks power to do, what happens? Can the President (with the consent of the Senate), just by making such a promise, thus empower Congress to do that thing, even if Congress lacked the power to do so the day before? In short, can the treaty increase the legislative power of Congress?

Now, it is undisputed that treaties are important. And it is undisputed that the United States should generally keep its promises. Nevertheless—and notwithstanding the uncompromising language

---

<sup>48</sup> David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1256 (2000).

used in *Holland*”<sup>49</sup> — it is also undisputed that the answer to this question is generally “no.”

If, for example, the treaty promised that Petitioner would be tried without presentment or indictment of a grand jury, the treaty would *not* thereby empower Congress to authorize a violation of the Fifth Amendment. Congress lacked that power before the treaty, and the treaty cannot confer it.<sup>50</sup>

If the treaty promised that Petitioner would be tried by military tribunal rather than by jury, the treaty would *not* thereby empower Congress to authorize a violation of the Sixth Amendment. Congress lacked that power before the treaty, and the treaty cannot confer it.<sup>51</sup>

And this principle extends beyond the Bill of Rights. If the treaty promised a violation of Article III, Congress is *not* thereby empowered to authorize a violation of Article III. Congress lacked that power before the treaty, and the treaty cannot confer it.<sup>52</sup>

Indeed this principle extends beyond express constitutional prohibitions and includes constitutional structure as well. If the treaty promised “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,” Congress is *not* thereby empowered to accomplish such things.<sup>53</sup> Congress lacked that power before the treaty, and the treaty cannot confer it.

And if, despite *Printz*<sup>54</sup> and *New York v. United States*<sup>55</sup>, a treaty promised that Congress would commandeer state officials or state

---

<sup>49</sup> *Bond*, 681 F.3d at 165.

<sup>50</sup> *Reid*, 354 U.S. at 16–17.

<sup>51</sup> *See id.*

<sup>52</sup> *See id.* at 17–18.

<sup>53</sup> *De Geofroy v. Riggs*, 133 U.S. 258, 267 (1890).

<sup>54</sup> 521 U.S. 898 (1997).

legislatures for its execution, then—even according to *Holland's* preeminent defender—Congress would *not* thereby be empowered to commandeer them.<sup>56</sup> Congress lacked that power before the treaty, and the treaty cannot confer it.

This leaves only *Holland*—the one anomalous exception to an eminently sensible rule. If a treaty promises that Congress will regulate something that is beyond its enumerated powers—guns near schools,<sup>57</sup> or violence against women,<sup>58</sup> then, under *Holland*, Congress *would* automatically attain that new legislative power, even though, under this Court's precedents, it lacks that power today.

This cannot be right. “[N]o agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution.”<sup>59</sup> And as to this, there is no basis for distinguishing enumerated powers and the Tenth Amendment from the rest of the Constitution. “Federalism,” no less than the Bill of Rights, “secures the freedom of the individual.”<sup>60</sup>

*Reid* is right, and *Holland* is wrong. A treaty cannot empower Congress to violate the Fifth Amendment, or violate the Sixth Amendment, or undermine Article III, or commandeer state officials, or subvert constitutional structure. Likewise, a treaty cannot empower Congress to exceed its enumerated powers and violate the Tenth Amendment.<sup>61</sup>

---

<sup>55</sup> 505 U.S. 144 (1992).

<sup>56</sup> See HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 467 n.75 (2d ed. 1996) (“Presumably, the United States could not command state legislatures, or ‘coopt’ state officials by treaty.”).

<sup>57</sup> See e.g., *United States v. Lopez*, 514 U.S. 549 (1995)

<sup>58</sup> See *United States v. Morrison*, 529 U.S. 598 (2000)

<sup>59</sup> *Reid*, 354 U.S. at 16 (plurality opinion) (emphasis added).

<sup>60</sup> *Bond*, 131 S. Ct. at 2364.

<sup>61</sup> See John C. Eastman, *Will Mrs. Bond Topple Missouri v. Holland?*, 2010-11 CATO SUP. CT. REV. 185, 194-202 (2011), available at <http://ssrn.com/abstract=1941434>.

This Court realized this long before *Holland*, in a case that Justice Holmes failed to cite. As this Court explained in 1836: “The government of the United States . . . is one of limited powers. It can exercise authority over no subjects, except those which have been delegated to it. Congress cannot, by legislation, enlarge the federal jurisdiction, nor can it be enlarged under the treaty-making power.”<sup>62</sup> Indeed, Justice Scalia made exactly the same point at oral argument just last Term: “I don’t think that powers that Congress does not have under the Constitution can be acquired by simply obtaining the agreement of the Senate, the President and Zimbabwe. I do not think a treaty can expand the powers of the Federal Government.”<sup>63</sup>

At that time, less than a year ago, the Solicitor General was in “complete[] agreement.”<sup>64</sup>

### III. THE NECESSARY AND PROPER CLAUSE DOES NOT EXPAND WITH EACH NEW TREATY

As this Court explained when it first encountered this case, the “ultimate issue” here turns on the conjunction of the Necessary and Proper Clause and the Treaty Clause.<sup>65</sup> The question is whether these two Clauses in conjunction somehow require all the anomalous results detailed above. To answer that question, it is essential to examine the text of the two clauses and determine how they fit together. Article I provides:

---

<sup>62</sup> *New Orleans v. United States*, 35 U.S. (10 Pet.) 662, 736 (1836) (emphasis added).

<sup>63</sup> Transcript of Oral Argument at 32–33, *Golan v. Holder*, 132 S. Ct. 873 (2012) (No. 10-545).

<sup>64</sup> *Id.* at 33.

<sup>65</sup> *Bond*, 131 S. Ct. at 2367 (2011).



The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.<sup>66</sup>

The Treaty Clause provides:

[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.<sup>67</sup>

By echoing the word “Power,” the Treaty Clause leaves no doubt: the treaty power is an “other Power[]” referred to in the Necessary and Proper Clause.

That much is implicit in *Holland*, although Justice Holmes did not quote either clause, let alone discuss how they fit together. But the conjunction of the two clauses is essential to analyzing whether a treaty may increase congressional power. Here, then, is the way that these two clauses fit together as a matter of grammar:

The 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>68</sup>

When the two clauses are properly conjoined, it becomes clear that the key term is the infinitive verb “to make.” The power granted to Congress is emphatically not the power to make laws for car-

---

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

<sup>67</sup> U.S. CONST. art. II, § 2, cl. 2

<sup>68</sup> U.S. CONST. art. I, § 8, art. II, § 2.

rying into execution “all treaties.” Rather, what may be carried into execution is the “Power . . . to make Treaties.”

This power would certainly extend to laws appropriating money for the negotiation of treaties. As Rep. James Hillhouse explained in 1796, “the President has the power of sending Ambassadors or Ministers to foreign nations to negotiate Treaties . . . [but] it is . . . clear that if no money is appropriated for that purpose, he cannot exercise the power.”<sup>69</sup>

But on the plain text of the conjoined clauses, the object of this necessary and proper legislation is limited to the “Power . . . to make Treaties” in the first place. This is not the power to *implement* treaties already made.

Nor will it do to say that the phrase “make Treaties” is a term of art meaning “conclude treaties with foreign nations and then give them domestic legal effect.” There is no indication that the phrase “make Treaties” ever had such a meaning. British treaties at the time of the Framing were non-self-executing, requiring an act of Parliament to create enforceable domestic law,<sup>70</sup> and yet Blackstone wrote simply of “the king's prerogative to make treaties,” without any suggestion that Parliament had a role in the “mak[ing].”<sup>71</sup> Blackstone understood the difference between *making* a treaty, which the King could do, and giving it domestic legal effect, which required an act of Parliament. The “Power . . . to make Treaties” is exhausted once a treaty is ratified; implementation is something else altogether.

This Court saw that textual point clearly when construing a statute with similar language, to wit, the “right . . . to make . . . con-

---

<sup>69</sup> 5 Annals of Cong. 673–74 (1796).

<sup>70</sup> See, e.g., *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 274 (1796),

<sup>71</sup> BLACKSTONE, *supra* note 25, at \*249 (emphases added); see also *id.* at \*243 (“[T]he king . . . may *make* what treaties . . . he pleases.” (emphasis added)); *id.* at \*244 (“[T]he king may *make* a treaty.” (emphasis added)).

tracts.”<sup>72</sup> This statutory “right . . . to make . . . contracts” is textually and conceptually parallel to the constitutional “Power . . . to make Treaties” both because they share the key infinitive verb “to make” and because, as Chief Justice Marshall explained, a non-self-executing treaty (like the one at issue in this case) is itself in the nature of a contract.<sup>73</sup> This Court explained:

[T]he right to *make* contracts does not extend, as a matter of either logic or semantics, to conduct . . . *after* the contract relation has been established, including breach of the terms of the contract . . . . Such *postformation* conduct does not involve the right to *make* a contract, but rather implicates the *performance* of established contract obligations . . . .<sup>74</sup>

This is exactly right—and it is flatly inconsistent with *Holland*. The “Power . . . to *make* Treaties” does not extend, as a matter of logic or semantics, to the implementation of treaties already made.

The title of the present statute suffices to finish the point. “The Chemical Weapons Convention Implementation Act of 1998” *implements* a treaty; it is neither necessary nor proper to *make* any treaty.

#### IV. THE MOST INFLUENTIAL ARGUMENT SUPPORTING *HOLLAND* IS BASED ON A MISREADING OF CONSTITUTIONAL HISTORY

Justice Holmes set forth no arguments whatsoever for the proposition that treaties can increase Congress’s legislative power.

<sup>72</sup> 42 U.S.C. § 1981 (1988) (current version at 42 U.S.C. § 1981(a) (2006)).

<sup>73</sup> See *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (“[W]hen the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the court.”).

<sup>74</sup> *Patterson v. McLean Credit Union*, 491 U.S. 164, 177 (1989) (emphases added).

And subsequent scholars and courts have generally contented themselves with a citation to *Holland*. But one eminent scholar has presented a single substantive argument in support of this proposition, based upon the drafting history of the Constitution.

As discussed above, the legislative power, unlike the judicial power, does not expressly “extend to . . . Treaties made, or which shall be made”<sup>75</sup>; indeed, the legislative power does not “extend” at all. Rather, the legislative power is limited by the Constitution to those powers that it enumerates—those that are “herein granted.”<sup>76</sup> And the Necessary and Proper Clause—even when conjoined with the “Power . . . to *make* treaties”—says nothing whatsoever about enforcing treaties already made.<sup>77</sup>

To these textual points, though, Professor Louis Henkin has an apparently devastating reply based on constitutional drafting history: “The ‘*necessary and proper*’ clause originally contained expressly the power ‘to enforce treaties’ but it was stricken as superfluous.”<sup>78</sup> This is the most powerful form of argument from constitutional history, because it is so specific and unambiguous. On this drafting history, it would certainly appear that the Necessary and Proper Clause—in its final form, without those crucial words—still subsumes the power “to enforce treaties” beyond the other enumerated powers. This argument from drafting history would appear to be a complete answer to the textual arguments above; indeed it would appear to obviate the need for textual analysis altogether.

---

<sup>75</sup> U.S. CONST. art. III, § 2, cl. 1

<sup>76</sup> U.S. CONST. art. I, § 1. *See supra* Part I-B.

<sup>77</sup> *See supra* Part III.

<sup>78</sup> HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 481 n.111 (2d ed. 1996) (emphasis added).

And so, unsurprisingly, this argument has proven quite influential.<sup>79</sup> Indeed, when this Court invoked *Holland* nine years ago, it cited Henkin's treatise.<sup>80</sup> Likewise, in this very case, the Government relied on this argument to oppose a motion to dismiss certain counts of the indictment—quoting this exact drafting history as set forth by Professor Henkin. Neither *Lara* nor the Government's brief opposing the motion to dismiss carefully parsed or conjoined the text of the Treaty Clause and the Necessary and Proper Clause,<sup>81</sup> but this is perfectly understandable. (Indeed, the phrase "necessary and proper" and the phrase "to make treaties" never appear in the same sentence in the United States Reports.) After all, any such analysis of the actual constitutional text was obviated by Henkin's ostensibly dispositive drafting history.

But Professor Henkin was wrong. As recent scholarship has demonstrated, he simply misread the constitutional history. The words "to enforce treaties" never appeared in any draft of the Necessary and Proper Clause. They were never struck as superfluous from that Clause, because they never appeared in that Clause at all. The phrase "enforce treaties" was struck from the *Militia* Clause, which was apparently the source of Henkin's confusion.<sup>82</sup> But *that* drafting history provides no support for *Holland*.<sup>83</sup>

In short, the leading treatise on the law of foreign affairs makes exactly one argument in support of *Holland's* unreasoned assump-

---

<sup>79</sup> It appeared in the first edition of Henkin's treatise, see LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 408 n.105 (1st ed. 1972), and again, a generation later, in the second edition, see LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 480 n.108, 481 n.111 (2d ed. 1996).

<sup>80</sup> *United States v. Lara*, 541 U.S. 193, 201 (2004).

<sup>81</sup> See *supra* Part III.

<sup>82</sup> See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 323, 382 (Max Farrand ed., rev. ed. 1937).

<sup>83</sup> See Rosenkranz, *supra* note 4, at 1912–18.

tion that treaties can increase the legislative power of Congress. This treatise has profoundly influenced debate on this question, and its argument from constitutional drafting history has, for decades, short-circuited any careful analysis of the actual constitutional text. But, as it turns out, the argument in the treatise is based on a historical premise that is simply, demonstrably false.

#### V. HOLLAND SHOULD NOT BE SUSTAINED ON STARE DECISIS GROUNDS

At first glance, *Holland* might appear to present the strongest possible case for application of *stare decisis*. It is 93 years old. It was written by Justice Holmes. And it is canonical.

But the argument for *stare decisis* is not nearly as compelling as it may first appear. The opinion may be canonical, but on the point at issue—Congress's power to legislate pursuant to treaty—it is also utterly unreasoned. The *stare decisis* force of an opinion turns, in large part, on the quality of its reasoning and diminishes substantially if it provides no reasoning at all.<sup>84</sup>

Moreover, while *Holland* is 93 years old, its holding concerning legislative power pursuant to treaty has been all but irrelevant for most of that time. Again, *Holland's* key sentence on this point is this one: "If the treaty is valid there can be no dispute about the validity of the [implementing] statute under Article I, Section 8, as a necessary and proper means to execute the powers of the Government."<sup>85</sup> But in 93 years, this Court has *never once* quoted any part of that

---

<sup>84</sup> See *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) ("[W]hen governing decisions are . . . badly reasoned, 'this Court has never felt constrained to follow precedent.'" (quoting *Smith v. Allwright*, 321 U.S. 649, 665 (1944))).

<sup>85</sup> *Missouri v. Holland*, 252 U.S. 416, 432 (1920).

sentence. It can hardly be contended that there has been much reliance upon it.

The reason is clear. From 1937 to 1995, this Court did not strike down a single statute as beyond Congress's enumerated powers. Throughout the decades when the Commerce Clause power was construed to be essentially plenary, the question of expanding Congress's legislative power by treaty was almost entirely hypothetical. During those years, any legislation that Congress enacted to execute a treaty could almost certainly have also been sustained under the Commerce Clause<sup>86</sup> or some other enumerated power.<sup>87</sup> Only after *Lopez*,<sup>88</sup> did *Holland's* secondary holding, on the scope of treaty-related legislative power, recover potential practical significance. Thus, any supposed reliance of the political branches on this holding must be dated from 1995, not 1920.

Even since 1995, this Court has struck down only three statutes as beyond the enumerated powers of Congress.<sup>89</sup> It can hardly be said, therefore, that the conduct of foreign affairs has been undertaken in substantial reliance on the rule that federal legislative power may be increased by treaty.

---

<sup>86</sup> Earlier in this litigation, the government foreswore any reliance on the Commerce Clause. JA31 ("Section 229 was not enacted under the interstate commerce authority."). It seems inappropriate to allow the government to resuscitate the Commerce Clause argument at this late date. But even if the government is to be allowed to reverse course as to this argument (and confess error for the second time in this case), the proper place for it would be on remand. This Court should decide the treaty question addressed by the opinion below.

<sup>87</sup> See Tribe, *supra* note 6, § 4-4, at 646 ("The importance of treaties as independent sources of congressional power has waned substantially in the years since . . . *Holland* . . . [;] the Supreme Court [in the intervening period has] so broadened the scope of Congress' constitutionally enumerated powers as to provide ample basis for most imaginable legislative enactments quite apart from the treaty power.").

<sup>88</sup> 514 U.S. 549 (1995).

<sup>89</sup> See *Morrison*, 529 U.S. at 627 (invalidating part of the Violence Against Women Act); *Flores*, 521 U.S. at 536 (invalidating part of the Religious Freedom Restoration Act); *Lopez*, 514 U.S. at 567-68 (invalidating the Gun-Free School Zones Act).

Scholars only now are discovering *Holland's* potential for evading this Court's stated limits on congressional power.<sup>90</sup> If the political branches should move to act on the proposals of these scholars, *that* would constitute unfortunate reliance on erroneous doctrine. But right now—while these proposals are in the law reviews and not in *Treaties in Force* or *Statutes at Large*—*Holland* may be overruled on this point without any dislocation of foreign relations or domestic law.

This Court has not hesitated to reconsider a canonical opinion when new scholarship in the HARVARD LAW REVIEW demonstrates that the conventional historical account was simply wrong.<sup>91</sup> And this Court has not hesitated to overrule such an opinion when it becomes clear that the opinion is fundamentally inconsistent with constitutional structure.<sup>92</sup> This is just such a case.

In short, *Holland* may be canonical, but it does not present a strong case for *stare decisis*. It was wrongly decided on this point, and it should be overruled.

---

<sup>90</sup> See Rosenkranz, *supra* note 4, at 1871–73 & nn.19–25 (collecting articles).

<sup>91</sup> See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 72–73 n.5 (1938) (citing Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 51–52, 81–88, 108 (1923)).

<sup>92</sup> *Erie*, 304 U.S. at 77 (overruling *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842)).



## CONCLUSION

A treaty cannot confer new legislative power on Congress, and so the treaty at issue here did not empower Congress to enact 18 U.S.C. § 229.<sup>93</sup> The Third Circuit's judgment should be reversed.

---

<sup>93</sup> It is a quirk of the pleadings that Petitioner purports to challenge the statute "as-applied." That characterization may be inapt, because the gravamen of the claim concerns the scope of *congressional* power under the Necessary and Proper Clause, which would seem to be "facial" by nature. In any case, and regardless of the vexed "facial" / "as-applied" dichotomy, the important point is that her challenge is necessarily a challenge to *legislative* action. This Court should hold that *Congress* exceeded its power (and thus violated the Tenth Amendment), by *enacting* 18 U.S.C. § 229. See *Bond*, 131 S. Ct. at 2368 (Ginsburg, J., concurring) ("[A] law beyond the power of Congress ... is no law at all. The validity of Bond's conviction depends upon whether the Constitution permits Congress to enact § 229."); see generally Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209 (2010).