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Justice Scalia's masterful concurrence in Bond v. United States

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Several of my co-bloggers (Eugene, Jonathan, and Ilya) have already noted today's opinion in Bond v. United States. As they have explained, Ms. Bond was prosecuted for violation of the Chemical Weapons Convention Implementation Act. She argued (1) that the statute did not reach her conduct; and, in the alternative, (2) if the statute does reach her conduct, then Congress had no constitutional power to enact it. Six justices agreed with her on the (relatively uninteresting) first proposition, and the other three justices agreed with her on the (extremely important) second proposition.

My co-bloggers have well explained the majority opinion and the Chief's seeming predilection for avoiding constitutional questions with (dubious?) statutory interpretations. I will just add a few words about Justice Scalia's concurrence, which Justice Thomas joined. In my view, it is extremely important, and exactly right.

For Justice Scalia, it is crystal clear that the statute reaches Ms. Bond's conduct. "Since the Act is clear, the *real* question this case presents is whether the Act is constitutional as applied to petitioner."

As to that question, the government argued that because the United States had entered into a treaty concerning chemical weapons, Congress automatically has the power to enact a statute on this topic, even if it would have lacked this power otherwise. It argued, in other words, that *a treaty can increase the legislative power of Congress*. And indeed, in 1920, the Supreme Court, per Justice Holmes, seemed to say exactly that. Holmes wrote: "If the treaty is valid there can be no dispute about the validity of the [implementing] statute under Article I, **§** 8, as a necessary and proper means to execute the powers of the government." Missouri v. Holland, 252 U.S. 416, 432 (1920).

In 2005, in the Harvard Law Review, I called this sentence an "ipse dixit"; in that article, and again in Cato's amicus brief in this case, I argued that it should be overruled. Today, Justice Scalia writes: "Petitioner and her amici press us to consider whether there is anything to this *ipse dixit*. The Constitution's text and structure show that there is not." He is exactly right, and his opinion is a masterpiece.

I. Text

The two relevant clauses of the Constitution are the Necessary and Proper Clause and the Treaty Clause, though you would never know it from Justice Holmes's opinion. "Justice Holmes did not quote either the Treaty Clause or the Necessary and Proper Clause, let alone discuss how they fit together grammatically. Indeed, it is striking to find that the phrase 'necessary and proper' and the phrase 'to make treaties' *never* appear in the same sentence in the *United States Reports*." Executing The Treaty Power, 118 Harv. L. Rev. at 1882. But now, at last, they shall. Justice Scalia quotes both clauses and carefully conjoins them: "Read together, the two Clauses empower Congress to pass laws 'necessary and proper for carrying into Execution … [the] Power … to make Treaties.'" Slip Op. at 9.

Once the Clauses are properly conjoined, it becomes clear that they do not give Congress the power that the government claims in this case. Per Justice Scalia: "It is obvious what the Clauses, read together, do *not* say. They do not authorize Congress to enact laws for carrying into execution 'Treaties.'" See also Executing the Treaty Power, 118 Harv. L. Rev. at 1882 ("The Power granted to Congress is emphatically not the power to make laws for carrying into execution 'the treaty power,' let alone the power to make laws for carrying into execution 'all treaties.'"). Once the Clauses are properly conjoined, it becomes clear that the key phrase is the infinitive verb "to make." "The Congress shall have Power … To make all Laws which shall be necessary and proper for carrying into Execution … [the] Power … *to make* Treaties."

As Justice Scalia explains: "the power of the President and the Senate 'to make' a Treaty cannot possibly mean to 'enter into a compact with a foreign nation and then give that compact domestic legal effect." See also Executing the Treaty Power, 118 Harv. L. Rev. at 1884 ("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.'"). Per Justice Scalia: "[u]pon the President's agreement and the Senate's ratification, a treaty … has been *made* and is not susceptible of any more making." See also Executing The Treaty Power, 118 Harv. L. Rev. at 1884 ("The 'Power … to make Treaties' is exhausted once a treaty is ratified; implementation is something else altogether.").

In short, as Scalia explains:

[A] power to help the President *make* treaties is not a power to *implement* treaties already made. See generally Rosenkranz, Executing the Treaty Power, 118 Harv. L. Rev. 1867 (2005). Once a treaty has been made, Congress's power to do what is "necessary and proper" to assist the making of treaties drops out of the picture. To legislate compliance with the United States' treaty obligations, Congress must rely upon its independent (though quite robust) Article I, **§** 8, powers.

In this case, Congress could not rely on any other Article I, **§** 8, power (oddly, the government waived reliance on the Commerce Clause), and so the statute should have fallen.

II. Structure

Justice Scalia begins with the constitutional axiom that Congress has limited and enumerated powers, and then explains how the government's argument would constitute a "loophole" to that

fundamental principle. If the government is right, "then the possibilities of what the Federal Government may accomplish, with the right treaty in hand, are endless and hardly farfetched …. It could begin, as some scholars have suggested, with abrogation of this Court's constitutional rulings." For example, *Lopez* and *Morrison*. But this is, as Scalia says, "the least of the problem." The government's position "places Congress only one treaty away from acquiring a general police power." But countless canonical opinions insist that Congress can have no such power.

To see the point another way, consider that a treaty cannot empower Congress to violate the Bill of Rights, see *Reid v. Covert*. But under *Missouri v. Holland*, the Tenth Amendment is treated differently: a treaty *can* empower Congress to exceed its enumerated powers and violate the Tenth Amendment. This distinction is untenable. "The distinction between provisions protecting individual liberty, on the one hand, and 'structural' provisions, on the other, cannot be the explanation, since structure in general—and especially the structure of limited federal powers—is *designed* to protect individual liberty." See also Cato Brief at 21. *Reid* and *Holland* cannot be reconciled; *Reid* is right and *Holland* is wrong.

This leaves one last quirk. If a self-executing treaty can reach matters other than those in Article I, section 8, isn't it odd to say that a non-self-executing treaty followed by an implementing statute cannot? At first glance, this may seem anomalous, but it actually makes perfect structural sense. Justice Scalia explains:

Suppose, for example, that the self-aggrandizing Federal Government wishes to take over the law of intestacy. If the President and the Senate find some foreign state as a ready accomplice, they have two options. First, they can enter into a treaty with "stipulations" specific enough that they "require no legislation to make them operative," *Whitney* v. *Robertson*, 124 U. S. 190, 194 (1888), which would mean in this example something like a comprehensive probate code. But for that to succeed, the President and a supermajority of the Senate would need to reach agreement on all the details—which, when once embodied in the treaty, could not be altered or superseded by ordinary legislation. The second option—far the better one—is for Congress to gain lasting and flexible control over the law of intestacy by means of a non-self-executing treaty. "[Implementing] legislation is as much subject to modification and repeal by Congress as legislation upon any other subject." *Ibid.* And to make such a treaty, the President and Senate would need to agree only that they desire power over the law of intestacy. Slip Op. at 15-16.

One could say the same thing about family law.

[A]ssume that the federal government desires power that it would otherwise lack over some subject matter–say, for example, family law. One option would be to make a self-executing treaty with the prolixity of a family law code, which would, of its own force, constitute the family law of the United States. This option is unlikely to be very tempting, however, because it would require that the President and two-thirds of the Senate agree on a particular family law code, to be frozen into the treaty (and arguably beyond the power of Congress to amend or supersede). But if Justice Holmes were correct, there would be a second option: the United States could enter into a *non-self-executing* treaty that simply promised (to attempt) to regulate family law in the United States "in a manner that best protects the institution of the family." This treaty

would be far more tempting to the treatymakers on the American side, because it would require the President and two-thirds of the Senate to agree on only one thing: *that they want power over family law*. Executing the Treaty Power, 118 Harv. L. Rev. at 1930.

The ultimate point here is that "the Constitution should not be construed to create this doubly perverse incentive—an incentive to enter 'entangling alliances' merely to attain the desired side effect of increased domestic legislative power." *Id.* at 1932.

Conclusion

Justice Scalia's opinion is a masterpiece. Unfortunately, he was only writing for himself and Justice Thomas. However, it is important to note that the other seven expressed no view about whether a treaty can increase the legislative power of Congress. (There is actually a hint that Justice Alito may agree with Justices Scalia and Thomas; although he did not join Justice Scalia's concurrence, he did sign onto Part III of of Justice Thomas's concurrence, which says that *Missouri v. Holland* "upheld a statute implementing [a] treaty based on an improperly broad view of the Necessary and Proper Clause.") So Justice Scalia's powerful opinion went unanswered, and today's score on this point is 2-0. *Missouri v. Holland* remains the law of the land, but in a proper case, it may yet be overruled.

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