



Is the Constitution Written Like the Da Vinci Code?

That's the ridiculous argument libertarians are making in the chemical weapons case before the Supreme Court.

By [Eric Posner](#)

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It's the Supreme Court case that [sounds like a Lifetime movie](#): When Carol Bond found out that her husband was having an affair with her best friend, Myrlinda Haynes—and that Haynes was pregnant—Bond, a microbiologist who lived in the Philadelphia suburbs, put toxic chemicals on Haynes' mailbox and her car. She got caught—and was indicted under a federal statute that makes it illegal to use toxic chemicals to harm other people. Congress had passed that statute to implement the U.S. government's obligations under the Chemical Weapons Convention, the same treaty that Syria was recently forced to sign.

Next Tuesday, Bond's lawyers will try to persuade the Supreme Court that Congress can't use the chemical weapons treaty as an excuse for punishing run-of-the-mill criminal behavior. This superficially appealing argument is beloved by libertarians, who have dashed to Bond's aid, but it depends on a bizarre and tendentious reading of the Constitution that honors neither the founders' intentions nor the practicalities of governance.

The Constitution gives Congress limited ("enumerated") powers, which are thought mostly to exclude the ordinary stuff of criminal law like the dispute Bond was involved in. Normally, we think that if we need a law that prohibits people from attacking each other with toxic chemicals, the states, not the national government, should pass it.

And it's true that the law that nailed Bond derives its authority circuitously. Congress enjoys the power under the Constitution's catchall Necessary and Proper Clause to enact laws that are needed to advance *other* powers in the Constitution. One of those other powers is the president's power to enter treaties with the consent of two-thirds of the Senate. Thus, the government argues, the federal law that criminalizes the harmful use of chemical weapons, privately as well as by governments and terrorists, was necessary and proper to implement the Chemical Weapons Convention.

Bond's argument is that the president and the Senate cannot, by entering a treaty, give Congress a power that it otherwise does not have. Such a reading of the Constitution crowds out the states' police powers and gives too much sway to Congress.

This case is a strange vehicle for examining this constitutional question. True, the feds took over the case from state authorities, but that was because Constable Dogberry of the local police thought that the toxic chemical Bond smeared on Haynes' car was cocaine and [advised](#) her to get it washed, not because Pennsylvania law allows people to assault each other with toxic chemicals. The federal law enabled the federal government to step in—the U.S. Postal Service did surveillance and caught Bond—and to punish Bond for acts that were illegal under Pennsylvania law as well.

But libertarian critics of national government power, like the Cato Institute, which submitted an amicus [brief](#), worry that if Bond loses this case, the United States could enter a treaty with Suriname or Lesotho to abolish the death penalty or home schooling. Then Congress could pass an implementing statute that shreds state laws on the death penalty and home schooling, which (according to the libertarians) Congress is otherwise not allowed to do.

You might wonder why Suriname or Lesotho, or the United States, would enter such a treaty. And it is most doubtful that they would. [Bond v. United States](#) has become an ideological dispute, based, as such disputes so often are, on the merely theoretical possibility that the government will abuse its powers.

Cato's brief is rooted in a literal-minded reading of the text of the Constitution. The Treaty Clause says that the president has the power to make treaties with the consent of the Senate. The necessary and proper clause says that Congress has the power to pass laws that are necessary and proper to the exercise of other powers in the Constitution. Cato concludes that therefore Congress has the power to pass laws that are necessary and proper to the *making* of treaties. But it doesn't have the power to pass laws that are necessary and proper to the *implementing* of the treaties, because there is no separately enumerated constitutional power for *implementing*. And so, according to Cato, Congress can pass laws to implement treaties only if it can rely on a source of power rooted elsewhere in the Constitution. It has no such power to criminalize the domestic use of chemicals as weapons.

One can respond to this argument by observing that Congress can rely on its old broadly interpreted friend, the power to regulate interstate commerce. But libertarians object to the broad interpretation of Congress' powers here as well. And in the *Bond* case, the government didn't make this argument in the lower courts. One can also respond by arguing that "make" has a broader meaning than Cato claims, as another amicus [brief](#) gamely does.

But the real problem with Cato's argument is that it reads the Constitution the way an evangelical might read the Bible, or a kindergartener might read a board book—assuming on the part of the author a level of precision that an ordinary person or group of people could not possibly achieve. It's like a fairy tale or myth in which you get your wish granted, but maliciously subject to the narrowest interpretation. You ask for eternal life and get immortality,

but not lasting youth, as in the [myth of Eos and Tithonus](#). Cato's is an evil-fairy theory of constitutionalism that subverts the document by insisting on its literal meaning.

The founders drafted the Constitution quickly, using vague terms whose meaning they did not always agree on, and it is impossible to say how the public understood most of the Constitution's specific provisions at the time (if indeed they thought much about them at all). It is most doubtful that anyone thought carefully about how the Necessary and Proper Clause, a generic provision, might interact with the specific wording of the treaty power. After ratifying the Constitution, Congress set to work passing laws to implement treaties, including the Treaty of Paris, which ended the Revolutionary War. Those laws, resting on the treaty, overrode state debt collection practices, much as Congress' law implementing the Chemical Weapons Convention inserts itself into state criminal regulation. No one understood the Constitution the way that Cato insists it should be understood, and subsequent practice entrenched the commonsense notion that Congress can pass laws to implement treaties, even if this means invading traditional powers reserved to the state. That was the conclusion of the Supreme Court in [Missouri v. Holland](#), the 1920 case that is a problem for Bond, because the court held that a federal law implementing a treaty that protected migratory birds validly overrode state laws that regulated hunting.

The effect of Cato's approach is not to ensure consistency with the wisdom of the framers, but to establish a set of arbitrary barriers against sensible interpretation of the Constitution. This tends toward a government subject to limits that are arbitrary—based on the obstacles to careful drafting faced by lots of people working together fast, as well as on the vagaries of the historical record—rather than limits that emerge from a coherent view of the role of government.

It says a lot about the degraded state of our legal culture that, nevertheless, arguments like Cato's are taken seriously, even [occasionally](#) by the courts. Because we all know that ordinary people cannot write laws this precisely, Cato's insistence to the contrary produces a number of negative effects. It leads people to deify the framers, who are assumed to be exempt from the cognitive deficiencies of ordinary mortals. It leads people to abuse history so they can claim that their current policy preferences originated in 18th-century understandings. And it forces arguments about constitutional policy into the narrow channels of the text. The reasonable (but contestable) libertarian argument that Congress possesses too much power, generally speaking, turns into the silly constitutional argument that the founders agreed to limit the power of Congress by drafting the Necessary and Proper Clause and the Treaty Clause in the style of the "Da Vinci code"—so that two centuries would pass before someone could decipher them.

The Constitution did, too, address the problem the libertarians say they're worried about. The treaty power can be exercised only with the consent of two-thirds of the Senate, a formidable standard, and the Senate is the chamber that was established to protect the interests of states. Thus, the states, acting through their representatives in the Senate, can ensure that Congress does not run roughshod over federalism, by blocking ratification of treaties or ensuring that treaties are subject to conditions that limit their domestic effect. Such limits have been put in place a number of times. And in 224 years, no treaty that drains states of their police powers has been ratified.

Why doesn't this suffice to preserve federalism against a flood of anti-death penalty and anti-home-schooling treaties? That part no one has explained.

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