

# Will Mrs. Bond Topple *Missouri v. Holland*?

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Game on!

No, not the one waged by Carol Anne Bond against her former best friend and husband's paramour, upon learning that the paramour was carrying the husband's love child. The old adage "hell hath no fury like a woman scorned" probably needs to be updated to something like, "Don't mess with the husband of someone who works in a chemical lab!" Mrs. Bond "borrowed" some toxic chemicals from her workplace and sprinkled them on the paramour's car and mailbox in her effort to show her displeasure with her former friend's conduct. That game is not going to end well for Carol Anne Bond no matter what happens in her current case. Either she gets prosecuted by the feds, or by her local district attorney. Whatever the jurisdiction, assaulting someone with chemicals is going to land you in a heap of trouble. Thus far, the Supreme Court has entered only a narrow ruling, holding simply that Mrs. Bond has legal standing to challenge the constitutionality of the *federal* statute under which she was convicted, a statute that was meant to implement the international treaty against the use of chemical weapons.<sup>1</sup> That holding was so clearly correct that even the government declined

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<sup>1</sup> See generally *Bond v. United States*, 131 S. Ct. 2355 (2011).

to defend before the Supreme Court the jurisdictional victory that the court of appeals had given it; the Court had to appoint former Supreme Court law clerk and University of Kansas Law School Dean Stephen McAllister as an *amicus curiae* to defend the indefensible position.<sup>2</sup>

No, the “Game on!” I want to discuss is the opportunity Mrs. Bond’s case presents for a further restoration of the principles of federalism that underlie our constitutional system and the dangers to the notion of limited government if she loses her case on the merits—whether back in the lower courts on remand or perhaps in the Supreme Court after a return trip. Although this particular case occurs in the rather arcane arena of international treaties and the statutes Congress adopts to execute them, the fact that it presents issues of federalism, enumerated powers, and limited national government should make it of great interest to anyone awaiting Supreme Court review of other more high-profile legal disputes. Most immediately, it could even have an effect on the constitutional challenges to the Patient Protection and Affordable Health Care Act (Obamacare) currently wending their way to the Court.

### From Birds to Obamacare

Here’s the issue in a nutshell. Ninety years ago, in a case involving a U.S.-Canada migratory bird treaty, the Supreme Court—in a confusing and curt opinion by Justice Oliver Wendell Holmes—held that Congress could adopt domestic legislation that it would not otherwise have the constitutional authority to adopt, if it furthered a treaty commitment.<sup>3</sup> Then, about 50 years ago, the Court held that even statutes adopted in furtherance of the treaty power are constrained by other constitutional limitations on federal power.<sup>4</sup> The latter case, *Reid v. Covert*, involved a claim that a treaty provision violated rights protected by the Bill of Rights, while the limits on federal power at issue in the earlier *Missouri v. Holland* case derived from the enumerated-powers doctrine. But in principle, under our constitutional structure, Congress can no more exceed the limits of

<sup>2</sup> He did an admirable job, considering that he was dealt a hand with no cards—and received a nice “attaboy” in the Court’s published opinion!

<sup>3</sup> *Missouri v. Holland*, 252 U.S. 416 (1920).

<sup>4</sup> *Reid v. Covert*, 354 U.S. 1 (1957).

the powers delegated to it in Article I than it can act in ways that violate the Bill of Rights. That most basic proposition was reaffirmed by the Supreme Court in its recent Commerce Clause cases, including the landmark decision in *United States v. Lopez*<sup>5</sup> and the follow-up decision in *United States v. Morrison*.<sup>6</sup> Even in cases such as *Gonzales v. Raich*<sup>7</sup> and *United States v. Comstock*,<sup>8</sup> the Court upheld the federal laws at issue (whether rightly or, as I think, wrongly) only after reaffirming its commitment to the enumerated-powers doctrine.

Before delving into the *Holland* versus *Reid* conflict, though, let me describe in greater detail the legal issues raised by Mrs. Bond's case and the preliminary jurisdictional question that the Supreme Court addressed in this round of litigation.

### An Unusual Case Reaches the Supreme Court

Mrs. Bond, who lives outside Philadelphia, was indicted in federal district court for, among other things, two counts of violating Section 229 of Title 18 of the U.S. Code, which forbids the knowing possession or use of any chemical that “can cause death, temporary incapacitation or permanent harm to humans or animals” where not intended for a “peaceful purpose.”<sup>9</sup> Had this statute been enacted pursuant to Congress's power to regulate commerce among the states, it would likely be unconstitutional. The statute contains no requirement of a nexus with interstate commerce (such as use of chemicals that had moved in interstate commerce, or harm to humans or animals traveling in interstate commerce); it applies to mere possession as well as use; and it is not limited to conduct that is economic in nature. In short, under the most recent precedent (*Lopez*, *Morrison*, and even *Raich*), Congress very likely could not enact this statute under its Commerce Clause authority.

No matter, say some in Congress and elsewhere, because the statute, part of the Chemical Weapons Convention Implementation Act of 1998,<sup>10</sup> implements a treaty, the Convention on the Prohibition

<sup>5</sup> 514 U.S. 549 (1995).

<sup>6</sup> 529 U.S. 598 (2000).

<sup>7</sup> 545 U.S. 1 (2005).

<sup>8</sup> 130 S. Ct. 1949 (2010).

<sup>9</sup> 18 U.S.C. §§229(a), 229F(1), 229F(7–8).

<sup>10</sup> 112 Stat. 2681–856, 22 U.S.C. § 229 et seq. (2011).

of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, which was ratified by the United States in 1997. Unlike ordinary laws, which form part of the supreme law of the land only if “made in Pursuance” of the Constitution, treaties are valid whenever made “under the Authority of the United States.”<sup>11</sup> Treaties thus provide their own authority for Congress to enact implementing statutes without regard to other, enumerated-powers limitations on its power—or so the argument goes. Indeed, some interpretations of *Missouri v. Holland* hold this view to have been approved by the Supreme Court.

Mrs. Bond moved to dismiss the indictment, contending that Section 229 was unconstitutional because it intruded upon powers that our Constitution reserves to the states, as acknowledged in the Tenth Amendment. The district court denied her motion and so Mrs. Bond entered a guilty plea, reserving her right to appeal the constitutionality of Section 229.

On that appeal, the U.S. Court of Appeals for the Third Circuit requested supplemental briefing on the issue of whether Mrs. Bond even had standing to raise the “intrudes on state sovereignty” constitutional challenge and, based in part on briefing by the Department of Justice (which the department would later disavow), held that she did not. Mrs. Bond is not a state, after all, so absent the state’s own objection to federal overreach, the Third Circuit Court of Appeals held that she could not herself defend the state’s prerogatives. This position found some support in a sentence from a New Deal-era decision of the Supreme Court, *Tennessee Electric Power Co. v. TVA*, noting that a private party, “absent the states or their officers, have no standing in this suit to raise any question under the [Tenth] amendment.”<sup>12</sup>

The Supreme Court agreed to review Mrs. Bond’s case to consider this preliminary issue of whether Mrs. Bond had legal standing to pursue her constitutional challenge. Although technically that was the only question decided—Mrs. Bond does indeed have standing to challenge the constitutionality of the statute under which she was convicted!—the language that Justice Anthony Kennedy chose to

<sup>11</sup> U.S. Const. Art. VI cl. 2.

<sup>12</sup> 306 U.S. 118, 144 (1939) (after apparently conflating concepts of legal standing and legal injury).

employ on behalf of the Court, echoed by Justice Ruth Bader Ginsburg in her concurring opinion, is what makes this case of much broader interest.

### **A Concise, Powerful, and Unanimous Opinion**

Justice Kennedy's opinion for the unanimous Court reiterates, for example, the long-standing view that the national government is one of limited and enumerated powers, not one of unlimited authority.<sup>13</sup> "The principles of limited national powers and state sovereignty are intertwined," Justice Kennedy wrote. "Impermissible interference with state sovereignty is not within the enumerated powers of the National Government . . . and action that exceeds the National Government's enumerated powers undermines the sovereign interests of the States."<sup>14</sup>

Mrs. Bond had standing to challenge Section 229 as an unconstitutional interference with state sovereignty because such "unconstitutional action can cause concomitant injury to persons in individual cases."<sup>15</sup> In other words, whether couched as a claim that the statute exceeds enumerated powers or violates the Tenth Amendment's proscription that the powers not delegated to the federal government are reserved to the states or to the people, the issue of Mrs. Bond's standing to challenge the constitutionality of the statute is the same.

<sup>13</sup> *Bond v. United States*, 131 S. Ct. 2355, 2366 (2011); see also, e.g., *Wyeth v. Levine*, 129 S. Ct. 1187, 1206 (2009); *United States v. Morrison*, 529 U.S. 598, 618 & n.8 (2000); *United States v. Lopez*, 514 U.S. 549, 552 (1995); *New York v. United States*, 505 U.S. 144, 156–57 (1992); *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 528–29 (1935); *Mayor of New Orleans v. United States*, 35 U.S. (10 Pet.) 662, 736 (1836); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 426, 428 (1821); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819) ("This government is acknowledged by all to be one of enumerated powers."); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) ("The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written."); cf. *Federalist No. 45*, at 292–93 (Madison) (Rossiter ed. 1961) ("The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite").

<sup>14</sup> *Bond*, 131 S. Ct. at 2366 (citing *New York v. United States*, 505 U.S. 144, 155–59 (1992) and *United States v. Lopez*, 514 U.S. 549, 564 (1995)).

<sup>15</sup> *Id.*

The Tenth Amendment is merely the “mirror image” of the enumerated-powers structure of the Constitution.<sup>16</sup>

Before turning to the merits of Mrs. Bond’s claim, which the lower courts will now consider on remand, it is worth pausing for a moment to discuss the alternative view proffered by the United States (via Acting Solicitor General Neal Katyal), a view that the Court described as “a misconception,” a “flawed” “premise,” with “no basis in precedent or principle.”<sup>17</sup> (Ouch.)

The Third Circuit had based its decision denying legal standing to Mrs. Bond on a view that the Tenth Amendment protects state sovereign interests even in the face of otherwise valid exercises of congressional power, and that only the states have standing to defend those interests. While disavowing the Third Circuit’s holding, the acting solicitor general tried to salvage its premise by contending that Mrs. Bond had actually raised an enumerated-powers objection to Section 229 (for which she would have standing), not a state sovereignty objection (for which, the SG claimed, she would not have standing).<sup>18</sup> The Supreme Court soundly rejected the solicitor general’s attempt to split the Tenth Amendment atom.

To be sure, the Supreme Court had suggested in the past that the Tenth Amendment creates a carve-out of state sovereign powers that cannot be infringed by Congress even when Congress is acting pursuant to an enumerated power.<sup>19</sup> The tension created by that extra-textual reading of the Tenth Amendment was subsequently cured, however, when the Court recognized that the same idea is more properly grounded in the “proper” element of the Necessary and Proper Clause than in a penumbra of the Tenth Amendment.<sup>20</sup>

<sup>16</sup> *New York*, 505 U.S. at 156 (1991) (“[T]he two inquiries are mirror images of each other. If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.”).

<sup>17</sup> *Bond*, 131 S. Ct. at 2365, 2367.

<sup>18</sup> Brief for United States at 18, *Bond v. United States*, 131 S. Ct. 2355 (2011) (No. 09-1227).

<sup>19</sup> *Nat’l League of Cities v. Usury*, 426 U.S. 833, 842-43 (1976); *Fry v. United States*, 421 U.S. 542, 547 (1975).

<sup>20</sup> *Printz v. United States*, 521 U.S. 898, 923-24 (1997); see also *Gonzales v. Raich*, 545 U.S. 1, 39 (2005) (Scalia, J., concurring in the judgment) (“cases such as [*Printz*] affirm that a law is not proper for carrying into Execution the Commerce Clause when it

*Printz v. United States* thus recognizes that even the “state sovereignty” concern flows from the enumerated-powers doctrine, not from a separate preserve of state powers that only the states have standing to protect.

Moreover, as Justice Kennedy emphasized, the federalist structure of our Constitution does more than simply “preserv[e] the integrity, dignity, and residual sovereignty of the States.”<sup>21</sup> “Rather, federalism [also] secures to citizens the liberties that derive from the diffusion of sovereign power.”<sup>22</sup> “By denying any one government complete jurisdiction over all the concerns of public life,” he elaborated, “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>23</sup> Powerful stuff!

Because “[f]idelity to principles of federalism is not for the States alone to vindicate,”<sup>24</sup> Mrs. Bond has as much standing to challenge the constitutionality of the statute under which she was convicted as Mr. Lopez had to challenge his conviction in *United States v. Lopez*. That Congress sought to criminalize conduct in excess of its authority under the Commerce Clause in *Lopez* and in excess of its authority under the Necessary and Proper Clause (implementing the treaty power) in Mrs. Bond’s case is of no moment on the jurisdictional issue. Both criminal defendants had the “concrete and particularized” “injury in fact” that the Supreme Court has deemed necessary for Article III standing,<sup>25</sup> and a finding of unconstitutionality would afford as much redress to Mrs. Bond as it did to Mr. Lopez. Indeed, because Mrs. Bond is the “object of the action” by the government, there was “little question” that the government’s action—its criminal prosecution—“caused [her] injury, and that a judgment preventing . . . the action will redress it.”<sup>26</sup> As Justice Ginsburg added in her concurring

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violates a constitutional principle of state sovereignty” (emphasis in original, internal quotation marks and brackets omitted)).

<sup>21</sup> *Bond v. United States*, 131 S. Ct. at 2364.

<sup>22</sup> *Id.* (quoting *New York v. United States*, 505 U.S. 144, 181 (1992) (in turn quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting))).

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

<sup>24</sup> *Id.*

<sup>25</sup> See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

<sup>26</sup> *Id.* at 561-62.

opinion, "'An offence created by [an unconstitutional law] . . . is not a crime.'"<sup>27</sup> "A conviction under [such a law] is not merely erroneous, but is illegal and void."<sup>28</sup>

Moreover, even if the Third Circuit's reasoning had simply been shifted to an inquiry into whether the congressional intrusion into a matter of core state concern was "proper" under the Necessary and Proper Clause, Mrs. Bond would still have standing to press her challenge to the constitutionality of the statute under which she was convicted. As we noted in the brief filed in *Bond* on behalf of the Center for Constitutional Jurisprudence and the Cato Institute, one of the principal purposes of federalism is to protect individuals against an overreaching federal government by subdividing sovereign authority between the federal and state governments, each capable of checking the other.<sup>29</sup> It would be anomalous to hold that an individual beneficiary of this system of checks and balances could not defend her own particularized interests when the state fails to do so. States simply cannot subvert the federal government powers that "We the People" assigned to them or reserved to ourselves, and individuals who are particularly harmed by the attempted reallocation of power are not without recourse to the courts to challenge it.

Finally, Justice Kennedy's opinion for the Court seems to recognize the emerging national consensus that criminal law is becoming overfederalized and, as a consequence, less tethered to its core principles and aims. Indeed, in May 2010, the Heritage Foundation and the National Association of Criminal Defense Lawyers—organizations often diametrically opposed to each other—co-published a study on the proliferation of the federal criminal code and the disturbing

<sup>27</sup> *Bond*, 131 S. Ct. at 2367 (Ginsburg, J., concurring) (quoting *Ex parte Siebold*, 100 U.S. 371, 376 (1880)).

<sup>28</sup> *Id.* (quoting *Siebold*, 100 U.S. at 376–77).

<sup>29</sup> Brief of the Center for Constitutional Jurisprudence and Cato Institute at 7, *Bond v. United States*, 131 S. Ct. 2355 (2011) (No. 09-1227) (citing *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) ("The 'constitutionally mandated balance of power' between the States and the Federal Government was adopted by the Framers to ensure the protection of 'our fundamental liberties.'")) (in turn quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985)).



way in which such laws are often passed without a *mens rea* requirement.<sup>30</sup>

### Overcriminalization

The sheer number of new federal crimes boggles the mind. To wit, the federal criminal code now includes at least 4,450 crimes.<sup>31</sup> Congress added an average of 56.5 crimes per year to the federal code between 2000 and 2007<sup>32</sup> and has raised the total number of federal crimes by 40 percent since 1970.<sup>33</sup> Moreover, the federal criminal code has grown not just in size but in complexity, making it difficult to both (1) determine what statutes constitute crimes and (2) “differentiat[e] whether a single statute with different acts listed within a section or subsection includes more than a single crime and, if so, how many.”<sup>34</sup>

Nevertheless, Congress keeps piling on. During the 109th Congress (2005–06), 446 new criminal offenses were proposed, less than half of which were sent for expert review at either the House or Senate Judiciary Committee. As a result, as the Supreme Court recently recognized in *Skilling v. United States*,<sup>35</sup> federal prosecutors are often left with enormously vague statutes that implicate core constitutional and due process concerns.

This complexity of criminal law, as well as the sheer number of statutes on the books, makes the systemic cleansing of the federal criminal code a difficult task. The Court’s holding in *Bond* that criminal defendants have standing to challenge the laws under which they are charged as *ultra vires* congressional actions violating either Article I or the Tenth Amendment is thus a crucial piece in the overall effort to reign in the burgeoning federal criminal law. Indeed, the Supreme Court has recognized that a government of enumerated

<sup>30</sup> Brian W. Walsh & Tiffany M. Joslyn, *Without Intent: How Congress Is Eroding the Intent Requirement in Federal Law* (2010).

<sup>31</sup> John S. Baker Jr., *Revisiting the Explosive Growth of Federal Crimes*, Legal Memorandum No. 26, Heritage Found. (June 16, 2008).

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

<sup>33</sup> James Strazella et al., *Task Force on the Federalization of Criminal Law*, Am. Bar Ass’n Criminal Justice Section, *The Federalization of Criminal Law* 7 (1998).

<sup>34</sup> John S. Baker Jr., *Jurisdictional and Separation of Powers Strategies to Limit the Expansion of Federal Crimes*, 54 Am. U. L. Rev. 545, 549 (2005).

<sup>35</sup> 130 S. Ct. 2896 (2010).

powers was created for the benefit of those living under the duly constituted government, that the “first principles” of the Constitution “serve to prevent the accumulation of excessive power in any one branch,” and that “a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.”<sup>36</sup> The same “first principles” hold true for any defendant charged with a federal crime that arguably goes beyond the enumerated powers of Congress, whether they bring a claim under Article I or the Tenth Amendment. Kudos to Justice Kennedy and a unanimous Court for adhering to this important principle.

Now for a preview of the merits of Mrs. Bond’s case, to be considered on remand.

### The Larger Issue

Justice Kennedy described the issue as follows: “The ultimate issue of the statute’s validity turns in part on whether the law can be deemed ‘necessary and proper for carrying into Execution’ the President’s Article II, § 2 Treaty Power.”<sup>37</sup> By so framing the question in terms of one of the Constitution’s enumerated powers (the Necessary and Proper Clause), Justice Kennedy has already signaled that the broader interpretation some courts and commentators have given to *Missouri v. Holland*—that provisions of a treaty can authorize legislation that Congress would not otherwise have the power to enact—is misplaced.

Yet that misplaced interpretation is just what the district court provided before the Third Circuit threw the standing curveball at the case. In rejecting Mrs. Bond’s challenge, the district court simply noted in conclusory fashion that because Section 229 “was enacted by Congress and signed by the President under the necessary and proper clause of the Constitution . . . [t]o comply with the provisions of a treaty,” it was constitutionally valid and, apparently, did not contravene federalism principles, as Mrs. Bond had claimed.<sup>38</sup> Mrs. Bond’s constitutional challenge cannot be dispensed with so easily.

<sup>36</sup> Lopez, 514 U.S. at 552 (quoting Gregory, 501 U.S. 452 (internal quotation marks omitted)).

<sup>37</sup> Bond, 131 S. Ct. at 2367 (citing U.S. Const. art. I, § 8, cl. 18).

<sup>38</sup> Pet. App. at 28, Bond, 131 S. Ct. 2355 (No. 09-1227) (district court ruling on motion to dismiss indictment).

As noted at the outset, the root of the district court's error is the broad interpretation that has been given to *Missouri v. Holland*, which in the lower courts has come to stand for two related and constitutionally dubious propositions: (1) that the treaty power is not limited to the enumerated powers otherwise delegated to the national government and (2) that the Necessary and Proper Clause is likewise not limited when used in support of the treaty power.<sup>39</sup>

The broad interpretation of *Missouri v. Holland* that the district court relied on results in an implicit overruling of precedent. In *Mayor of New Orleans v. United States*, the Supreme Court held that because the "government of the United States . . . is one of limited powers" and "can exercise authority over no subjects, except those which have been delegated to it," the congressional police power authority over federal territories could not "be enlarged under the treaty-making power."<sup>40</sup> *Missouri v. Holland* does not mention that precedent, much less hold that it was being overruled.

Moreover, the broad interpretation of *Missouri v. Holland* has been severely undermined by two subsequent decisions of the Supreme Court: *Reid* and *Lopez*.

*Reid* addressed whether, by adopting a statute designed to give effect to a treaty, the federal government could avoid the requirements in Article III, Section 2, of the Constitution, and in the Fifth and Sixth Amendments, that civilians are entitled to indictment by grand jury and trial by jury. In a rare reversal of course after a petition for rehearing allowed the Court additional time to consider just how significant a matter of basic constitutional law was at stake, the Court held that the Constitution imposed limits even on the treaty power. "The United States is entirely a creature of the Constitution," noted Justice Hugo Black, writing for the plurality and

<sup>39</sup> See, e.g., *United States v. Lue*, 134 F.3d 79, 83 (2d Cir. 1998) ("the United States may make an agreement on any subject suggested by its national interests in relation with other nations"); *id.* at 84 ("If the Hostage Taking Convention is a valid exercise of the Executive's treaty power, there is little room to dispute that the legislation passed to effectuate the treaty is valid under the Necessary and Proper Clause"); *id.* at 85 ("the treaty power is not subject to meaningful limitation under the terms of the Tenth Amendment"); *United States v. Ferreira*, 275 F.3d 1020, 1027–28 (11th Cir. 2001) (agreeing with *Lue*); see also Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 Harv. L. Rev. 1867, 1871 n.11 (2005), and cases cited therein.

<sup>40</sup> 35 U.S. (10 Pet.) 662, 736 (1836).

announcing the judgment of the Court.<sup>41</sup> “Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution.”<sup>42</sup> “[T]he United States Government . . . has no power except that granted by the Constitution.”<sup>43</sup>

Although Justice Black was writing for a four-justice plurality, Justice John Marshall Harlan II agreed with the essential point in his separate opinion concurring in the judgment: “Under the Constitution Congress has only such powers as are expressly granted or those that are implied as necessary and proper to carry out the granted powers.”<sup>44</sup>

The Court plurality flatly rejected the contention that the legislation depriving Mrs. Reid of her constitutional right to a civilian jury trial could “be sustained as legislation which is necessary and proper to carry out the United States’ obligations under the international agreements made with [Great Britain and Japan].” According to the plurality, “The obvious and decisive answer to this, of course, is that no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution.”<sup>45</sup> And Justice Harlan specifically disclaimed reliance on an unlimited treaty power in his separate opinion concurring in the judgment:

To say that the validity of the statute may be rested upon the inherent “sovereign powers” of this country in its dealings with foreign nations seems to me to be no more than begging the question. As I now see it, the validity of this court-martial jurisdiction must depend upon whether the

<sup>41</sup> Reid, 354 U.S. at 5–6 (citing *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 326 (1816); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 119, 136–37 (1866); *Graves v. People of State of New York ex rel. O’Keefe*, 306 U.S. 466, 477 (1939); *Ex parte Quirin*, 317 U.S. 1, 25 (1942)).

<sup>42</sup> *Id.* at 6 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176–80 (1803); *Territory of Hawaii v. Mankichi*, 190 U.S. 197, 236–39 (1903) (Harlan, J., dissenting)).

<sup>43</sup> *Id.* at 12.

<sup>44</sup> Reid, 354 U.S., at 66 (Harlan, J., concurring in judgment). Similarly, Justice Felix Frankfurter, who also filed a separate opinion concurring in the judgment, recognized that a “particular provision” of the Constitution “cannot be dissevered from the rest of the Constitution.” Reid, 354 U.S. at 44 (Frankfurter, J., concurring in judgment).

<sup>45</sup> *Id.* at 16.

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statute, as applied to these women, can be justified as an exercise of the power, granted to Congress by Art. I, § 8, cl. 14 of the Constitution, "To make Rules for the Government and Regulation of the land and naval Forces." I can find no other constitutional power to which this statute can properly be related.<sup>46</sup>

Hence, neither the treaty power nor the Necessary and Proper Clause may be used to expand Congress's lawmaking authority beyond the powers enumerated in the Constitution.

That brings us to *United States v. Lopez*, the second major Court decision that undermined the overly broad interpretation that has been given to *Missouri v. Holland*. In *Lopez*, the Court made clear that the doctrine of enumerated powers also serves as a significant restraint on the powers of the national government: "Congress' authority is limited to those powers enumerated in the Constitution, and . . . those enumerated powers are interpreted as having judicially enforceable outer limits."<sup>47</sup>

*Lopez's* holding complements quite nicely the reasoning of *Reid*, and the two cases together cast serious doubt on the continuing vitality of the broad reading that has been given to *Missouri v. Holland*. The *Reid* plurality noted, for example, that "the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because it happens to be in another land."<sup>48</sup> Further, when repudiating the holding of *In re Ross*<sup>49</sup> that the Constitution did not apply abroad, the *Reid* plurality specifically noted that the problem with the statutory scheme upheld in *Ross* was the "blending of executive, legislative, and judicial powers in one person or even in one branch of the Government," which it described "as the very acme of absolutism."<sup>50</sup> While individual provisions of the Bill of Rights were undoubtedly implicated as well, the *Reid* plurality did not discuss them, focusing

<sup>46</sup> *Id.* at 66 (Harlan, J., concurring in judgment).

<sup>47</sup> *Lopez*, 514 U.S. at 566.

<sup>48</sup> 354 U.S. at 6 (emphasis added). Note how this concern for liberty is echoed in Justice Kennedy's discussion of the Tenth Amendment and other structural protections for liberty. *Bond*, 131 S. Ct. at 2364–67.

<sup>49</sup> 140 U.S. 453 (1891).

<sup>50</sup> *Reid*, 354 U.S. at 11.

instead on the protection of liberty provided by the core separation-of-powers structure found in the main body of the Constitution itself.<sup>51</sup>

Similarly, the *Reid* plurality rejected the notion that the Supremacy Clause exempted “treaties and the laws enacted pursuant to them” from “comp[li]ance] with the provisions of the Constitution.”<sup>52</sup> The only reason the Supremacy Clause does not use the “in pursuance” of the Constitution formulation for treaties that it uses for legislation was to confirm that agreements made by the United States under the Articles of Confederation “would remain in effect.”<sup>53</sup> “It would be manifestly contrary to the objectives of those who created the Constitution,” noted the plurality,

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. The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined.<sup>54</sup>

Accordingly, the *Reid* plurality noted that “[t]his Court has regularly and uniformly recognized the supremacy of the Constitution over a treaty.”<sup>55</sup> The exemplary language cited by the *Reid* plurality from one such case is particularly instructive: “The treaty power, as expressed in the constitution, is in terms unlimited *except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States.*”<sup>56</sup> The language quoted from

<sup>51</sup> *Id.* at 10–12.

<sup>52</sup> *Id.* at 16.

<sup>53</sup> *Id.* at 16–17 (citing 4 Farrand, Records of the Federal Convention 123 (rev. ed. 1937)).

<sup>54</sup> *Id.* at 17 (citing Virginia Ratifying Convention, 3 Elliot’s Debates 500–19 (1836 ed.)).

<sup>55</sup> *Id.* (citing United States v. Minnesota, 270 U.S. 181, 207–08 (1926); Holden v. Joy, 84 U.S. (17 Wall.) 211, 242–43 (1872); The Cherokee Tobacco, 78 U.S. (11 Wall.) 616, 620–21 (1870); Doe ex dem. Clark v. Braden, 57 U.S. (16 How.) 635, 657 (1853)).

<sup>56</sup> *Id.* (citing Geofroy v. Riggs, 133 U.S. 258, 267 (1890) (emphasis added)).

*Geofroy* speaks of both kinds of restraints against the power of the federal government, the explicit prohibitions of the Bill of Rights and those arising from the nature of the government itself, including apparently that the federal government is one of limited, enumerated powers.<sup>57</sup>

The *Reid* plurality did not itself apply that necessary conclusion to *Missouri v. Holland* because, at the time, the Court had so broadly interpreted the enumerated powers at issue as to amount to almost no limitation at all: “To the extent that the United States can validly make treaties, the people and the States have delegated their power to the National Government and the Tenth Amendment is no barrier.”<sup>58</sup> By citing *United States v. Darby*, however, the *Reid* Court indicated that it was addressing constitutional limits imposed by the scope of other enumerated powers, not asserting that the people had delegated an unlimited authority to the national government via the treaty power.

Hence the significance of *Lopez*. The *Reid* plurality’s *obiter dictum* (non-binding commentary) with respect to *Holland* must be read in light of *Lopez* and the doctrine of limited, enumerated powers that it confirms. The United States cannot “validly” make a treaty that ignores the structural limits on federal power, any more than it can “validly” make a treaty that ignores the express prohibitions on federal power.<sup>59</sup> More to the point for *Bond*, Congress cannot “validly” exceed its enumerated powers by the simple expedient of relying on a treaty rather than Article I. At least, not without altering the limited “nature of the government itself,”<sup>60</sup> removing the liberty-protecting “shield” that the structural parts of the Constitution provides, or acting “manifestly contrary to the objectives of those who

<sup>57</sup> See also *id.* at 22 (discussing how the Necessary and Proper Clause is limited by both kinds of specific restraints on governmental power: the text of the enumerated powers being furthered and specific prohibitions elsewhere in the Constitution and the Bill of Rights).

<sup>58</sup> *Id.* at 18 & n.35 (citing, e.g., *United States v. Darby*, 312 U.S. 100, 124–25 (1941)).

<sup>59</sup> See, e.g., Virginia Ratifying Convention (June 18, 1788), in 3 Elliot’s Debates 504 (Gov. Randolph) (“When the Constitution marks out the powers to be exercised by particular departments, I say no innovation can take place [by use of the treaty power]”); *id.* (June 19, 1788), in 3 Elliot’s Debates 514–15 (Madison) (rejecting the claim that the treaty power “is absolute and unlimited,” noting that “[t]he exercise of the power must be consistent with the object of the delegation,” and that “[t]he object of treaties is the regulation of intercourse with foreign nations, and is external”).

<sup>60</sup> *Geofroy*, 133 U.S. at 267.

created the Constitution, . . . let alone alien to our entire constitutional history and tradition,” or permitting “amendment of [the Constitution] in a manner not sanctioned by Article V.”<sup>61</sup>

Thus far, the lower courts have been unwilling to follow the combined reasoning of *Reid* and *Lopez* to reject the broader interpretation that has been given to *Missouri v. Holland*. Instead, as manifested by the district court’s perfunctory dismissal of the issue below, they apparently feel bound by the view that the entire matter must be dispensed with simply by noting that the challenged act of Congress was enacted as a “necessary and proper” means of giving effect to a treaty—and therefore no further inquiry into constitutionality is required.

Such a view can yield some very absurd results. For example, a treaty with Austria that included a provision assisting its native son, the naturalized (rather than native-born) citizen and former governor of California, could allow the president, with the advice and consent of the Senate, to excise the native-born citizen eligibility requirement for the presidency.<sup>62</sup> A multinational treaty on age discrimination could likewise excise the 35-year-old age requirement for the same office.<sup>63</sup> Another one, such as the Convention on the Elimination of All Forms of Discrimination Against Women, could authorize the provisions of the Violence Against Women Act already held to be unconstitutional in *Morrison*. Yet another, such as the Convention on the Rights of Children, could authorize the provisions of the Gun-Free School Zones Act held constitutionally infirm in *Lopez*. The examples are as numerous as the imagination. This small sampling should demonstrate just how significant a threat to the concept of limited government there is from the pernicious theory that the treaty power is exempt from constitutional constraints or that, contrary to the Framers’ understanding that a “treaty” could only concern the relations between nations, the treaty power can instead be used to alter how a nation deals domestically with its own citizens.<sup>64</sup>

<sup>61</sup> *Reid*, 354 U.S. at 17, 33.

<sup>62</sup> U.S. Const. art. II, § 1, cl. 5.

<sup>63</sup> *Id.*

<sup>64</sup> See *Geofroy*, 133 U.S. at 266 (“the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations”) (emphasis added); *id.* at 267 (“It would not be contended that [the treaty power] extends so far as to authorize what the Constitution forbids, or a change in



### Looking to the Future

Happily, the district court's perfunctory rejection of Mrs. Bond's claim had already been rebuffed by the Third Circuit, which recognized that she raised important constitutional issues that, but for the lack of standing it erroneously attributed to her, would require the court to "wade into the debate over the scope and persuasiveness of" *Missouri v. Holland*.<sup>65</sup> The Third Circuit should now wade into that debate with the vigor that a remand from the Supreme Court demands.

Even if the Third Circuit holds that the treaty power itself allows the federal government to address issues that are not otherwise within its constitutional powers, such a holding would not answer the analytically distinct question of whether a treaty that is not self-executing could authorize Congress to act in excess of the legislative powers assigned to it. Professor Nicholas Quinn Rosenkranz's recent article in the *Harvard Law Review* persuasively argues that such a promise in a treaty must be read as a commitment to push for a constitutional amendment that would authorize the promised legislation, not as authorization for Congress to adopt unconstitutional legislation.<sup>66</sup> That is, textually, the Necessary and Proper Clause authorizes Congress "[t]o 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>67</sup> Rosenkranz carefully points out that, as a simple matter of grammatical construction, Congress has the power to make laws necessary and proper for the president "to make Treaties" (such as appropriating money for diplomats to travel to treaty negotiations), not to make laws necessary and proper to implement non-self-executing treaties already made.<sup>68</sup>

As no less a justice than Joseph Story recognized, "the power is nowhere in positive terms conferred upon Congress to make laws

the character of the government or in that of one of the states"); see also, e.g., Virginia Ratifying Convention (June 19, 1788), in 3 Elliot's Debates 514–15 (Madison) (noting that "[t]he object of treaties is the regulation of intercourse with foreign nations, and is external").

<sup>65</sup> *Bond v. United States*, 581 F.3d 128, 135 (3d Cir. 2009).

<sup>66</sup> See Rosenkranz, *supra* note 39.

<sup>67</sup> U.S. Const. art. I, § 8, cl. 18; art. II, § 2, cl. 2.

<sup>68</sup> Rosenkranz, 118 Harv. L. Rev. at 1882–84.

to carry the stipulations of treaties into effect.”<sup>69</sup> Justice Holmes’s *ipse dixit* in *Missouri v. Holland*, conclusorily stating the opposite, that “[i]f the treaty is valid there can be no dispute about the validity of the statute under Article I, § 8, as a necessary and proper means to execute the powers of the Government,”<sup>70</sup> warrants a more reasoned analysis than Justice Holmes provided. If Holmes was correct, the treaty power can be used to undo the carefully wrought edifice of a limited government assigned only certain enumerated powers. That those who drafted and ratified the Constitution intended to bury such a dormant time bomb in their handiwork is too much of a stretch to be seriously entertained.

Yet that is precisely the path the lower courts have embarked on, via their broad interpretation of *Missouri v. Holland*. Hopefully, the slight nod from Justice Kennedy at the conclusion of his opinion for the Court in phase 1 of Mrs. Bond’s case will be read as an invitation to the lower courts to begin grappling with these constitutional issues in the serious manner they deserve. If, as seems evident, the treaty power cannot be used as an end run around the carefully wrought limitations on the power of the federal government, it will be the solemn duty of the courts to say so.

<sup>69</sup> Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 618–22 (1842).

<sup>70</sup> 252 U.S. at 432.