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Stepping back from the precipice in *Bond*

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The Supreme Court has finally issued its decision in *United States v. Bond*. Although it appeared the Court might be on the brink of a momentous decision that would have substantially diminished the historical reach of the treaty power, or of Congress's power to ensure the nation's compliance with its treaty obligations, none of the radical theories put before the Court attracted more than three votes. *Bond* clearly is significant. But its significance lies not in what the Justices did, but instead in what a majority of them declined to do. In short, the decision sustained the constitutional status quo.

In an opinion written by the Chief Justice, a six-Justice majority did what one of us had proposed (and the other had hoped the Court might do)—namely, to use a plain-statement presumption in order to construe the statute in question so that it does not apply to the discrete conduct involving the two private individuals in this particular case. The Chemical Weapons Convention, and the federal statute implementing that treaty, were drafted broadly, presumably so that they would not fail to cover the sorts of cases of dangerous use of chemicals that the treaty-makers plainly had in mind. The result, however, is that the words of the statute, read literally, would also make a federal crime out of virtually any "nonpeaceful" use of toxic chemicals, including all run-of-the-mill poisonings traditionally handled under state law. This goes well beyond anything that motivated the treaty-makers. The Chief Justice is surely correct that, notwithstanding the breadth of the treaty and statutory language, "there is no reason to think the sovereign nations that ratified the Convention were interested in anything like Bond's common law assault." The paradigmatic case that the treaty is designed to address, wrote the Chief, is the sort of chemical attack depicted in John Singer Sargent's haunting 1919 painting "Gassed." But as the Chief jibed, "[t]here are no life-sized paintings of [Carol Anne] Bond's rival washing her thumb" after she had touched the toxic chemicals that Bond had spread on her car, mailbox and front door.*

The Chief Justice therefore construes the federal statute not to cover Bond's conduct. [See Curt Bradley in defense of the Court's plain-statement analysis.] The precise scope of the majority's statutory construction remains a bit obscure. (Presumably the law is not limited to conduct that is apt to inspire great paintings!) But this much is clear: The Court explains that the statute *does* apply in cases where toxic chemicals are used for "assassination, terrorism, and acts with the potential to cause mass suffering"—presumably even if such offenses are wholly intrastate and/or where they do not involve any foreign nationals. The Chief writes that such cases do not

implicate federalism concerns because "[t]hose crimes have not traditionally been left predominantly to the States." But of course it *has* predominantly been state law that traditionally handled such "noneconomic, violent criminal conduct," and the Chief Justice does not explain why creation of a parallel federal offense would not implicate the federalism concerns reflected in the Court's Commerce Clause decisions since *Lopez* (1995). Accordingly, the Court's confirmation of Congress's power to implement treaties by criminalizing such conduct is quite important, as we explain further below.

The most important aspect of *Bond*, however, was not its statutory interpretation but the fact that the ground-breaking constitutional limitations offered up to the Court each failed to attract the support of a majority of Justices.

a. Limiting Congress's Power to Implement Treaties

The Cato Institute filed an amicus brief urging the Court to hold that even in cases where the President and the Senate conclude a valid treaty, Congress lacks any specific power to pass legislation necessary and proper to ensure that the United States abides by its treaty commitments. This deeply counterintuitive argument—that the Necessary and Proper Clause empowers Congress to enact legislation to help the President and the Senate *make* treaties, but not to help the federal government *implement* the nation's agreements—was first suggested by Cato's lawyer, Professor Nicholas Rosenkranz, in 2005 (that is to say, more than two centuries after adoption of the relevant constitutional provisions). As we explain in Part II of our amicus brief in *Bond*, this argument is simply implausible on historical, textual, and structural grounds—not to mention inconsistent with a series of Supreme Court decisions, including the unanimous opinion in *Neely v. Henkel* (1901) and Justice Holmes's celebrated 1920 decision in *Missouri v. Holland*.

In his opinion concurring in the judgment in *Bond*, Justice Scalia uncritically embraced the Cato argument, joined by Justice Thomas. The Scalia opinion is, to say the least, unpersuasive. It does not contend with most of the counterarguments, including that Cato's reading of the N&P Clause would have absurd and revolutionary implications for virtually all of Congress's powers outside the treaty context, and would call into question a huge swath of the U.S. Code. (See our amicus brief at pages 26-29.) Justices Scalia and Thomas would, moreover, casually overrule the Court's Necessary & Proper holdings in *Holland* and *Neely* on the ground that they were "unreasoned." As we explain in our amicus brief, however, the reason the Court in those cases was able to so confidently and quickly resolve the question of Congress's power to enact Necessary and Proper legislation to implement a valid treaty was that the question was settled and uncontroversial (indeed, virtually uncontroverted), reflecting a shared understanding of the Court, both political branches, and virtually all leading authorities, extending back to the Founding.

There are very good reasons why no one—not even the strongest opponents of a broad federal treaty power—took this argument seriously for the first 215+ years of our constitutional history. The uniform silence over more than two centuries should have given Justices Scalia and Thomas some pause, rather than encouraging them to strike forth so boldly. What is of critical importance, however, is that the Cato argument found favor with only those two Justices. Even

Justice Alito, who joined Justices Scalia and Thomas on their other constitutional argument (see below), expressly declined to join this part of Justice Scalia's opinion. That ought to sound the death knell for this misbegotten argument.

b. <u>Limiting the Power of the President and the Senate to Enter Into Treaties</u>

The Necessary and Proper Clause was not the only constitutional provision in the cross-hairs in *Bond*. Many feared that a majority of Justices might use the case as the occasion to conduct a slash and burn expedition overturning long-settled historical precedents—most importantly, the primary holding in *Missouri v. Holland* itself—that affirm the great breadth of the power of the President and the Senate to enter into treaties in the first instance.

The Court in *Holland*, per Justice Holmes, famously ruled that the Article II treaty power is not limited to those subjects that otherwise fall within Congress' legislative powers in Article I. Thus, a treaty—like the migratory birds treaty in *Holland* or a contemporary human rights convention—is not constitutionally invalid because it contains provisions that Congress, in the absence of the treaty, would be without power to adopt pursuant to its Article I powers.

Even though it reflected settled constitutional doctrine going back to the Founding, this holding in *Holland* has proved to be enormously controversial. The passage of a century since—and an extended, but failed, attempt to amend the Constitution to overrule the decision, led by Senator Bricker in the 1950's—has not dimmed the controversy. Indeed, to this day, overturning *Holland* remains a high aspiration of many conservative legal scholars, as reflected in several of the amicus briefs filed in *Bond*.

It is therefore especially significant that, notwithstanding the highly favorable factual context and long-awaited opportunity the case presented, not a single Justice argued in favor of overruling this aspect of *Holland*—that is to say, no Justice concluded that the treaty power extends only to subjects on which Congress could otherwise legislate under Article I.

For all intents and purposes, then, it appears that the assault on *Holland*—whether it be a frontal attack on its famous holding concerning the treaty power, or an indirect attack via a radical misreading of the Necessary and Proper Clause—has reached a dead end in *Bond*.

Nevertheless, even if *Holland* is safe, Justice Thomas's separate opinion concurring in the judgment invoked an independent line of attack on the scope of the treaty power, citing the longstanding view that treaties may deal only with "proper" subjects for negotiation. Articulating limits on the "proper" subject matter of treaties has been one of the enduring puzzles of constitutional law. Indeed, it has proved impossible for the judiciary to specify which subjects are proper and which are not. Recognizing that these limits are necessarily political in character, and deeply context-dependent, the Court for more than two centuries has eschewed any role in their enforcement, leaving the ultimate judgment to the President and to the Senate (which can reject any treaty based solely on the objection of 34 Senators, representing but a tiny slice of the nation's population).

In his opinion, however, Justice Thomas suggests that the judiciary should begin to draw such lines and should, in particular, recognize that "treaties by their nature relate to intercourse with other nations (including their people and property), rather than to purely domestic affairs." Justice Thomas acknowledges that "the distinction between matters of international intercourse and matters of purely domestic regulation may not be obvious in all cases." Even so, he concludes that "hypothetical difficulties in line-drawing are no reason to ignore a constitutional limit on federal power."

Although his opinion does not say so explicitly, Justice Thomas's proposed distinction appears to be premised on the notion that the nations of the world have no proper business at all—at least not as far as the U.S. Constitution is concerned—in trying to regulate the way in which nations treat, or protect, their nationals within their own jurisdiction. Obviously, such a holding would be quite radical, and upend a huge swath of modern treaty practice. For example, because human rights treaties regulate, *inter alia*, the relationship between a state and its own citizens, under Justice Thomas's apparent view such provisions do not deal with matters of "intercourse with other nations (including their people and property)," and therefore would not be "proper" subjects for treaties.

It is difficult to understand how such a view could be squared with history, with newspaper headlines on virtually any given day, or with common understandings of the nation's legitimate foreign policy interests. The well-being of persons in other nations has long been a central foreign policy concern of many nations, including the United States, for manifest economic, diplomatic, security, and humanitarian reasons. *See, e.g.*, *Agency for Int'l Development v. Alliance for Open Society Int'l*, 133 S. Ct. 2321, 2324 (2013) (describing the "comprehensive" U.S. strategy to combat the spread of HIV/AIDS around the world); David Golove, *Human Rights Treaties and the U.S. Constitution*, 52 DePaul L. Rev. 579, 605-10, 616-18 (2002); Myres S. McDougal & Gertrude C.K. Leighton, *The Rights of Man in the World Community: Constitutional Illusions Versus Rational Action*, 59 Yale L.J. 60 (1949). Can it really be the case, for example, that the Framers intended to preclude the United States from working to obtain commitments that would help ensure that the Syrian government does not slaughter or poison its own nationals?

On Justice Thomas's view, it appears that the United States, uniquely among nations, would be constitutionally inhibited from concluding not only human rights treaties, but a host of other international agreements dealing with subjects as varied as the environment, health, terrorism, and kidnapping, to name only a few. Moreover, regardless of how the Court would eventually draw the line between legitimate international concerns and "purely domestic affairs," the very prospect of judicial management of such distinctions—after treaties have already been concluded and become binding on the nation, courts would undertake to reconsider the constitutional propriety of each of their many and complex provisions—would cast a cloud of uncertainty over the ability of the United States to carry out its existing treaty commitments and would dramatically destabilize the diplomatic practices of the United States going forward.

It is therefore especially significant that only three Justices embraced Justice Thomas's view of the treaty power. To be sure, because they disposed of the case on other grounds, it is impossible to say what the Justices in the majority, particularly Chief Justice Roberts and Justice Kennedy,

would do if the Court were to consider another case raising such a challenge to the scope of Article II. It is fair to infer, however, that they would be unwilling to go down that path. *Bond* presented what will probably prove to be the most favorable context in which to establish such a new doctrine, for the very reason that articulating a strong international interest in this prosecution would have been a fool's errand. If neither the Chief Justice nor Justice Kennedy could be persuaded to embrace this line of argument in *Bond*, it is doubtful that they would be willing to do so in any other case likely to come before the Court. Moreover, as noted above, the Court majority affirmatively blessed the application of this very treaty to cases of terrorism and use of chemicals that threatens mass suffering, presumably even in cases that do not involve any "intercourse with other nations (including their people and property)." If it is legitimate to enter into a treaty regulating such internal conduct, it is difficult to imagine that a majority of Justices would be able and willing to initiate a jurisprudence in which courts must navigate which domestic events are, and which are not, "*purely* domestic affairs" of no legitimate importance to the international community.

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To say that the Court in *Bond* left the Constitution where it found it seriously understates the importance of the decision. Longstanding constitutional doctrine about the way the United States relates to the rest of the world—doctrine that traces its roots back to the Founding—has been under an increasingly dark cloud for several years. To be sure, it is unusual to invoke judicial silence as a ground for celebration, but there are occasions when silence speaks louder than words. *Bond* grants the treaty power—and Congress's authority to make good on our treaty obligations—a most welcome reprieve.

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* As one of us has written (see part 7 of this post), the Court's somewhat cavalier dismissal of the seriousness of the offense here is unwarranted: Bond attempted to poison or burn her former friend with potentially lethal doses of highly toxic chemicals more than two dozen times over several months, and sprinkled the chemicals in a government-owned mailbox shortly after the national Anthrax scare. That's no mere soap opera, and it's understandable why the Postal Service would have investigated it. Even so, the Court is right that it is not the sort of conduct that motivated the treaty-makers or Congress to act.