Article

The Sad, Quiet Death of *Missouri v. Holland*: How *Bond* Hobbled the Treaty Power

Michael J. Glennon[†] & Robert D. Sloane[††]

† Professor of International Law, The Fletcher School of Law and Diplomacy, Tufts University.

†† Professor of Law and R. Gordon Butler Scholar in International Law, Boston University School of Law. We acknowledge with gratitude the insightful critiques and suggestions of Anthony C. Colangelo, Michael C. Dorf, Gary Lawson, and W. Michael Reisman; and the research assistance of Julie Krosnicki, Angela Linhardt, Gabriela Morales, Ashley Novak, Seth Pate, and Emma Wright. Professor Sloane would also like to express his gratitude to Gary Born and WilmerHale's Scholar-in-Residence Program for generously providing the time and resources to carry out some of the initial work on this Article.

The treaties of the United States, under the [Articles of Confederation] are liable to infractions of thirteen [states] . . . . The faith, the reputation, the peace of the whole union, are thus continually at the mercy of the prejudices, the passions, and the interests of every member of which it is composed. Is it possible that foreign nations can either respect or confide in such a government? Is it possible that the people of America will longer consent to trust their honor, their happiness, their safety, on so precarious a foundation?

—Alexander Hamilton[1]

INTRODUCTION

Missouri v. Holland[2] was to the federal treaty power what *McCulloch v. Maryland*[3] is to its legislative power. In *McCulloch*, Chief Justice Marshall wrote that "we must never forget that it is a *Constitution* we are expounding."[4] In *Holland*, Justice Holmes interpreted the treaty power in the spirit of Marshall's dictum by adopting a functional, adaptivist approach to its relationship to the Tenth Amendment. Referring to the degree to which the federal government may make treaties that trench upon what might ordinarily be traditional state functions, he wrote, "We must consider what this country has become in deciding what that Amendment has reserved."[5] *Holland* was therefore far more than what generations of law students might recall as the curious case about migratory birds written by the Supreme Court's most eminent Justice since Marshall; it was a case, like *McCulloch*, that would have vindicated their professors in claiming that we live today, not only in Marshall's America but in Holmes's too. The Constitution's remarkable durability and resilience over 230 years should be ascribed in no small part to the prescient spirit of pragmatism that infuses cases like *McCulloch* and *Holland.*

Yet *Holland*, alas, should now be discussed in the past tense. On June 2, 2014, in *Bond v. United States*,[6] the Supreme Court abandoned *Holland*. It did not say so. Nor did the Justices themselves believe *Bond* did so. Chief Justice Roberts, for the majority, and Justices Scalia, Alito, and Thomas, who concurred in the judgment only, arguing that *Holland* should be unambiguously overruled, all nonetheless wrote as though *Bond* did not disturb *Holland*. Commentators, too, did not see *Holland*'s demise.[7] A consensus rapidly emerged that the Court had decided *Bond* on a narrow statutory basis, successfully—even if, to the concurring Justices, objectionably—eliding the

1. THE FEDERALIST NO. 22, at 144 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).
2. 252 U.S. 416 (1920).
3. 17 U.S. (4 Wheat.) 316 (1819).
4. *Id*. at 407.
5. *Holland*, 252 U.S. at 434.
6. 134 S. Ct. 2077 (2014).
7. *E.g*., Curtis A. Bradley, *Federalism, Treaty Implementation, and Political Process*: Bond v. United States, 108 AM. J. INT'L L. 486, 486, 495 (2014); Jean Galbraith, *Congress's Treaty-Implementing Power in Historical Practice*, 56 WM. & MARY L. REV. 59, 73 (2014); Heather K. Gerken, *Slipping the Bonds of Federalism*, 128 HARV. L. REV. 85, 89 (2014); Nicholas Quinn Rosenkranz, Bond v. United States*: Concurring in the Judgment*, 2014 CATO SUP. CT. REV. 285, 306 (2014). For examples of earlier media commentary to the same effect, see *infra* note 98.

constitutional issue in *Holland*. But that consensus was premature; and it is mistaken. The Court *tried*, of course, to avoid the constitutional issues raised by *Holland*. But it failed. In fact, holding all else constant, had *Bond* honored *Holland*, the Court would have reached the opposite result; had *Holland* applied *Bond*'s analysis—a federalism background principle and commensurate canon of avoidance that will henceforth govern laws implementing treaties—*Holland*, too, would have reached the opposite result.[8]

We write to explain, and lament, *Holland*'s passing. We argue that it represented the most sensible reconciliation of the tension between the Treaty Clause and the Tenth Amendment. We further suggest that *Bond* is inconsistent with the Court's decision in *Medellín v. Texas*,[9] for the Court there suggested that the federal government can do what *Bond* has now held that it constitutionally cannot. Yet the problem *Bond* creates is not limited to one inconsistency; it runs deeper. By abandoning *Holland*, the Court has handicapped the nation in a globalizing world and risked impeding the ability and reliability of the United States as a treaty partner. Without *Holland*, it will be well-nigh impossible for the nation to honor certain treaties—treaties that the nation has routinely concluded since its founding and, today more than ever, we expect, increasingly will. Mindful of the origins of the Treaty Clause in the experience with state practice under the Articles of Confederation, it is not only unfortunate but also hazardous for the Court to have unwittingly recreated one of the paramount problems the Framers sought to remedy at Philadelphia.

Granted, the Court surely will not soon explicitly regard *Bond* as having overruled *Holland*. But for the reasons we develop, adherence to *Bond*'s analysis would effectively undermine *Holland*—notwithstanding the majority's effort in *Bond* to avoid constitutional questions. Indeed, ironically, it is the Court's misguided insistence on a background principle and constitutional avoidance canon based on pre-*Holland* federalism that renders *Bond* inconsistent with *Holland*. At most, *Holland* survives in name only. Unless the Court repudiates *Bond*'s analysis, it will have abandoned *Holland*'s core doctrine. We conclude, however, by noting that the Court could choose to reorient and expand its remarks in *Bond* so as to reinvigorate the *Holland* doctrine—without conceding error in the case (and thus perhaps saving institutional face). Such a reorientation would likely have the additional virtue of clarifying *Holland*'s holding in conformity with the actual principles that animated Holmes's opinion.

We develop the argument in five parts. In Part I, we clarify the conundrum created by the treaty power's interaction with the Tenth Amendment.

In Part II, we argue that a close reading of *Holland* reveals that its true rationale is far more subtle and forceful than the textual-delegation rationale often ascribed to Justice Holmes. We also consider how two oft-neglected

8. We assume that no alternative rationale or tacit consideration existed in either case; holding the facts, law, and judicial analyses constant, both decisions would have reached the opposite result at the times *Holland* and *Bond*, respectively, were decided.

9. 552 U.S. 491 (2008).

decisions on which Holmes relied, *Andrews v. Andrews*[10] and *Carey v. South Dakota*,[11] offer critical insight into what *Holland* held—and why.

In Part III, we scrutinize *Bond* and argue that, contrary to the consensus that it left *Holland* untouched, *Bond* gutted *Holland* by rejecting at least two indispensable predicates of Holmes's analysis: first, that a treaty and its implementing legislation must be considered together; and, second, that a treaty's validity under the Tenth Amendment immunizes that treaty's implementing legislation against a generic federalism challenge. In contrast, *Bond* held that a treaty and its implementing legislation must be assessed separately under the Tenth Amendment—without considering the implementing statute in view of the treaty it implements; and that in doing so, the "statute—unlike the [treaty]—*must* be read consistent with principles of federalism inherent in our constitutional structure."[12] Further, the Court erred by treating those "principles of federalism" as excluding, rather than incorporating, *Holland*'s interpretation of the interaction of the Tenth Amendment and the Article II treaty power.

A careful analysis of what Justice Holmes held in *Holland* makes clear that *Bond* and *Holland* cannot be reconciled. We do not find it plausible to dismiss the Court's troubling premise ("the statute—unlike the [treaty]—*must* be read consistent with principles of federalism inherent in our constitutional structure") as a mere case of careless or ill-considered language. The quoted premise does not exist in isolation. It both motivated and enabled the majority's approach to statutory interpretation and, in particular, Chief Justice Roberts's reliance on the canon of constitutional avoidance based on supposed background federalism concerns. Had the majority honored *Holland*, no such concerns would have arisen.

The Court could have plausibly decided *Bond* on the basis of non-constitutional principles of statutory interpretation—resolving what it saw as an ambiguity in the implementing legislation without resort to a federalism-based canon of constitutional avoidance. But tellingly, it did not. To the contrary, the proposition that a treaty's implementing legislation, unlike the treaty itself, "must be read consistent with principles of federalism inherent in our constitutional structure,"[13] constituted *an indispensable predicate* of the majority's statutory analysis—the chief factor that resolved the putative ambiguity of the implementing legislation. The same predicate is emblematic of the *Bond* Court's central mistake. Assuming, as every Justice correctly did, the constitutionality of the treaty,[14] "there can be no dispute about the validity of the statute"[15] based only on general "principles of federalism inherent in our constitutional structure."[16]

10. 188 U.S. 14 (1903), *abrogated by* Sherrer v. Sherrer, 334 U.S. 343 (1948).

11. 250 U.S. 118 (1919).

12. 134 S. Ct. 2077, 2088 (2014) (emphasis added).

13. *Id*. at 2088.

14. *See id*. at 2098 (Scalia, J., concurring in the judgment) (noting the Court's consensus that the treaty is valid).

15. Missouri v. Holland, 252 U.S. 416, 432 (1920).

16. *Bond*, 134 S. Ct. at 2088.

In Part IV, we argue that perennial critiques of *Holland* and the risks it allegedly entails ring hollow. No theoretical consideration or practical development since *Holland* has suggested any reason to disturb its doctrine. Indeed, critics have been unable to point to a single incident of abuse or concrete, not hypothetical, example of any risk that the decision supposedly poses, including the parade of horribles *Holland* allegedly set to march. Nor does *Holland* threaten to abrogate individual rights or other constitutional limits. It does not, as the Court wrote in 1957, "confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution,"[17] in particular, those rights set forth in the Bill of Rights and other provisions of the Constitution.

In Part V, we consider *Bond*'s likely future consequences, especially its potentially deleterious implications for modern U.S. treaty practice. We suggest that the Court's decision in *Medellín v. Texas*[18] implicitly required *Holland*'s doctrine. *Bond*'s abandonment of *Holland* therefore renders a core holding in *Medellín*, which is likely the most significant decision on the domestic U.S. law of treaties in decades, incoherent. More generally, *Bond* needlessly complicates the conduct of U.S. foreign affairs. It diminishes the nation's diplomatic capacity, handicapping it in its relations with foreign nations and threatening its ability to cooperate with them to tackle some of the most serious global issues in the twenty-first century.

We conclude that the nation's response to its experience under the Articles of Confederation, which motivated the Framers to lodge the treaty power in the federal government and to make treaties supreme federal law, remains equally vital today. *Bond*'s short-term effects may seem modest. But the nation may well come to regret abandoning *Holland*. For that reason, we conclude by suggesting how the Court might resolve the problems *Bond* created. Without calling into question the result in *Bond*, the Court could recast its copious references to federalism to bring its jurisprudence back into conformity with *Holland*—because the very "principles of federalism inherent in our constitutional structure,"[19] on which the Court placed such emphasis, *include* Holmes's reconciliation of the treaty power and federalism.

I. THE TREATY CLAUSE VERSUS THE TENTH AMENDMENT?

The treaty power and the Tenth Amendment, read together, present a conundrum. The Tenth Amendment provides simply, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[20] Article II gives the President "power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur."[21] The conundrum lies in the consequences of applying, or not applying, Tenth

17. Reid v. Covert, 354 U.S. 1, 16-17 (1957); *see also* Boos v. Barry, 485 U.S. 312 (1988).
18. 552 U.S. 491 (2008).
19. *Bond*, 134 S. Ct. at 2081.
20. U.S. CONST. amend. X.
21. *Id*. art. II, § 2, cl. 2.

Amendment limits to the treaty power in the event that the federal government were to ratify an Article II treaty[22] regulating a subject generally reserved to the states—that is, an area of law that falls within the traditional power of the states to legislate on matters not delegated by the Constitution to the federal government.[23]

If the Tenth Amendment limits the treaty power, a treaty obliging the United States to legislate on a subject reserved to the states would by definition be unconstitutional. The federal government would be powerless to enter into the potentially broad class of treaties obliging the United States to enact domestic federal laws regulating areas of traditional state competence. In practice, foreign nations would also lack an alternative way to conclude such treaties with the United States. They would be compelled to negotiate with each state individually in an effort to conclude fifty identical international agreements, which, under the Constitution, would be "compacts."[24]

The Compact Clause requires that agreements between states and foreign nations receive congressional approval.[25] That a foreign nation might negotiate fifty substantially identical compacts with the states, each contingent on congressional approval, is implausible, not to mention inefficient. And even if a series of state compacts could be concluded, the United States, as a nation, would not be legally bound by them under federal law; it would not be a party. The nation would be all but powerless to enforce an international obligation in the event of a state's breach.

Because any federal law intended to implement international legal obligations under these compacts would be unconstitutional, it would also be left to the states to agree on how to implement those obligations uniformly under their respective laws and constitutions. This scenario, including the level of cooperation it would require, is—to say the least—improbable.[26] Yet as a rule, international law recognizes and governs relations between nations, not their political subdivisions. So the United States, not the states, might incur *international* legal responsibility for any breach.[27] That prospect, of course, ranked among the foremost defects of the Articles of Confederation. It is

22. *Holland* relied on the proposition that Article II treaties differ from other types of U.S. international agreements. References to treaties, unless otherwise indicated, are therefore only to international agreements made in conformity with Article II.

23. International law refers to countries as nation-states or simply states. Because we discuss both nation-states and U.S. states, for clarity and convenience, we refer to nation-states as "countries" or "nations" and to the states of the Union as "states."

24. U.S. CONST. art. I, § 10. International law is indifferent to the denomination of an international agreement (compact, treaty, convention, etc.). Vienna Convention on the Law of Treaties art. 2(1)(a), May 23, 1969, 1155 U.N.T.S. 331. Under the Constitution, however, even though neither the Court nor anyone else has managed to explain what differentiates treaties from compacts, terminology matters. *See* LOUIS HENKIN, FOREIGN AFFAIRS AND THE US CONSTITUTION 152 & nn.12-13 (2d ed. 1996) (citing, inter alia, Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685, 695 n.37 (1925)).

25. U.S. CONST. art. I, § 10, cl. 3.

26. *Cf.* New York v. United States, 505 U.S. 144 (1992) (concluding that Congress may not constitutionally commandeer the states to enter into compacts by which they would cooperate to dispose of radioactive waste produced within their respective jurisdictions).

27. Articles on the Responsibility of States for Internationally Wrongful Acts art. 4, *in* Report of the International Law Commission on the Work of Its Fifty-Third Session, UN GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc. A/56/10 (2001).

difficult to imagine that the Framers understood the Tenth Amendment and the treaty power, in conjunction, to create one of the very problems they sought to resolve at Philadelphia. At any rate, today, with more and more problems requiring global cooperation and with the proliferation of multilateral treaties, the detrimental consequences of this reading of the Constitution could be serious and far-reaching. The United States could find itself increasingly isolated in foreign affairs and handicapped in its relations with other nations.

Yet the alternative resolution to the conundrum is also problematic. If the Tenth Amendment does not limit the treaty power, the rights reserved to the states would be theoretically defeasible at the whim of the federal government. With the right treaty partner, it would seem that the federal government could enter into a treaty on a subject ordinarily reserved to the states and then enact legislation to implement its treaty obligations under the Necessary and Proper Clause.[28] The treaty and its implementing legislation, in turn, would preempt inconsistent state law under the Supremacy Clause. The principal obstacle to federal government intent upon usurping state authority over a local issue would be finding another nation able and willing to enter into a treaty including the necessary obligations. Echoing other critics, Justice Scalia thus suggested in *Bond* that "the holding that a statute prohibiting the carrying of firearms near schools went beyond Congress's enumerated powers . . . could be reversed by negotiating a treaty with Latvia providing that neither sovereign would permit the carrying of guns near schools."[29] If the treaty power enables the federal government to coopt powers reserved to the states in this way, the Tenth Amendment would become no more than a "parchment barrier" in Madison's felicitous phrase.[30] State authority over traditional state functions could atrophy as globalization, and the consequent need for international cooperation on issues once deemed quintessentially local, relentlessly broaden and advance.

For most of the nineteenth century and into the twentieth, the United States remained a largely agrarian, inward-looking country and a comparatively minor player on the international stage. The 1823 Monroe Doctrine,[31] while principally intended to convey to the major European powers that the United

28. U.S. CONST. art. I, § 8, cl. 18. Indeed, depending on its details, the implementing legislation could preempt state regulation of an entire field of law ordinarily reserved to the states.

29. Bond v. United States, 134 S. Ct. 2077, 2100 (2014) (Scalia, J., concurring in the judgment). Since *Missouri v. Holland*, 252 U.S. 416 (1920), commentators have expressed concerns about this risk. We are aware of no evidence that it has ever materialized. Comparable hypotheticals have, however, become a staple of courses in foreign relations law. *Holland* is often deemed a "liberal" decision because of such hypotheticals. Yet the issue does not, in fact, track any partisan divide. Consider, by contrast to Justice Scalia's example, what might be characterized as a "conservative" hypothetical: the Supreme Court overrules *Roe v. Wade*, 410 U.S. 113 (1973), holding that abortion's regulation falls within the realm of rights reserved to the states. Thereafter, some states prohibit abortion while others legalize and regulate it. The President and Senate, dissatisfied with the unwieldy patchwork of state laws and believing abortion should be nationally prohibited, ratify the American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123. Article 4 of the Convention says that everyone has the right to life, which "shall be protected by law, in general, from the moment of conception." *Id*. art. 4. Congress might then enact implementing legislation to uniformly prohibit abortion in all or virtually all circumstances, preempting state laws that authorize it. Countless similar hypotheticals, culminating in conventionally liberal or conservative outcomes, may be constructed. *Holland*'s political valence is de minimis.

30. THE FEDERALIST NO. 48, at 333 (James Madison) (Jacob E. Cooke ed., 1961).

31. 41 ANNALS OF CONG. 22-23 (1823) (statement of Pres. James Monroe).

States would not tolerate their intrusion in the Western hemisphere, also reflected a policy against being drawn into the maelstrom of European diplomatic maneuvering, colonial politics, and wars—a prudent stance for a fledgling nation that persisted, with some exceptions, into the twentieth century.[32] Also, for much of the nineteenth century, custom remained the principal source of international law. Treaties, particularly multilateral treaties, were less common.[33] And because treaties seldom implicated local issues, the conundrum raised by the potential tension between the treaty power and the Tenth Amendment remained largely academic.

Nations began to conclude more treaties after the 1814 Congress of Vienna, however, and by the turn of the century, the number of treaties had proliferated. Even then, bilateral treaties remained the norm and multilateral treaties focused almost exclusively on bread-and-butter international issues. Nations rarely perceived the need for international regulation of local issues. Research discloses few jurists at the time who considered whether treaties could regulate matters that traditionally fell within the province of state law.[34] Nor had the Supreme Court yet considered the issue directly.[35] But it would have been at least reasonable to suppose that the federal government could not sidestep the Tenth Amendment with a minuet patterned by the Treaty Clause.

II. DECIPHERING HOLMES'S CRYPTIC OPINION IN *HOLLAND*

That changed in 1920. The issue confronted the Court squarely in *Missouri v. Holland*.[36] In 1913, Congress had enacted one of the nation's first environmental laws, regulating the taking of game and migratory birds.[37] Yet less than two decades earlier, in *Geer v. Connecticut*, the Court had said that "the right to preserve game flows from the undoubted existence in the State of a police power,"[38] notwithstanding incidental effects on interstate commerce. Relying in part on *Geer*, two federal district courts held that the 1913 statute usurped powers reserved to the states.[39]

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32. JOHN LEWIS GADDIS, THE COLD WAR: A NEW HISTORY 206 (2005).

33. *See* Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 396 (1998).

34. *But see* HENKIN, *supra* note 24, at 189-90, 456 n.57. Some scholars sought to establish "that the executive and legislative branches of the government in the period 1830-60 believed that treaties could not deal with matters not otherwise in the federal domain." *Id.* at 456 n.57 (citing, inter alia, Ralston Hayden, *The States' Rights Doctrine and the Treaty-Making Power*, 22 AM. HIST. REV. 566 (1917)). According to Henkin, however, these scholars "represented a minority view." HENKIN, *supra* note 24, at 462 n.57.

35. In *Bond v. United States*, 134 S. Ct. 2077, 2098 & n.4 (2014), Justice Scalia noted that *Neely v. Henkel*, 180 U.S. 109, 121 (1901), and *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 619 (1842), respectively, "embraced" and "arguably favor[ed]" the rationale in *Holland*—albeit, in his view, "without reasoning." In contrast, in *Mayor of New Orleans v. United* States, 35 U.S. (10 Pet.) 662 (1836), the Court said that treaties may not expand the scope of the powers delegated by the Constitution to the federal government. Henkin suggests that "the basic principles of . . . *Holland* were laid down in the early years of the Republic." HENKIN, *supra* note 24, at 463 n.65 (citing Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796)).

36. 252 U.S. 416 (1920).

37. Act of Mar. 4, 1913, ch. 145, 37 Stat. 828, 847 (codified as amended at 16 U.S.C. § 673 (2012)).

38. 161 U.S. 519, 534 (1896).

39. United States v. McCullagh, 221 F. 288 (D. Kan. 1915); United States v. Shauver, 214 F.

Undeterred, the United States entered into a treaty with the United Kingdom, which, at the time, controlled Canadian territory. Migratory birds of value to both nations routinely traversed the border. The treaty thus required each nation to enact laws protecting migratory birds within their territories. Congress then enacted legislation substantially identical to the 1913 statute that two federal district courts had struck down[40]—but this time in the exercise of its Necessary and Proper Clause power to implement the treaty. Missouri brought suit claiming a Tenth Amendment violation. The Court therefore faced the core issue directly: may Congress legislate under the Necessary and Proper Clause to implement an Article II treaty if the implementing legislation might otherwise exceed Congress's enumerated powers,[41] intruding upon an area of law ordinarily reserved to the states by the Tenth Amendment?

Justice Holmes answered in the affirmative with characteristic eloquence and brevity. Whether he truly intended to offer arguments in the alternative, *Holland* has been read to supply at least two rationales for the Court's decision: one textual, the other functionalist or adaptivist. Much of the literature focuses on or presupposes the former (textual) rationale. Yet as we will see, it is implausible. We nonetheless explain and critique it briefly at the outset—in part because of its prominence in the literature but, more significantly, to situate it within the context of *Holland*'s actual, and far more compelling, rationale.

A. *The Textual Rationale*

The textual rationale seizes upon Holmes's self-evident observation that Article II of the Constitution delegates the whole treaty power to the federal government.[42] At first blush, Holmes thus seems to have supposed simply that any treaty, and any law made to implement a treaty, is by definition not reserved to the states. But that apparent argument rests on a semantic error. The Treaty Clause, which says that the President has "Power, by and with the Advice and Consent of the Senate, to make Treaties," is not a delegated power comparable to Congress's Article I, Section 8 delegated (enumerated) powers; rather, it is a *mode of exercising* power. It enables the federal government to make treaties to regulate international issues, including but not limited to trade, extradition, military alliances, borders, fishing and navigation rights, and

154 (E.D. Ark. 1914). These decisions have been thought to show that, before *Holland*, no one thought treaties could empower the federal government to act in realms otherwise reserved to the states. Not so. Before *Holland*, at least three district courts had sustained the Migratory Bird Treaty Act notwithstanding that substantially the same law might be constitutionally beyond federal power absent the treaty. *See* United States v. Thompson, 258 F. 257 (E.D. Ark. 1919); United States v. Rockefeller, 260 F. 346, 348 (D. Mont. 1919); United States v. Samples, 258 F. 479 (W.D. Miss. 1919); *see also Bond*, 134 S. Ct. at 2098 & n.4 (2014) (Scalia, J., concurring in the judgment) (citing two earlier Supreme Court opinions favorable to *Holland*).

40. Missouri v. Holland, 252 U.S. 416, 431 (1920).

41. Many have framed the issue posed by *Holland* solely in terms of Congress's Article I, Section 8 delegated powers. That is misleading, for it is not the question Holmes answered. The Constitution does not limit the federal government's delegated powers to those of Congress. Nor is there a "plausible reason to suppose that the treaty power can extend only to subjects within Congress's enumerated powers." Gary Lawson & Guy Seidman, *The Jeffersonian Treaty Clause*, 2006 U. ILL. L. REV. 1, 11.

42. *See Holland*, 252 U.S. at 432.

diplomatic relations. Unlike Congress's Article I, Section 8 powers, the text of Article II, Section 2 neither specifies nor limits the subjects about which treaties may be concluded.

Congress's legislative power, insofar as that refers to its power to make laws, is likewise properly understood as a *mode of exercising* the powers "herein granted,"[43] by Article I, Section 8 over enumerated subjects: regulating commerce, coining money, establishing post offices, making rules to govern the army, and so forth.[44] The Constitution does not say that Congress has the "power to make laws"; rather, it vests "[a]ll legislative Powers herein granted" in "a Congress of the United States."[45] Hence, the word "Power[]" in Article I, Section 1 is not semantically equivalent to "Power" in Article II, Section 2, Clause 2. When we speak of Congress's delegated powers, we typically mean the Article I, Section 8 "list" of enumerated powers, not Congress's authority to make laws about the items on that list. In short, the word "delegated" can be ambiguous and therefore misunderstood in this context. Were we to conceptualize the treaty and legislative modes as freestanding powers that the Constitution delegates to the federal government, then the Tenth Amendment, which reserves to the states those powers not delegated to the federal government, would limit the operation of *neither*. That construction would effectively read the Tenth Amendment out of the Constitution. It would have nothing on which to operate.

To avoid this absurd result, neither the legislative nor the treaty mode should be understood as a delegated power within the meaning of the Tenth Amendment. The textual rationale alone would not only sweep too broadly; it is simply implausible. The other, and far better, rationale, as Holmes surely recognized, would likely be characterized in modern constitutional theory as functionalist or adaptivist. Our analysis of *Holland* will focus on this dimension of its rationale—for despite, or perhaps because of, the perennial debate about Holmes's "cryptic" opinion,[46] it has not, we suggest, been correctly or fully understood in the literature.

B. *The Force of Functionalism and Adaptivism in* Holland

Holmes made short work of the facts in *Holland*, recounting them briefly only to remark that "it is enough that the bill is a reasonable and proper means to assert the alleged quasi sovereign rights of a State," for "the question raised is the general one whether the treaty and statute are void as an interference with the rights reserved to the States."[47] But after so posing the question, Holmes appropriately reframed it. The issue, he said, cannot be resolved simply by

43. U.S. CONST. art. I, § 1.

44. The Constitution does not, of course, delegate the power to make treaties to the states; it expressly prohibits them from exercising this mode of exercising power. *Id*. art. I, § 10, cl. 1. But delegating the treaty mode to the federal government—without enumerating (as Article I, Section 8 does for Congress) or otherwise indicating the scope of the *substantive* legal issues delegated—does not tell us which, if any, such substantive issues the Tenth Amendment might nonetheless reserve to the states.

45. *Id*. art. I, § 1.

46. *E.g*., Rosenkranz, *supra* note 7, at 295.

47. 252 U.S. at 431-32.

reference to the Tenth Amendment. That Amendment reserves to the states only what the Constitution does not delegate to the federal government—and yet Article II delegates the treaty power to the federal government. Holmes did not, however, rest his argument on this observation alone, which, as noted, would be misguided.

1. *How Holmes Framed the Constitutional Question—and Why*

It is nonetheless worth pausing here to emphasize how and why Holmes reframed the constitutional question as he did. Missouri had argued that the federal statute interfered with its Tenth Amendment right to regulate migratory birds within its territory—not to make treaties.[48] That is, of course, exactly as one would have expected. After all, the Court had previously characterized this right as an aspect of "the undoubted existence in the state of a police power."[49] And just one year before *Holland*, in *Carey v. South Dakota*, the Court had applied the interpretive canon of constitutional avoidance[50] to avoid deciding the constitutionality under the Tenth Amendment of the *pre*-treaty 1913 Migratory Bird Act relative to a state law that regulated the shipping of migratory birds. Justice Brandeis, speaking for the Court, construed the 1913 Act narrowly, sidestepping the federalism issue and reiterating essentially what the Court had said in *Geer*: "a state has exclusive power to control wild game within its borders, and the South Dakota law was valid when enacted, although it incidentally affected interstate commerce."[51] The Missouri law at issue in *Holland* also did not affect interstate commerce more than incidentally, for the Court construed the Commerce Clause more narrowly at the time. Missouri therefore had every reason to conclude that the Tenth Amendment reserved to it the right to regulate migratory birds, free from federal interference.

But Justice Holmes correctly reoriented the analysis to focus on the true—and constitutionally distinct—question. Rather than asking whether the Tenth Amendment reserves to the states *power over the subject* of the legislation (migratory birds), the question raised in *Geer* and *Carey*, he observed that the Amendment does not, of course, reserve to the states the *power to make treaties*. To the contrary, the Constitution expressly delegates that power to the federal government and denies it to the states.[52] That was and is uncontroversial. It is not the gravamen of Holmes's rationale, as noted in the preceding Section. Yet it enabled him to clarify an indispensable point: that the "question before us is narrowed to an inquiry into the ground upon which the present supposed *exception* is placed."[53]

Holmes clarified, in other words, that the appropriate way to frame the constitutional question in *Holland*, in contrast to *Carey* and *Geer*, is not to ask

48. *See* Missouri v. Holland, 252 U.S. 416, 431 (1920).

49. Geer v. Connecticut*,* 161 U.S. 519, 534 (1896).

50. Carey v. South Dakota, 250 U.S. 118, 122 (1919) ("Where a statute is reasonably susceptible of two interpretations, by one of which it would be clearly constitutional and by the other of which its constitutionality would be doubtful, the former construction should be adopted.").

51. *Id*. at 120.

52. U.S. CONST. art. I, § 10; *id*. art. II, § 2.

53. 252 U.S. at 432 (emphasis added).

whether the treaty power calls for an exception to the Tenth Amendment but the converse: whether the Tenth Amendment compels an exception to the federal government's otherwise plenary power to make treaties. Recall in this regard that the federal government's power to make treaties, unlike Congress's power to make laws, is not textually limited to enumerated subjects. That is why, as Holmes thereafter emphasized, "[w]hether the two cases [striking down on Tenth Amendment grounds the earlier federal law regulating migratory birds] were decided rightly or not[,] they cannot be accepted *as a test of the treaty power*."[54] As he remarked in a critical but often misunderstood sentence, "[i]f the treaty is valid there can be no dispute [under the Tenth Amendment] about the validity of the statute under Article 1, Section 8, as a necessary and proper means to execute the powers of the Government."[55] *Holland* therefore focused on the Tenth Amendment validity of the *treaty*—and only derivatively on its implementing legislation.

Holland, Holmes continued, raised an issue quite distinct from those in *Geer*, *Carey*, and the two federal district court decisions that had struck down the earlier 1913 Migratory Bird Act—namely, whether the Tenth Amendment compels an exception to the otherwise (textually) plenary federal power to make treaties. The Court held that it does not. Holmes's rationale for this conclusion is worth quoting here at length:

> It is said that a treaty cannot be valid if it infringes the Constitution, that there are limits, therefore, to the treaty-making power, and that one such limit is that what an act of Congress could not do unaided, in derogation of the powers reserved to the States, a treaty cannot do. . . .
>
> [But] that cannot be accepted as a test of the treaty power [under the Tenth Amendment]. We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way. It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, ''a power which must belong to and somewhere reside in every civilized government'' is not to be found. . . . What was said in that case with regard to the powers of the States applies with equal force to the powers of the nation in cases where the States individually are incompetent to act. . . . [W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not

54. *Id*. at 433 (emphasis added).

55. *Id*. at 432. This sentence has caused needless confusion and often been criticized, most recently by Justice Scalia's characterization of it as "unreasoned and citation-less." Bond v. United States, 134 S. Ct. 2077, 2098 (2014) (Scalia, J., concurring in the judgment); *cf*. Bradley, *supra* note 33, at 424 (speculating about this sentence's interpretation). In context, it is clear that Holmes meant only to refer to the Tenth Amendment validity of the legislation, that is, valid in the sense of necessary and proper despite otherwise potentially applicable federalism limits. Legislation to implement a treaty may, of course, be invalid for many reasons that have nothing to do with the Tenth Amendment. It might, for example, bear an insufficiently rational relationship to the treaty under the Necessary and Proper Clause or abrogate express individual rights. *See* Boos v. Barry, 485 U.S. 312 (1988); Reid v. Covert, 354 U.S. 1 (1957). Holmes did not—because nothing in *Holland* required him to—speculate about such other arguable "qualifications to the treaty-making power." 252 U.S. at 432.

> merely in that of what was said a hundred years ago. The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment. We must consider what this country has become in deciding what that Amendment has reserved.[56]

2. Holland*'s Functionalist Rationale*

This quotation has become famous, not only for its significance to *Holland*'s rationale but also because it captures a particular, albeit controversial, view of political theory, judicial interpretation, and the relevance of history to constitutional adjudication. Were it adopted generally, it would exert an especially forceful influence on the broader field of foreign affairs law, which frequently invokes history, practice, tradition, and similar non-textual considerations. It is also essential to understanding what *Holland* necessarily held—and why *Bond* and *Holland* cannot be reconciled. So at the risk of belaboring *Holland*'s analysis, it is instructive to consider this passage in greater depth.

Holmes began with the proposition that the treaty power is not just an alternative method by which the federal government may exercise in the international sphere the same congressional powers enumerated in Article I, Section 8; rather, Article II, Section 2, the treaty power, is a separate and independent *source* of federal lawmaking power. It both complements and augments Congress's enumerated powers. The Treaty Clause gives the federal government—in particular, the "treaty-makers,"[57] viz., the President plus two-thirds of the Senate[58]—the power to make national law by international means: "It is obvious," Holmes wrote, "that there may be matters of the sharpest exigency that an act of Congress could not deal with but that a treaty followed by such an act could."[59]

For *Holland*'s critics, of course, it was, and is, not at all obvious. But Holmes did not believe that the Framers, with the experience under the Articles fresh in their minds, created a Constitution that would disable the United States as a nation from exercising the same powers as other nations, including the power to make internationally lawful treaties. International law, of course, does not place federalism constraints on treaties; and it is definitional of a nation that it has full capacity to enter into relations with other nations.[60] The Constitution *itself*, for Holmes, established a fully empowered and functional nation. That is why, as he concluded, this authority must be found somewhere in the nation's government.[61] Yet in the federalist structure of the United States, it does not

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56. *Holland*, 252 U.S. at 432-34 (citations omitted).

57. *See generally* HENKIN, *supra* note 24, at 175-214.

58. U.S. CONST. art. II, § 2, cl. 2.

59. *Holland*, 252 U.S. at 433.

60. *See, e.g.*, Montevideo Convention on the Rights and Duties of States art. 1, Dec. 26, 1933, 165 L.N.T.S. 19.

61. This conclusion might at first seem redolent of Justice Sutherland's notoriously problematic theory in *United States v. Curtiss-Wright Export Co.*, 299 U.S. 304 (1936)—viz., that sovereignty provides the federal government, and in particular, in Sutherland's view, the President, with an extra-Constitutional source of power—although *Curtiss-Wright* postdates *Holland*. Yet Holmes clearly meant to interpret the Constitution *itself*. Nothing in *Holland* suggests any dubious thesis about

reside in the states. Nor could it. The national experience under the Articles established as much. And the nation's history and experience since 1789, especially the Civil War (in which Holmes fought and to which he alluded in *Holland*) put any residual doubts on this issue to rest.

Not coincidentally, Holmes's reference to "matters of the sharpest exigency for the national well being" echoes Marshall's proclamation in *McCulloch v. Maryland*. The Treaty Clause, like the Necessary and Proper Clause, is part of

> a constitution, intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur.[62]

Marshall's words aptly capture Holmes's answer to the question of the appropriate test, as he put it, of the treaty power. Given the "character of the [Constitution]," the treaty power's scope and limits were not frozen for all time by "immutable rules," which the Constitution set out in 1789. It is not accidental that the Article II power to make treaties, unlike Congress's Article I power to make laws, does not enumerate an exclusive list of allowable subjects for treaties. The treaty power must be sufficiently flexible to adapt to the exigencies of governing a nation "for ages to come."[63] It must be robust enough to handle crises "which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur."[64]

3. *The Andrews Analogy*

Holmes's reference to *Andrews v. Andrews*[65] is far more significant in this regard than scholars have recognized. It clarifies the nature and force of *Holland*'s rationale. A routine estate dispute in Massachusetts, *Andrews* may at first seem to be no more than a convenient source for a poignant quotation. It reached the Supreme Court only because the plaintiff invoked the Full Faith and Credit Clause,[66] injecting a federal question into an otherwise quintessential state-law dispute in which the decedent's ex-wife and second wife each sought appointment as administratrix of his estate. The local issues in *Andrews* scarcely seem relevant to the international issues in *Holland*.

Yet *Andrews* clarifies *Holland*'s functional rationale. While Holmes did not offer details about the case, his remark on it is informative: "What was said

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extraconstitutional foreign-affairs powers. *See* Michael D. Ramsey, *The Myth of Extraconstitutional Foreign Affairs Power*, 42 WM. & MARY L. REV. 379 (2000).

62. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819); *see also* THE FEDERALIST No. 23, at 147 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

63. *McCulloch*, 17 U.S. (4 Wheat.) at 415.

64. *Id*.

65. 188 U.S. 14, 33 (1903), *abrogated by* Sherrer v. Sherrer, 334 U.S. 343 (1948). *Sherrer*'s abrogation of *Andrews* does not affect how the latter informs the rationale in *Holland*: What matters is Justice White's rationale and his constitutional methodology, not the validity of his conclusion.

66. U.S. CONST. art. IV, § 1.

in [*Andrews*] with regard to the powers of the States applies with equal force to the powers of the nation in cases where the States individually are incompetent to act."[67] The gravamen of Justice White's opinion for the Court in *Andrews* was that the Constitution established a functional *nation*. It should therefore be construed, in the event of ambiguity or uncertainty, to effectively lodge every legal power indispensable to a well-ordered nation in *a* government, state or federal, of that nation. Understanding *Andrews*'s relevance to *Holland* requires a brief review of the former's facts.

Charles Andrews sought to divorce his first wife, Kate. But the law of his domicile, Massachusetts, disallowed it. He therefore moved to South Dakota for the short period of time needed to establish residence, secured a divorce decree in South Dakota state court, and then returned to Massachusetts. A year later, he married his second wife, Annie. When he died five years later, Annie and Kate each claimed the right to administer his estate. The trial court, while observing that Kate had unscrupulously "connived at and acquiesced in the South Dakota divorce decree," found that she nonetheless retained the "right to administer his estate as his lawful widow,"[68] for Massachusetts law prohibited Charles's conduct and directed its courts not to recognize the South Dakota divorce decree.[69] Because that decree could not be enforced in Massachusetts, Kate remained the decedent's lawful spouse and administratrix of his estate. Annie countered that the Full Faith and Credit Clause preempted Massachusetts state law and compelled its courts to enforce the decree, making her, not Kate, the administratrix.

Andrews's relevance can now be fully appreciated. In the United States of 1903, legally codified cultural norms conceived of marriage as a vital social institution. *Andrews*, citing earlier decisions, went so far as to describe marriage as "an essential attribute of government . . . upon which the *existence* of civilized society depends."[70] The Constitution does not, obviously, delegate power over marriage to the federal government; it is a power reserved to the states. But just as in *Holland* applying the treaty power despite what might ordinarily be Tenth Amendment reserved rights over the legal regulation of migratory birds generated a conundrum, so too, in *Andrews*, did applying the Full Faith and Credit Clause to the reserved authority of the states over marriage. The Constitution apparently required Massachusetts to give full faith and credit to, and hence enforce, the very divorce decree that its own law prohibited. One law or the other, state or federal, had to yield.

A formal reading of the Constitution would have required that federal law prevail: A decree rendered in one state must be given full faith and credit in the courts of every other.[71] The Constitution therefore seemed to require Massachusetts to enforce the South Dakota divorce decree in its courts even though its own state law prohibited just that. But the *Andrews* Court reasoned that so applying the Full Faith and Credit Clause to marriage would effectively

67. Missouri v. Holland, 252 U.S. 416, 433 (1920).
68. *Andrews*, 188 U.S. at 17.
69. *Id*. at 29.
70. *Id*. at 30-31 (emphasis added).
71. U.S. CONST. art. IV, § 1.

deprive the domiciliary state of its reserved right under the Tenth Amendment to regulate marriage: a citizen of one state could evade its marriage laws, as did Charles, by the expedient of residing briefly in another state with lax marriage laws, obtaining a divorce decree there, returning to his domicile, and then enforcing the out-of-state decree in its courts—notwithstanding any domiciliary state law to the contrary, which the Constitution would preempt.

Justice White declined to construe the Constitution to require this dysfunctional result. Because, he noted, the Full Faith and Credit Clause could divest the states of their reserved right to regulate marriage, and yet the Constitution does not delegate that power to the federal government, it would result that, in practice, *neither* the states *nor* the federal government could effectively regulate marriage—a social institution "upon which the existence of civilized society depends," and further, one which "ha[d] always been subject to the control of the [state] legislature."[72] To interpret the Constitution in *Andrews* to nullify Massachusetts state marital law would therefore be to prioritize form over substance. It would "presuppos[e] that the determination of what powers are reserved and what delegated by the Constitution is to be ascertained by a blind adherence to mere form, in disregard of the substance of things. But the settled rule is directly to the contrary."[73] The Court concluded that it would be untenable to interpret the Constitution to "destroy"—that is, to deprive government in the aggregate (state *and* federal) of—the effective legal power to regulate marriage, a social institution indispensable to government.[74]

The same principle, Holmes reasoned in *Holland*, applies, *mutatis mutandis*, to the treaty power. It would be untenable to construe the Constitution to deprive the federal government of the power to make and implement treaties indispensable to the nation the Constitution established "for ages to come."[75] Treaties, like the social institution of marriage during the *Andrews* era, are "an essential attribute of government."[76] To insist that the treaty power cannot be exercised if the subject would otherwise be reserved to the states would be to render an important class of treaties beyond the authority of *any* government of the United States—state or federal. For it would be implausible to suppose that treaties could be coordinated and enforced uniformly by the states. The treaty power is among the "powers of the nation . . . where the States individually are incompetent to act."[77]

Holland, in brief, applied the constitutional logic of *Andrews*—viz., to oversimplify somewhat, that the Court should construe tensions in the text to enable the Constitution to function effectively given evolving national interests and needs—to a converse situation in terms of whether, functionally, federal or state law should prevail: in *Andrews*, that logic prioritized state law; in *Holland*, federal. But the principle in each case is the same: a contrary holding

72. *Andrews*, 188 U.S. at 30.

73. *Id*. at 33.

74. *Id*. ("This would be but to declare that, in a necessary aspect, government had been destroyed by the adoption of the Constitution."); *cf*. Missouri v. Holland, 252 U.S. 416, 435 (1920).

75. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819).

76. *Andrews*, 188 U.S. at 31.

77. *Holland*, 252 U.S. at 433.

would interpret the Constitution to deprive government (in the aggregate, state and federal) of power to regulate "a subject . . . upon which the existence of civilized society depends,"[78] a power indispensable to the nation's "well being,"[79] and perhaps even to its "existence."[80] Neither Justice White nor Justice Holmes thought a sound interpretation of the Constitution, which *establishes* the United States as a nation, compels a conclusion that *disempowers and diminishes* that nation.

C. *An Anachronism?*

The preservation of migratory birds may not strike the modern reader as a "national interest of very nearly the first magnitude."[81] Nor would many citizens today describe the social institution of marriage as indispensable to the "existence" of civilized society.[82] But it would be mistaken to dismiss the logic of these cases as anachronistic. At the time of *Holland*, migratory birds were, the Court emphasized, a crucial "food supply" and "protectors of our forests and our crops."[83] The federal government's need to prevent their extinction by entering into a treaty—after lower courts had struck down its earlier effort to accomplish the same objective through the use of Congress's Article I powers alone—is itself evidence of just how important this national interest was at the time. And whatever the truth of Justice Holmes's characterization of the need to protect migratory birds, or of Justice White's description of marriage, the principle advanced in both cases is no less forceful: the Constitution need not and should not be read to disable government (again, understood in the aggregate, federal *and* state) from legislating effectively on matters of national significance.

Holmes stressed in *Holland* that a vital national interest could "be protected *only* by national action in concert with that of another power."[84] Without the doctrine established in *Holland*, such vital national interests, then as now, would be beyond the power of the United States to safeguard and promote. That is the gravamen of Holmes's argument: *a Constitution intended to function effectively for the ages and to adapt to the exigencies of a constantly evolving nation should not be read to deny government the power to protect indispensable interests of the nation it constitutes.*[85]

As we will see in Part V, despite its relatively modest influence in the past century, contemporary international law and dramatic changes in the

78. *Andrews*, 188 U.S. at 31.

79. *Holland*, 252 U.S. at 433.

80. *Andrews*, 188 U.S. at 31; *cf. Holland*, 252 U.S. at 435.

81. *Holland*, 252 U.S. at 435.

82. On the other hand, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), suggests that citizens continue to perceive marriage as a critical social institution.

83. *Holland*, 252 U.S. at 435.

84. *Id*. (emphasis added).

85. Holmes did not argue that "need implies power," a dangerously illiberal argument. He accepted that the Constitution limits as well as empowers government, and he suggested that limits on the treaty power exist. He denied, however, that those limits were properly to be ascertained simply by checking the list of Congress's enumerated powers. Again, there is no "plausible reason to suppose that the treaty power can extend only to subjects within Congress's enumerated powers." Lawson & Seidman, *supra* note 41, at 11.

global legal order mean that *Holland*'s reconciliation of the treaty power with federalism remains even more vital to the national interest today. Only that reconciliation enables the Constitution to endure in this regard and to "adapt[] to the various *crises* of human affairs" we face in the twenty-first century.[86] Given the consensus that *Bond* did not overrule or substantially modify *Holland*'s core doctrine, however, why is there cause for concern? Because, as we explain in the next part, the consensus is wrong: *Bond* eviscerated *Holland*.

III. HOW *BOND* HOBBLED *HOLLAND*

In 2014, the Supreme Court granted certiorari to review *United States v. Bond*,[87] which squarely posed the issue in *Holland* for the first time in nearly a century. The *film noir* facts of the case generated no few chuckles. In 1997, the United States ratified the Convention on Chemical Weapons (CWC or Convention).[88] It requires the parties to prohibit certain activities set forth in the Convention, including by "enacting penal legislation."[89] The prohibited activities include the development, possession, or use of chemical weapons, which the CWC defines as "[t]oxic chemicals and their precursors," which, in turn, it defines broadly as "[a]ny chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals. This includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere."[90] Congress implemented the CWC in 1998.[91] The CWC Implementation Act, modeled closely on the Convention's language, made it a federal crime to develop, possess, or use chemical weapons.[92]

In 2006, Carol Anne Bond, a microbiologist, discovered that her friend Myrlinda Haynes was pregnant by Bond's husband. Seeking revenge, Bond stole toxic chemicals from her employer and ordered others on the Internet. On at least twenty-four occasions between November 2006 and June 2007, she spread these chemicals on Haynes's car door, mailbox, and doorknob. Bond did not intend to kill Haynes; rather, she "hoped that Haynes would touch the chemicals and develop an uncomfortable rash."[93] Because the chemicals were readily noticeable, however, Haynes avoided them except on one occasion, when she suffered a minor burn to her thumb. Haynes repeatedly reported Bond's conduct to the police. Eventually, they referred her reports to the postal service, which set up surveillance and filmed Bond stealing from Haynes's mailbox and stuffing chemicals into her car muffler.

Federal prosecutors indicted Bond for mail theft and—perhaps because

86. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819).

87. 681 F.3d 149, 149-70 (3d Cir. 2012).

88. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, *opened for signature* Jan. 13, 1993, 1974 U.N.T.S. 317.

89. *Id*. art. VII.

90. *Id*. art. II.

91. Bond v. United States, 134 S. Ct. 2077, 2083 (2014).

92. *Id*. at 2085.

93. *Id*.

this charge alone failed to capture the seriousness of Bond's attempted assaults—also for a violation of 18 U.S.C. § 229, the main criminal provision of the Act. Bond moved to dismiss this charge on two grounds. First, while conceding that her conduct could not technically be characterized as a statutorily exempt "peaceful purpose[],"[94] she argued that this exemption implied that the Act should not be read to reach non-"warlike" conduct. Second, she argued that, if it did, the Act "exceeded Congress's enumerated powers and invaded powers reserved to the States by the Tenth Amendment."[95] The Third Circuit rejected her arguments, relying, in the latter case, on *Holland* to sustain section 229 as "necessary and proper to carry the [CWC] into effect."[96]

A. *The Court's Attempt to Sidestep* Holland

Because the federal government disavowed reliance on the Commerce Clause as the basis for section 229,[97] leaving implementation of the CWC through the Necessary and Proper Clause as the statute's only potential constitutional basis, *Bond* offered the Court an opportunity, were it so inclined, to overrule *Holland*. But the majority did not seem so inclined. It instead chose to decide the case on statutory grounds, thereby avoiding—or so it thought—the need to revisit the constitutional issue it had decided in *Holland*. And since the Court's decision, a consensus has indeed emerged that, for better or worse, the *Bond* Court successfully elided *Holland* and managed to leave its core holding undisturbed.[98]

According to this now-orthodox view, the Court dodged the issue in *Holland* by applying the canon of constitutional avoidance and resolving *Bond* on statutory grounds alone. That is, in fact, not only the consensus among commentators; it is how all of the Justices evidently understood the majority opinion, written by Chief Justice Roberts and joined by Justices Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan. Justices Scalia, Thomas, and Alito, who concurred in the judgment despite vehement disagreement with the majority opinion, nonetheless understood it as the majority did.[99]

The Supreme Court, so this reading of the case continues, essentially embraced the statutory interpretation of the Act that the Third Circuit had rejected.[100] Avoiding consideration of the Tenth Amendment's interaction with

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94. *Id*. at 2086.

95. *Id*.

96. *Bond*, 681 F.3d 149, 162 (3d Cir. 2012).

97. *See id*. at 168-69.

98. To the best of our knowledge, all commentary on *Bond* to date takes this position. *See supra* note 7. For earlier media commentary, see, among many other examples, Adam Liptak, *Chemical Weapons Treaty Does Not Apply to Petty Crime, Justices Rule*, N.Y. TIMES, June 3, 2014, at A13, and Ronald J. Bettauer, *Supreme Court Limits Holding in Bond, Not Reaching Constitutional Treaty Implementation Authority*, AM. SOC'Y INT'L L. INSIGHTS (June 25, 2014), http://www.asil.org/insights/volume/18/issue/14/supreme-court-limits-holding-bond-not-reaching-constitutional-treaty.

99. *See Bond*, 134 S. Ct. at 2094-97 (Scalia, J., concurring in the judgment). Justices Thomas and Alito adopted Justice Scalia's analysis in this regard. *See id*. at 2102 (Thomas, J., concurring in the judgment); *id*. at 2111 (Alito, J., concurring in the judgment).

100. The Third Circuit, like the concurring Supreme Court Justices, concluded that the constitutional question could not be avoided because "while one may well question whether Congress

the Treaty Clause, the Court read the Act narrowly such that it did not need to revisit *Holland*: Roberts found it implausible to construe the Act as criminalizing Bond's pedestrian efforts at revenge for marital infidelity. Congress enacted the Act, Roberts concluded, to implement the CWC's ban on chemical *weapons*—not, as he colorfully wrote, to define chemical weapons so broadly as to "sweep in everything from the detergent under the kitchen sink to the stain remover in the laundry room" or to "make[] it a federal offense to poison goldfish."[101]

In short, by construing the Act's text narrowly and inferring that Congress did not intend to criminalize conduct such as Bond's, the majority rendered section 229 unobjectionable from a federalism perspective. The Court concluded that the Act simply did not reach any conduct vouchsafed to the states by the Tenth Amendment. Roberts thereby obviated any need for the Court to decide whether the Act—*if* it were interpreted to sweep more broadly, and *if* it were found to intrude upon traditional state functions absent a treaty—could nonetheless be constitutionally sustained as necessary and proper to implement the CWC under the doctrine it had adopted in *Holland*.

A cursory reading of the majority opinion indeed seems to bear out this view of the majority opinion and therefore to minimize *Bond*'s import. Roberts summarized the potential stakes in the *Holland* debate only to dismiss it as needless to resolve *Bond*.[102] He began with the canon of constitutional avoidance: that, as a rule, "the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case."[103] Consequently, he considered whether a non-constitutional ground to resolve *Bond* existed and concluded that Bond's statutory argument—that the Act, properly interpreted, did not reach her misconduct—supplied a sound one.

Despite the Act's facially broad language, Roberts found "no reason to think the sovereign nations that ratified the Convention were interested in anything like Bond's common law assault"; and at any rate, "nothing prevents Congress from implementing the Convention in the same manner it legislates with respect to innumerable other matters—observing the Constitution's division of responsibility between sovereigns and leaving the prosecution of purely local crimes to the States."[104] The gravamen of Roberts's argument is therefore clear: The Act excludes Bond's conduct because the correct statutory construction of section 229, the one consistent with its text and Congress's presumed intent, renders it inapplicable to "purely local crimes."[105]

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envisioned the Act being applied in a case like this, the language itself does cover Bond's criminal conduct. . . . [T]he statute speaks with sufficient certainty that we feel compelled to consider the hard question presented in this appeal." *Bond*, 681 F.3d at 155.

101. *Bond*, 134 S. Ct. at 2091. The majority concluded that "[t]here is no reason to suppose that Congress—in implementing the Convention on Chemical Weapons—thought" that "the global need to prevent chemical warfare [requires] the Federal Government to reach into the kitchen cupboard, or to treat a local assault with a chemical irritant as the deployment of a chemical weapon." *Id*. at 2093.

102. *See id*. at 2087.

103. *Id*.

104. *Id*.

105. *Id*. at 2090.

B. *Why the Court's Attempt to Sidestep* Holland *Failed*

1. *The Neglect of* Holland*'s Own Federalism Principles*

Despite the Court's efforts, a close analysis of *Bond* reveals that it failed to sidestep the constitutional issues in *Holland* for at least three related reasons, summarized here and further elaborated below.

First, recall that after citing the canon of constitutional avoidance, the Court proceeded from the premise that it "[f]ortunately [had] no need to interpret the scope of the Convention . . . . Bond was prosecuted under [section 229], and the statute—unlike the Convention—must be read consistent with principles of federalism inherent in our constitutional structure."[106] So framed by the Court, this premise is mistaken. To be sure, it is conceivable that this quotation reflects no more than ill-considered language. But the balance of the majority opinion suggests otherwise, and it is difficult to reconcile this statement with *Holland.* If the majority meant that treaty-implementing legislation must be read "consistent with" the *same* "principles of federalism inherent in our constitutional structure" as those that apply to legislation that does not implement a treaty, that proposition is manifestly inconsistent with *Holland*.[107] Whatever else *Holland* held, there can be no question that it distinguished between federalism constraints on laws that do and do not implement treaties.

Second, the same quotation reflects the Court's struggle to avoid revisiting *Holland*. If we assume, as did every member of the Court, that the majority succeeded, then *Holland* remains good law and binding precedent. That, in turn, means that "principles of federalism inherent in our constitutional structure," as authoritatively interpreted by the Court itself, do not *conflict* with *Holland*'s doctrine; they *incorporate* it. *Holland*'s resolution of the tension between the treaty power and the Tenth Amendment, in other words, is among the "principles of federalism inherent in our constitutional structure." It is also among the federalism principles that the Court invoked and therefore should have applied when it enlisted the constitutional avoidance canon in support of its resolution of section 229's perceived ambiguity. Yet the *Bond* Court did not—as *stare decisis* and respect for precedent generally require—adhere to *Holland*'s conclusion about federalism principles in the context of a treaty-implementing statute.

Third, *Holland* held that a treaty and its implementing legislation must be appraised together under the Tenth Amendment; if the treaty is valid in this regard, so too is its implementing legislation. *Bond* proceeded from the contrary premise that the "statute—unlike the [treaty]—must be read consistent with principles of federalism inherent in our constitutional structure."[108] The

106. *See id*. at 2088.

107. Had *Holland* truly been treated as good law by the majority, the Act at issue in *Bond* would not have presented an ordinary case of statutory interpretation—to be resolved in conformity with the same federalism principles that apply to a statute that does not implement a treaty. *Bond* mistakenly applied the same methodology as the federal district courts that had appraised the 1916 Migratory Bird Treaty Act *before* the Court's decision in *Holland*.

108. *Bond*, 134 S. Ct. at 2088.

majority further reasoned that "nothing prevents Congress from implementing the Convention in the same manner it legislates with respect to innumerable other matters—observing the Constitution's division of responsibility between sovereigns and leaving the prosecution of purely local crimes to the States."[109] The majority's assertion would ordinarily be unobjectionable. Nations frame multilateral treaties in terms that enable them to implement international legal obligations so as not to violate internal laws. *Bond*'s conflict with *Holland* in this regard arises because the majority's premise—viz., that legislation to implement treaties must comply with the *same* federalism principles as apply to legislation that does not—directly contravenes *Holland*. Were that so, a treaty and its implementing legislation could be assessed independently under the Tenth Amendment, notwithstanding *Holland*'s insistence to the contrary, viz., that a treaty's validity vis-à-vis federalism renders its implementing legislation valid under the Tenth Amendment—as necessary and proper to implement the treaty.[110]

2. Holland*'s Uniform Standard: Treaties and Implementing Legislation*

Each prong of the majority's analysis depended ineluctably on the last of these flawed reasons—never acknowledged as such, still less justified—namely, that the implementing legislation (the Act) and the treaty it implements (the CWC) may be appraised independently under the Tenth Amendment. Introducing the balance of the majority's analysis, Roberts thus wrote that "the statute—unlike the Convention—must be read consistent with principles of federalism inherent in our constitutional structure."[111] Under *Holland*, that's wrong. The validity of the CWC and the Act must be assessed together; logically, the two are inextricably linked. *Holland* held, among other things, that under the Tenth Amendment, if the treaty is constitutionally valid, so is its implementing legislation; if the treaty is not, neither is its implementing legislation. Roberts could interpret the Act not to reach purely local crimes only by neglecting, indeed subverting, this essential premise of *Holland*: *The constitutional validity of an Article II treaty determines the validity under the Tenth Amendment of its implementing legislation.*

Holmes could not have made this more explicit: "If the *treaty* is valid, there can be no dispute about the [Tenth Amendment] validity of the statute under Article I, Section 8, as a necessary and proper means to execute the powers of the Government."[112] That is why, recall, Holmes recast the constitutional question in *Holland* to focus on the *treaty*'s validity rather than that of the implementing legislation: "The language of the Constitution as to the supremacy of *treaties* being general, the question before us is narrowed to an inquiry into the ground upon which the present supposed *exception* [to the

109. *Id*. at 2087.
110. *See* 252 U.S. 416, 432 (1920).
111. *Bond*, 134 S. Ct. at 2088.
112. *Holland*, 252 U.S. at 432 (emphasis added).

treaty power] is placed."[113] Recall, too, that by "exception," Holmes meant exception to the treaty power based on the Tenth Amendment, not exception to the Necessary and Proper Clause.[114] In other words, the Tenth Amendment validity of the implementing legislation is derivative of and determined by the Tenth Amendment validity of the treaty.[115] That is why Holmes could conclude without hesitation that the holdings of the two federal district courts striking down similar laws—laws that did *not*, however, implement a treaty—were irrelevant to the real issue in *Holland*. In contrast, *Carey v. South Dakota*,[116] which found the 1913 Migratory Bird Act unconstitutional, did not raise the "test of the treaty power"[117] at issue in *Holland*. Holmes accordingly prioritized analysis of the *treaty*. He assessed the validity of the treaty, not its implementing legislation, in light of the Tenth Amendment.

Holland therefore began with the text of the 1916 treaty between the United States and the United Kingdom concerning the preservation of migratory birds. It "provided . . . that the two powers would take or propose to their lawmaking bodies the necessary measures for carrying the treaty out."[118] Those measures, the implementing legislation challenged by Missouri, were passed "to give effect to the convention."[119] For the *Holland* Court, however, the validity of that convention, not its implementing legislation, determined the Tenth Amendment's relevance *vel non*.

After reframing the question, appropriately, as an "inquiry into the ground upon which the present supposed exception [to the treaty power based

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113. *Id*. (emphasis added).

114. As part of the resurgence of federalism in the 1980s and 1990s, the Supreme Court established federalism limits on the Necessary and Proper Clause itself. It is therefore arguable that, even before *Bond*, these limits abrogated *Holland*'s holding that the treaty power enables Congress to regulate some subjects beyond those enumerated in Article I, Section 8 (or delegated elsewhere to the federal government). Principles of federalism now apply also, and directly, to limit the ambit of the Necessary and Proper Clause, U.S. CONST. art. I, § 8, cl. 18. *See, e.g*., Printz v. United States, 521 U.S. 898, 924 (1997) (finding that a federal law that "violates the principle of state sovereignty" can never be necessary and proper to execute Congress's powers); New York v. United States, 505 U.S. 144, 160-62 (1992) (holding that although the federal government had the power to regulate the radioactive waste at issue, the Tenth Amendment limited the *means* by which it could do so because federalism limits the Necessary and Proper Clause itself); *accord* Nat'l Fed. of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2592 (2012); Alden v. Maine, 527 U.S. 706, 728-29 (1999). Because federalism now directly constrains the Necessary and Proper Clause vis-à-vis Article I, it is technically an open question (especially bearing in mind that this body of case law postdates *Holland* by decades) whether the same constraints apply to legislation necessary and proper to implement an otherwise valid treaty. In other words, do federalism limits on the Necessary and Proper Clause in the context of Congress's Article I enumerated powers *alone* apply equally to Congress's powers to implement a treaty concluded by the President and Senate under Article II? In our view, the arguments advanced in this Article in support of *Holland*'s analysis of putative Tenth Amendment limits on Congress's *substantive* enumerated powers to effectuate a treaty apply with equal force to the limits now imposed by the Court on the *means* at Congress's disposal under the Necessary and Proper Clause. The logic of *Holland* does not depend in any obvious way on such a means-ends distinction. But it is conceivable that the prohibition on commandeering state political institutions, for example, might apply to a statute that would otherwise be necessary and proper to implement a treaty.

115. Again, implementing legislation might, of course, be unconstitutional for other reasons, such as a violation of the Bill of Rights. *E.g*., Reid v. Covert, 354 U.S. 1, 16 (1957). *Holland* involved only its constitutionality under the Tenth Amendment. Holmes did not consider issues like prosecutorial discretion (surely a question in *Bond*) or the Necessary and Proper Clause's rational basis requirement.

116. Carey v. South Dakota, 250 U.S. 118 (1919).

117. *Holland*, 252 U.S. at 432.

118. *Id*. at 431.

119. *Id*.

on the Tenth Amendment] is placed,"[120] Holmes thus considered the state's principal argument: that "a *treaty* cannot be valid if it infringes the Constitution," in particular federalism limits, and that "what an act of Congress could not do unaided, in derogation of the powers reserved to the States, a *treaty* cannot do."[121] This is the core argument—an argument that turns on the *treaty's* validity—that *Holland* considered and rejected: "The treaty in question," Holmes reasoned, not the implementing legislation, "does not contravene any prohibitory words to be found in the Constitution."[122] He also recognized that "but for the treaty," not the implementing legislation, "the State would be free to regulate this subject itself."[123] Consequently, he concluded, "the *treaty* and statute must be upheld."[124]

3. *The Unavoidable Conflict Between Holland and Bond*

Now reconsider *Bond*. The justices took the constitutional validity of the treaty for granted.[125] They did not question that the CWC involves "a national interest of very nearly the first magnitude," deals with an issue as to which "the States individually are incompetent to act," or requires "action in concert" with other nations.[126] In short, they did not regard the CWC's constitutionality as the relevant issue. Here again, the *Bond* Court's abandonment of *Holland* emerges clearly in Roberts's proclamation that the Court had "no need to interpret the scope of the Convention" because *Bond* was prosecuted under [section 229], and the statute—unlike the Convention—must be read consistent with principles of federalism inherent in our constitutional structure."[127]

These words, and the balance of the analysis predicated upon them, mark a dramatic departure from *Holland*. The *Holland* defendants, too, were prosecuted under a law that Congress had enacted to implement a treaty. Unlike the *Bond* Court, however, the *Holland* Court did not state or imply that this law "must be read consistent with principles of federalism inherent in our constitutional structure."[128] Justice Holmes held to the contrary that, for Tenth Amendment purposes, a valid treaty renders generic "principles of federalism inherent in our constitutional structure" nugatory as putative limits on congressional power to implement that treaty. Assuming it to be, as both Chief Justice Roberts and Justice Holmes did, an otherwise constitutional treaty, *Holland* thus held *immaterial* the very same canon of statutory construction that *Bond* held *mandatory*. Stated otherwise, in the context of treaty-implementing legislation, Holmes characterized *Bond*'s "principles of federalism inherent in our constitutional structure" as an irrelevant "invisible

120. *Id*. at 432.

121. *Id*. (emphasis added).

122. *Id*. at 433 (emphasis added).

123. *Id*. at 434 ("No doubt the great body of private relations usually fall within the control of the State, but a treaty may override its power.").

124. *Id*. at 435 (emphasis added).

125. Bond v. United States, 134 S. Ct. 2077, 2087 (2014); *accord id*. at 2098 (Scalia, J., concurring in the judgment); *id*. at 2111 (Alito, J., concurring in the judgment).

126. *See id*. at 2083-84.

127. *Id*. at 2088.

128. *Id*.

radiation from the general terms of the Tenth Amendment."[129]

Consider also the sharp (and irreconcilable) distinction between how Justice Holmes and Chief Justice Roberts framed the issue in, respectively, *Holland* and *Bond*—notwithstanding that each case arose in substantially the same posture and raised substantially the same constitutional question. Holmes focused first and foremost on the *treaty*: The precise "question before us," he wrote, "[can now be] narrowed to an inquiry into the ground upon which the present supposed exception [to the treaty power] is placed."[130] Chief Justice Roberts, in contrast, focused foremost, indeed exclusively, on the implementing legislation: "The question presented . . . is whether the *Implementation Act* . . . reaches a purely local crime."[131] In fact, in the *Bond* Court's view, this focus obviated the need to consider the treaty.

4. *Bond's Misguided "Background Principle"*

Only by rejecting *Holland*'s insistence on the mutual dependence of the treaty and its implementing legislation for Tenth Amendment purposes could the *Bond* Court shift its focus to the statute alone, which it then analyzed as though it were a routine exercise in statutory interpretation. And only by abandoning *Holland* could the *Bond* Court conclude that the Tenth Amendment constrained the reach of the Act. In contrast to *Holland*, *Bond* treated the federalism-based canon of constitutional avoidance as mandatory.

The orthodox reading of *Bond* interprets the majority opinion to introduce a clear statement rule in the context of laws implementing treaties: Congress must be explicit if it intends implementing legislation to abrogate the usual limitations imposed by federalism. Illustrative of this reading is Professor Bradley's conclusion that "[*Bond*] extends a federalism-based clear statement requirement, which was originally developed by the Supreme Court in the context of purely domestic legislation, into the realm of treaty-implementing legislation."[132]

To be sure, much language in the *Bond* opinion seemingly lends itself to this view. The Court characterized the clear statement rule as a "background principle[] of construction"[133] and "conclude[d] that, in this curious case, we can insist on a clear indication that Congress meant to reach purely local crimes before interpreting the statute's expansive language in a way that intrudes on the police power of the States."[134] In part because of such statements, it is understandable that *Bond* has been read to impose a modest clear-statement rule on treaty-implementing legislation rather than to abandon (or even reach) the constitutional issue in *Holland*.

The Supreme Court could have, plausibly if controversially,[135] held that

129. Missouri v. Holland, 252 U.S. 416, 434 (1920).

130. *Id*. at 432.

131. *Bond*, 134 S. Ct. at 2083 (emphasis added); *see also id*. at 2088.

132. Bradley, *supra* note 7, at 493.

133. *Bond*, 134 S. Ct. at 2088.

134. *Id*. at 2090.

135. Justice Scalia, like the Third Circuit, argued that textualism sufficed to show that the Act reached Bond's conduct and left no room for ambiguity. *Id*. at 2094.

the Act did not reach Bond's conduct by means of a variety of canons of statutory interpretation—*without* invoking the canon of constitutional avoidance based on federalism; after all, as Karl Llewelyn famously pointed out, there's no shortage of them available to support particular results.[136] But the Court saw the federalism background principle and canon as all but determinative, the principal factor that resolved section 229's perceived ambiguity.

We have repeatedly quoted the Court's analytic predicate that "the statute—unlike the Convention—must be read consistent with principles of federalism in our constitutional structure"[137] because it so clearly underscores *Bond*'s abandonment of *Holland.* It also directly illustrates the Court's misguided assumptions: first, that a mandatory federalism limit applies to laws implementing valid treaties; and, second, that the statute and treaty may be assessed separately under the Tenth Amendment. *Holland* rejected both of these assumptions. Still, lest it seem that this is a case of cherry-picking one misguided quotation, note that the quoted proposition is not an anomaly. The majority's analysis relied on it. Roberts stressed, time and again, that interpreting section 229 to reach Bond's local crimes would raise serious constitutional questions based on the structural principle that the federal government exercises only delegated powers and that crimes such as Bond's would ordinarily fall within the state's "police power." In sum, the Court's pervasive reliance on a federalism "background principle" and canon of constitutional avoidance to resolve section 229's ambiguity was not just one factor among many; it was, in the majority's view, dispositive.[138]

From the perspective of the orthodox reading, one might raise the following objection: Leave aside the Tenth Amendment. The majority did not try to avoid deciding whether the Act violates that Amendment; it only sought to resolve section 229's perceived ambiguity without considering whether *Holland* remains good law.[139] The easiest way to accomplish this was to apply a routine canon of avoidance that counsels construing the Act such that *Holland*'s continuing validity would not affect the Act's analysis regardless. That is why the Court insisted on "a clear indication that Congress meant to

136. Karl N. Llewelyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 396 (1950). The *Bond* majority indeed referred to some of these principles. Roberts cited, for example, the Act's ordinary meaning, context, and purpose; the intention of the nations that ratified the CWC; the circumstances culminating in Bond's prosecution; the absurd results that would presumably follow from a broader reading of the Act; and non-constitutional inferences about Congress's intent in implementing the CWC. *Bond*, 134 S. Ct. at 2085-91.

137. *Bond,* 134 S. Ct at 2088.

138. *See id*. at 2086. It is unnecessary to catalogue every instance where the Court relied on the avoidance canon predicated on pre-*Holland* federalism to construe section 229. A few examples suffice to show the extent to which it pervades the Court's statutory analysis. *See, e.g*., *id*. at 2086 ("A criminal act committed wholly within a State cannot be made an offence against the United States, unless it have some relation to the execution of a power of Congress, or to some matter within the jurisdiction of the United States.") (internal quotation marks omitted); *id*. at 2088 (stating that a contrary interpretation would "dramatically intrude upon traditional state criminal jurisdiction") (internal quotation marks omitted); *id*. at 2088-89 (mentioning federalism as a "background principle" of construction); *id*. at 2090 ("[I]t is appropriate to refer to basic principles of federalism embodied in the Constitution to resolve ambiguity in a federal statute.").

139. We thank Mike Dorf for pointing to the need for this clarification.

reach purely local crimes, before interpreting the statute's expansive language in a way that intrudes on the police power of the States."[140] For if the Court had *not* required this clear indication, then it *would* have needed to decide whether the statute's expansive language intruded on police powers vouchsafed to the states by the Tenth Amendment. That is all, one might argue, the Court did; it avoided the constitutional issue in *Holland* by assuming that for treaty-implementing legislation, as for other federal statutes, Congress legislates mindful of the background principle that federalism limits the reach of federal criminal law.

Yet if that characterization of the Court's approach is accurate, the majority misunderstood the implications of its analysis. After *Holland*, generic federalism principles are no longer a sound reason to believe that a treaty-implementing statute violates the Tenth Amendment. The *Bond* Court's application of the constitutional avoidance canon on this basis, however, assumes the contrary. *Holland* held, in relevant part, that an "invisible radiation from the terms of the Tenth Amendment,"[141] or in Chief Justice Roberts's substantively equivalent words, general "principles of federalism inherent in our constitutional structure,"[142] do not carve out an exception to the otherwise plenary federal treaty power. That does not mean, as Holmes said, that there are *no* limits on the treaty power.[143] It does, however, mean that in the context of a statute implementing a treaty, there are no limits based on general principles of federalism.[144] *Holland*, like any other precedent of the Supreme Court interpreting the Constitution, is (or was) itself *part of* the constitutional principles (here, of federalism) that, according to the Court, Congress must be presumed to respect when it legislates.[145] The Court's constitutional decisions have the same legal status as the document's text—Congress may not supersede them.[146] The Court's federalism background principle and associated canon of constitutional avoidance are themselves inconsistent with the Court's own authoritative interpretation of the Tenth Amendment in *Holland*,[147] unless and until the Court expressly overrules the case.

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140. *Bond*, 134 S. Ct. at 2090.

141. *Holland*, 252 U.S. at 434.

142. *Bond*, 134 S. Ct. at 2088.

143. *Holland*, 252 U.S. at 433.

144. *See* HENKIN, *supra* note 24, at 193. Citing several scholars, Henkin speculates that "[t]he Constitution probably protects some few states' rights, activities, and properties against federal invasion, even by treaty." Though the Court has held that the Guarantee Clause, U.S. CONST. art. IV, § 4, is non-justiciable, given that Clause's specific "prohibitory words," *Holland*, 252 U.S. at 433, it would, for example, be doubtful that the treaty-makers could enter into a treaty requiring a state to adopt an authoritarian government. HENKIN, *supra* note 24, at 193. *Holland* rejected the notion that abstract or general principles of federalism, without more, constrain the federal government's power to make treaties under Article II or to implement them by means of Congress's Article I, Section 8 power to make laws necessary and proper to carry those treaties into effect.

145. *Cf.* DAVID STRAUSS, THE LIVING CONSTITUTION (2012); David Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

146. *See* Dickerson v. United States, 530 U.S. 428, 437 (2000) (citing City of Boerne v. Flores, 521 U.S. 507, 517-21 (1997)).

147. Roberts invoked the avoidance canon in an effort to decide *Bond* without being compelled to revisit the constitutional issue in *Holland*. But the only reason there *was* a constitutional issue to avoid was that the Court had tacitly rejected *Holland*. In the treaty context, the principles of federalism inherent in our constitutional structure, which emanate from the Tenth Amendment, *as the Court has construed it*, include *Holland,* thus obviating the same federalism concerns that, in *Bond*, animated its

The point merits some elaboration. The Court began its analysis of federalism in Part III.A of the *Bond* opinion by criticizing the government's interpretation of section 229, according to which the statute reaches local crimes like Bond's. It said that "this interpretation would dramatically intrude upon traditional state criminal jurisdiction, and we avoid reading statutes to have such reach in the absence of a clear indication that they do."[148] Then, at the close of this Part, after exploring a series of cases (none of which, tellingly, involved treaties) that invoked federalism as a principle of statutory interpretation, the Court concluded:

> These precedents make clear that it is appropriate to refer to basic principles of federalism embodied in the Constitution to resolve ambiguity in a federal statute. In this case, the ambiguity derives from the improbably broad reach of the key statutory definition given the term—"chemical weapon"—being defined; the deeply serious consequences of adopting such a boundless reading; and the lack of any apparent need to do so in light of the context from which the statute arose—a treaty about chemical warfare and terrorism. We conclude that, in this curious case, we can insist on a clear indication that Congress meant to reach purely local crimes, before interpreting the statute's expansive language in a way that intrudes on the police power of the States.[149]

The problem with this conclusion is twofold. First, because section 229 implements a treaty, there *is* no dramatic intrusion upon traditional state criminal jurisdiction—unless the Court has tacitly abandoned *Holland*. Second, assuming, as the *Bond* Court implicitly did by trying to avoid the constitutional issue in *Holland*, that the latter case remains good law, the presumption that Congress legislates against a federalism background principle cannot do the interpretive work that the majority supposed. In the treaty context, after *Holland*, there is no reason to presume that Congress sought to preserve the usual federal-state balance that obtains outside the treaty context. Rather, the "principles of federalism inherent in our constitutional structure" include *Holland*'s doctrine that those principles do *not* compel federalism constraints on statutes implementing treaties.[150] Provided the Act were enacted to implement a constitutionally valid treaty (as all of the Justices in *Bond* regarded the CWC to be), generic "principles of federalism inherent in our constitutional structure" would have been immaterial to, not the mandatory lodestar of, statutory construction. And it would have been equally immaterial that the Act, *absent the treaty*, might have intruded upon background principles of federalism against which Congress may be assumed ordinarily to legislate.

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invocation of the avoidance canon in the first place.

148. Bond v. United States, 134 S. Ct. 2077, 2088 (2014) (internal quotation marks omitted).

149. *Id*. at 2090.

150. *Id*. The Court might, of course, have logically concluded that because the CWC does not require implementation by federal criminal law, Congress exercised its discretion to respect general, non-doctrinal federalism concerns in implementing the CWC. After all, the federal government routinely does consider federalism when it negotiates treaties, and Congress may and likely does consider it as well in deciding how to implement treaties. In *Holland*, in contrast, the 1916 treaty arguably required Congress to intrude upon traditional federalism limits, and the evidence could not have been clearer that Congress also intended to transgress those limits. *Bond*'s assumption that Congress sought to respect the usual federal-state balance despite the CWC might be right; the legislative history behind the Act apparently did not clarify Congress's intent in this regard. But, after *Holland*, the Court cannot assume that legislation implementing a treaty should be construed, if possible, to adhere to the *same* federal-state balance as in a purely domestic context.

5. Carey v. South Dakota*: The Constitutional Avoidance Canon in Context*

The prudential rationale for the canon of constitutional avoidance bears emphasis. It adjures judges to avoid interpreting an ambiguous statute in a manner that might raise a constitutional doubt—but only *if* another construction is equally plausible. We need not defend any position here on the merits of the *Bond* majority opinion's approach to the Act's statutory interpretation in contrast to that of Justice Scalia's concurrence.[151] But it is instructive to call attention to Scalia's exasperation that, in his view, the majority misapplied the canon of constitutional avoidance *in order to find* the implementing legislation ambiguous based on federalism rather than, as it should have done, applied that canon only *if and after* finding the statute ambiguous—and only *because* of that ambiguity.[152]

It is ironic in this regard, but not coincidental, that in the absence of a treaty, Justice Brandeis in *Carey*, like Chief Justice Roberts in *Bond*, also applied the canon of constitutional avoidance to a federal statute (for Brandeis, the Migratory Bird Act of 1913). For Brandeis's opinion in *Carey* reveals how Roberts misunderstood the real issue in *Bond*. In short, Roberts treated *Bond* as the functional equivalent of *Carey* rather than *Holland*. But *Carey* arose under a federal law that did *not* implement a treaty. That law, the 1913 Migratory Bird Act, like the CWC Act in *Bond*, arguably raised Tenth Amendment issues, especially given the Court's precedents affirming state authority over the regulation of migratory birds.[153] But because of the treaty in *Holland*, unlike in *Carey* (decided only the previous year), Justice Holmes found no place for the canon of constitutional avoidance that Brandeis had applied in *Carey*. Brandeis agreed—for in *Holland*, unlike in *Carey*, the question had been the constitutional validity of the treaty and only derivatively that of the implementing legislation.

In *Carey*, by contrast, the question had been the constitutionality of the 1913 law, which substantively resembled the 1916 Migratory Bird Treaty Act, but did not implement a treaty. Yet in *Bond*, Chief Justice Roberts applied the *non*-treaty analysis in *Carey* rather than the treaty analysis in *Holland*. It is telling that Brandeis, *Carey*'s author, joined *Holland* without reservation.[154] His distinct approaches to *Carey* and *Holland*, which he regarded as constitutionally consistent, show that Brandeis agreed with Holmes that a treaty fundamentally reorients the Tenth Amendment analysis.[155]

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151. *Bond*, 134 S. Ct. at 2094 (Scalia, J., concurring in the judgment).

152. *Id*. at 2095-97.

153. *See* Carey v. South Dakota, 250 U.S. 118, 120, 122 (1919).

154. The Tenth Amendment, that is, motivated Justice Brandeis to apply the constitutional avoidance canon in *Carey*. Chief Justice Roberts reasoned that the same goes for *Bond*. But *Carey* did not consider the constitutional test of the treaty power. Nor did *Carey* require the Supreme Court to consider whether that test should include a federalism exemption to the treaty power, as did *Missouri v. Holland*, 252 U.S. 416, 434 (1920).

155. *Id*. at 432-33. Just as the 1916 migratory bird treaty in *Holland* rendered general Tenth Amendment limits irrelevant to its implementing statute, so too, in *Bond*—were it truly the case that it did not overrule *Holland*—should the CWC have rendered Tenth Amendment limits irrelevant to *its* implementing legislation.

In sum, had Chief Justice Roberts honored *Holland*, the real question in *Bond* would have been the federal government's authority to enter into the CWC itself *notwithstanding potential limits imposed by the Tenth Amendment*.[156] Justice Holmes did not (because he had no need to) speculate on the comparable issue in *Holland*. He simply said that the Court did not mean to imply that the treaty power has no limits.[157] Under *Holland*, then, either a treaty is beyond the federal government's Article II power—that is, an international agreement that the President plus two-thirds of the Senate may never constitutionally conclude—or it is not. If it is beyond the treaty power, then of course no statute to implement it could be constitutional. If it is not, then "principles of federalism inherent in our constitutional structure" would not apply to its implementing legislation, just as they would not apply to the same treaty were it self-executing. Either Tenth Amendment limits apply to both, or they apply to neither. And in the event of an arguable ambiguity in the implementing legislation, mandatory application of the canon of constitutional avoidance based on federalism principles would be erroneous—or at least, contrary to what the *Bond* Court suggested, inconsistent with *Holland*.

Bond's application of the avoidance canon, which it deemed mandatory, not precatory, cannot be reconciled with *Holland*. There is only a reason to apply the canon—only a constitutional issue to avoid—if one assumes, as the Court did, that the statute might otherwise conflict with general principles of federalism. But if the Court did not disturb *Holland*, as it supposed, there *is* no worry that generic federalism principles call into question the Tenth Amendment validity of a statute that implements a concededly constitutional treaty—rendering the canon of constitutional avoidance superfluous. Instead, the *Bond* Court relied on that canon, albeit among other principles of statutory interpretation, to interpret a purportedly ambiguous statute one way rather than another.

Because the Court did not see the presence of the CWC as relevant to the Tenth Amendment appraisal of the Act, it decided *Bond* by asking if the Act would be valid absent the treaty.[158] And absent the treaty, the *Bond* Court held that it was not only "appropriate to apply the background assumption that Congress normally preserves the constitutional balance between the National Government and the States" but also required by "the very structure of the Constitution."[159] Had the Court, holding all else constant, employed that same assumption in *Holland*, Missouri would have prevailed: the law implementing the 1916 treaty would have been constitutionally required to conform to the same "principles of federalism inherent in our constitutional structure"[160] that would have applied in the absence of the treaty; and the Supreme Court had

156. In theory, Congress might enact an absurdly broad or otherwise manifestly inappropriate statute, ostensibly to implement a treaty—and that statute would be invalid. But it would not be invalid because of the Tenth Amendment; it would be invalid because it would not be a genuinely necessary and proper means to implement the treaty. Not surprisingly, given the political safeguards of federalism, the Supreme Court has never had occasion to consider this issue.

157. *See Holland*, 252 U.S. at 433.

158. Bond v. United States, 134 S. Ct. 2077, 2087 (2014).

159. *Id*. at 2091.

160. *Id*. at 2088.

held in *Geer* and *Carey*, both of which arose in a non-treaty context, that the regulation of the taking of migratory birds falls within the state's police power despite incidental effects on commerce. Applying *Bond*'s methodology in *Holland*, the Court would therefore have been obliged to strike down the Migratory Bird Treaty Act as a violation of the Tenth Amendment—for as Holmes affirmed, "but for the treaty, the State would be free to regulate this subject itself."[161] Consensus to the contrary notwithstanding, *Bond* abandoned *Holland*.

IV. CRITIQUES OF *HOLLAND*: THEORY AND PRACTICE

Whether *Holland*'s substantive demise is cause for celebration is, of course, a different question. Fears of *Holland*'s supposed implications have never entirely receded. If we are right that *Bond* either effectively overruled *Holland* or, at a minimum, eviscerated its foundations, a word on the likely effects of this development is in order. In this and the following parts, we consider, respectively, the force of the chief critiques of *Holland* and the probable consequences, in a vastly changed international legal order, of the Court having now hobbled *Bond*. We point out how abandoning *Holland* will impede the United States's ability to carry out certain international obligations. We begin in the first Section with a brief review of the nation's experience with *Holland* in the century before *Bond*, for it supplies the appropriate empirical light in which to assess the chief objections to and critiques of *Holland.* In the latter two Sections, we then turn to the political and legal constraints, which, we suggest, dramatically mitigate, if not obviate, the threats *Holland* allegedly poses to our constitutional order.

A. *Before* Bond*: States' Rights, Individual Rights, and the Lessons of History, Experience, and Jurisprudence*

Holmes's opinion has never lacked critics.[162] It generated controversy from the outset. Scholars almost immediately speculated about potential threats *Holland* might pose to both state and individual rights.[163] Nine years after *Holland*, former Secretary of State and later Chief Justice Hughes launched a broadside against *Holland* in a speech to the American Society of International Law, arguing that the treaty power extends only to "properly" international issues.[164]

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161. *Holland*, 252 U.S. at 434.

162. Some commentators therefore bemoaned the *Bond* Court's perceived refusal to revisit the constitutional issue. *See, e.g.*, Julian Ku & John Yoo, *The Supreme Court Misses Its Chance to Limit the Treaty Power*, FORBES (June 12, 2014), http://www.forbes.com/sites/realspin/2014/06/12/the-supreme-court-misses-its-chance-to-limit-the-treaty-power.

163. *E.g.*, Thomas Reid Powell, *Constitutional Law in 1919-20*, 19 MICH. L. REV. 1, 12-13 (1920).

164. *See* Power Auth. of N.Y. v. Fed. Power Comm'n, 247 F.2d 538, 543 (D.C. Cir. 1957) (quoting Proc. Am. Soc'y Int'l L. 194, 196 (1929)), *vacated as moot*, 355 U.S. 64 (1957); *see also Bond*, 134 S. Ct. at 2110 (Thomas, J., concurring in the judgment), HENKIN, *supra* note 24, at 197, 471-72 n.87; Louis Henkin, *The Treaty Makers and the Law Makers: The Niagara Reservation*, 56 COLUM. L. REV. 1151 (1956); *accord* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 117 (1965). Hughes's objections reflected those made by Thomas Jefferson early in the nation's history. *See* David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of*

After World War II, *Holland* also provoked a political backlash. The postwar rise of international institutions and multilateral human rights treaties raised fears among some politicians that treaties would intrude upon national sovereignty. Foremost in the mind of many were worries that such treaties might empower the federal government to enact civil rights legislation that would preempt state segregation and other racially discriminatory laws. In 1953, these fears culminated in Ohio Senator Bricker's proposal of the infamous Bricker Amendment, which sought to overrule *Holland* by amending the Constitution to add that "[a] treaty shall become effective as internal law in the United States only through legislation that would be valid in the absence of a treaty."[165] The most prominent variation of the Amendment narrowly failed after President Eisenhower opposed it.[166] But many continued to fear that *Holland* could be used to avoid *all* constitutional limits—not only, as Holmes had more judiciously put it, "some invisible radiation from the general terms of the Tenth Amendment."[167] The Supreme Court found a welcome opportunity to put that fear to rest—or at least attempt to do so—in 1957.

In *Reid v. Covert*,[168] the plaintiffs argued that Article 2(11) of the Uniform Code of Military Justice—which, in conformity with executive status-of-forces agreements, authorized the trial of civilian dependents of military service members abroad by court-martial—deprived them of due process under the Constitution.[169] Echoing *Holland*, the government countered that Article 2(11) could be "sustained as legislation which is necessary and proper to carry out the United States' obligations under the international agreements made with" the host states.[170] Justice Black, writing for a plurality, replied 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 . . . . The prohibitions of the Constitution . . . cannot be nullified by the Executive *or by the Executive and the Senate combined*,"[171] thus implying that the same result would be forthcoming under an Article II treaty as opposed to the executive agreements at issue in *Reid*.[172] The *Reid* plurality also carefully distinguished *Holland*, in which, Black stressed, "[T]he treaty involved was not inconsistent with any specific provision of the Constitution.

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the Treaty Power, 98 MICH. L. REV. 1075, 1187-88 (2000); Lawson & Seidman, *supra* note 41, at 15-16.

165. S. REP. NO. 412, at 1, amend. 2 (1953).

166. Jide Nzelibe, *Partisan Conflicts Over Presidential Authority*, 53 WM. & MARY L. REV. 389, 428 (2011). *See generally* DUANE TANANBAUM, THE BRICKER AMENDMENT CONTROVERSY: A TEST OF EISENHOWER'S POLITICAL LEADERSHIP (1988).

167. Missouri v. Holland, 252 U.S. 416, 434 (1920).

168. 354 U.S. 1 (1957).

169. *Id*. at 3-4, 15-16; *see* U.S. CONST. art. III, § 2; *id*. amends. V & VI.

170. *Reid*, 354 U.S. at 16.

171. *Id*. at 16-17 (emphasis added). Because *Reid* involved only sole executive agreements, its reference to Article II treaties ("the Executive and Senate combined") is dicta (in a plurality opinion); it therefore did not and could not overrule *Holland*.

172. *Id*. at 5-6. Justice Harlan concurred on the narrow ground that the defendants were tried for capital offenses. *Id*. at 65. But a majority of the Court found that distinction irrelevant three years later. Kinsella v. U.S. *ex rel*. Singleton, 361 U.S. 234 (1960); *accord* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 721 (1987); *see also* Boos v. Barry, 485 U.S. 312, 323-24 (1988).

The Court was concerned with the Tenth Amendment which reserves to the States or the people all power not delegated to the National Government."[173]

Reid has long been understood, correctly, to allay fears that *Holland* implies that treaties can supersede clear constitutional constraints. In 1987, the American Law Institute did not hesitate to codify in the new *Restatement* that "[n]o provision of an agreement may contravene any of the prohibitions or limitations of the Constitution applicable to the exercise of authority by the United States."[174] The following year, the Supreme Court, citing *Reid*, struck down on First Amendment grounds a provision of the D.C. Code prohibiting the display of any sign, or the congregation of three or more persons, within 500 feet of a foreign embassy, if the display or congregation tended to bring that foreign government into public "odium" or "disrepute."[175] The Court so held even though, first, Congress enacted it pursuant to its power to "define and punish . . . Offenses against the Law of Nations,"[176] and, second, the Vienna Convention on Diplomatic Relations, to which the United States is a party and which "represents the current state of international law," requires states "to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity."[177]

By the late twentieth century, it therefore seemed clear that *Holland* did not affect constitutional provisions apart from arguable Tenth Amendment limits. But the vitality of the Tenth Amendment as a check on the treaty power remained unclear. The Supreme Court continued to cite *Holland* in cases in which the Tenth Amendment might otherwise have presented a fatal barrier.[178] In fact, as of 2006, the Court's Justices had cited *Holland* in thirty-four opinions, none of which overturned it.[179] Lower courts too have applied and cited *Holland* as good law.[180]

Yet for most intents and purposes, *Holland* scarcely mattered for decades. Roughly between the Bricker Amendment's defeat in 1953 and the resurgence of states' rights jurisprudence in the 1980s, the Court's broad reading of the Commerce Clause enabled Congress to regulate virtually any activity, however attenuated its connection to federal interests. Canonical cases like *Wickard v. Filburn*,[181] *Katzenbach v. McClung*,[182] and other post-New Deal and Civil

173. *Reid*, 354 U.S. at 18.

174. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 302(2) & cmt. b (1987).

175. *Boos*, 485 U.S. at 315 (quoting D.C. CODE § 22-1115 (1987)). *But see* Lawson & Seidman, *supra* note 41, at 6, 16-18 (arguing that the First Amendment does not apply to the treaty power).

176. U.S. CONST. art. I, § 8, cl. 10; *see Boos*, 485 U.S. at 316.

177. Vienna Convention on Diplomatic Relations art. 22, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95.

178. *E.g.*, United States v. Lara, 541 U.S. 193, 201, 225 (2004); Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 204 (1999).

179. See Duncan B. Hollis, *Executive Federalism: Forging New Federalist Constraints on the Treaty Power*, 79 S. CAL. L. REV. 1327, 1353 (2006).

180. *E.g.*, United States v. Lue, 134 F.3d 79, 82-85 (2d Cir. 1998); United States v. Belfast, 611 F.3d 783, 805-06 (11th Cir. 2010); Cunard S.S. Co. v. Lucci, 222 A.2d 522, 527 (N.J. Super. Ct. Ch. Div. 1966); *see also* Martin v. State, 24 Ill. Ct. Cl. 6, 10 (1960).

181. 317 U.S. 111 (1942).

Rights era cases expanded the scope of the Commerce Clause to all but eliminate constraints on Congress's power to regulate issues that once might have been deemed clearly reserved to the states. To be sure, as late as 1976, in *National League of Cities v. Usery*,[183] the Supreme Court, 5-4, said that the Tenth Amendment protects certain traditional or integral state functions from federal regulation (although it did not identify them). But a decade later, in *Garcia v. San Antonio Metropolitan Transit Authority*, a similarly divided Court overturned *National League*, concluding that the distinction between traditional and non-traditional state functions could not be sustained "for purposes of state immunity under the Commerce Clause."[184] It "reject[ed], as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional.'"[185]

The Court thus embraced the idea that limits on federal power reside solely in the political safeguards of federalism,[186] that is, structural features of the Constitution that "protect the States from overreaching by Congress," for example, by giving the states prominent "role[s] in the selection both of the Executive and the Legislative Branches of the Federal Government."[187] For as long as this view prevailed, *Holland*'s merits seemed mostly academic. Jurisprudential developments since 1920 would have rendered it unnecessary for the federal government to protect migratory birds that routinely cross international and state borders by concluding a treaty. The Commerce Clause would have sufficed. No longer, in other words, did it seem "obvious" that there were "matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could."[188]

But the jurisprudential tide shifted under Chief Justice Rehnquist's leadership as the Court breathed new life into federalism. Among other developments reinvigorating federalism, the Rehnquist Court invalidated federal laws commandeering state legislatures and executive officials;[189] expanded the scope of the Eleventh Amendment to confer upon the states immunity from suit in most cases;[190] and for the first time since the New Deal, struck down federal laws as beyond the reach of the Commerce Clause.[191] Furthermore, although the Court has not overruled *Garcia* explicitly, it has

182. 379 U.S. 294 (1964).

183. 426 U.S. 833, 854-55 (1976).

184. 469 U.S. 528, 530 (1985).

185. *Id*. at 546-47.

186. *See* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954). The Supreme Court has expressly adopted this view in several cases. *E.g*., *Wickard*, 317 U.S. at 120.

187. *Garcia*, 469 U.S. at 551.

188. Missouri v. Holland, 252 U.S. 416, 433 (1920).

189. Printz v. United States, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144 (1992)

190. Alden v. Maine, 527 U.S. 706 (1999); Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996).

191. United States v. Morrison, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995).

decided several cases that seem to be in considerable tension with *Garcia*'s rejection of the idea of traditional state functions.[192] *Holland*'s potential implications therefore began to resurface insofar as they might enable the federal government to accomplish by treaty what is now foreclosed by the Tenth Amendment. This prospect has long been among the chief critiques of *Holland*,[193] and it has reemerged because of developments in both national and international law.

B. *The Political and Legal Limits of* Holland

1. *Political Constraints: A Short, Not-So-Horrible Parade*

Before considering *Bond*'s future consequences more closely, it is prudent to put into some perspective a red herring that persists despite a century of experience with *Holland*: the parade of horribles that *Holland* supposedly set to march. Critics of *Holland* have long constructed a variety of implausible hypothetical scenarios. Justice Scalia's concurrence in *Bond* is a recent exemplar:

> [T]he possibilities of what the Federal Government may accomplish, with the right treaty in hand, are endless and hardly farfetched. . . . For example, the holding that a statute prohibiting the carrying of firearms near schools went beyond Congress's enumerated powers, *United States v. Lopez*, 514 U.S. 549, 512 (1995), could be reversed by negotiating a treaty with Latvia providing that neither sovereign would permit the carrying of guns near schools.[194]

Similarly, Justice Scalia suggested, the United States could bar "state inheritance taxes on real property" to implement a treaty. Among other jurists over the years, he concluded based on such speculation that "*Holland* places Congress only one treaty away from acquiring a general police power."[195]

Hypotheticals of this sort have been bandied about since the Court decided *Holland*. Any competent law professor can construct countless others. Senator Bricker and his colleagues took them seriously, and Justice Scalia's concurrence shows that this worry persists. Yet it *is* both fair and accurate to describe such hypotheticals as farfetched. *Holland* has been good law for almost a century. No one can point to a single real example of abuse. In the ninety-four years since *Holland*—through World War II, global economic integration, massive immigration flows, the modern conflict with transnational terrorism, and all the familiar dislocations that beset the modern world—the federal government has never, *never*, sought to evade a Supreme Court decision or otherwise circumvent the Constitution by concluding a contrived treaty with a foreign nation. It is not difficult to see why.

First, whatever the general force of the political safeguards of federalism,

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192. *See, e.g.*, Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003). *See generally* John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311 (1997).

193. *E.g.*, Bond v. United States, 134 S. Ct. 2077, 2100 (2014) (Scalia, J., concurring in the judgment).

194. *Id.*

195. *Id.* at 2101.

they prove manifestly effective in the treaty realm.[196] The Constitution deliberately makes it difficult to conclude treaties. Under Article II, the President may ratify a treaty only with the concurrence of two-thirds of the Senate.[197] Securing that concurrence is no simple matter—and it shows.[198] Consider a few examples: the United States has refused to ratify, among other treaties, the Convention on the Rights of Persons with Disabilities,[199] which essentially codified U.S. law internationally;[200] the Convention on the Rights of the Child, which only the United States has not ratified;[201] and the Convention on the Law of the Sea, despite a widespread belief that it would further the national interest.[202]

Second, constituents hold senators accountable. Except perhaps in (historically unprecedented) exigent circumstances, senators would be highly unlikely to agree to an ersatz treaty crafted by the executive branch simply to override state authority or "overrule" a disfavored Supreme Court decision. As Professor Epps observed, commenting on Justice Scalia's hypothetical treaty with Latvia, "67 senators or so (depending on the number voting), after a public debate, would have to agree that Latvian-U.S. relations should govern guns in American high schools," and because the Constitution guarantees all states two senators regardless of their populations, "[e]ven in a harmonious Senate, senators representing roughly 7.5 percent of the population could block a gun treaty."[203]

Third, it is unclear why the federal government would have an interest in arrogating to itself power over traditional state functions like probate. It is no accident that it has never sought to conclude a treaty for the purpose of taking over a traditional state police power. To the contrary, it has become commonplace for the federal government to insert federalism clauses in international agreements in order to protect the states from intrusion upon their

196. Martin S. Flaherty, *Are We to be a Nation? Federal Power vs. "States' Rights" in Foreign Affairs*, 70 U. COLO. L. REV. 1277, 1308-09 (1999); Wechsler, *supra* note 186.

197. U.S. CONST. art. II, § 2.

198. *See, e.g.*, GLEN S. KRUTZ & JEFFREY S. PEAKE, TREATY POLITICS AND THE RISE OF EXECUTIVE AGREEMENTS 32-35 (2009).

199. Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3. President Bush signed the Convention, but despite former Senator Dole's memorable appearance in a wheelchair to encourage Senate approval, the treaty did not even make it out of committee. Michael Kranish, *The Story of Washington Gridlock Seen Through the Eyes of Bob Dole*, BOSTON GLOBE (Mar. 24, 2013), http://www.boston.com/news/politics/2013/03/23/the-story-washington-gridlock-seen-through-the-eyes-bob-dole/zyQ05CKoGMKjPBDcNJGAVP/story.html.

200. *Convention on the Rights of Persons with Disabilities Hearing Before the S. Comm. on Foreign Relations*, 113th Cong. (2013) (statement of C. Boyden Gray), http://www.foreign.senate.gov/imo/media/doc/Gray_Testimony.pdf.

201. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3. Federalism is one reason the United States has not ratified the Convention on the Rights of the Child (CRC). Some fear that the CRC will interfere with family matters traditionally reserved to the states. *See Why Won't America Ratify the UN Convention on Children's Rights?*, ECONOMIST (Oct. 6, 2013), http://www.economist.com/blogs/economist-explains/2013/10/economist-explains-2.

202. *See, e.g.*, Thomas Wright, *Outlaw of the Sea*, FOREIGN AFF. (Aug. 7, 2012), https://www.foreignaffairs.com/articles/oceans/2012-08-07/outlaw-sea.

203. Garrett Epps, Bond v. U.S. *Doesn't Mean Latvian Cops Are Coming for Your Guns*, THE ATLANTIC (June 5, 2014), http://www.theatlantic.com/politics/archive/2014/06/bond-v-us-doesnt-mean-that-latvian-cops-are-coming-for-your-guns/372263/.

traditional powers.[204] Senators often insist upon these provisions as a condition of their consent, often because the states carry out their functions ably, and Senators see no need to fix what does not need fixing.

Finally, of course, treaties require two parties: the United Kingdom and the United States had a mutual interest in cooperating to preserve migratory birds that traversed international, not just state, borders. Absent a similar mutual interest, it would require a good measure of (passing strange) collusion for Latvia, or any foreign nation, to enter into a contrived treaty with the United States to enable the federal government to keep guns out of school zones—or, in general, to expand federal power at the expense of the states.[205] And it is a virtual certainty that any such contrivance would become evident long before the treaty received the consideration, still less approval, of the Senate.

In sum, "*Holland* places Congress only one treaty away from acquiring a general police power"[206] only in an imaginary world—not the one in which we live.

2. *Legal Constraints: The Scope of* Holland

The lessons of practice, experience, and history notwithstanding, some critics object to *Holland*'s supposed theoretical scope: did the Framers really vest the federal government with the potential power to vitiate the Tenth Amendment altogether, subject to finding the right treaty partner? How could that be consistent with the foundational principle that the Constitution establishes a federal government with delegated powers only, all residual authority remaining with the states? Tellingly, Holmes did not offer a general theory of the scope and limits of the treaty power. *Holland* did not require it. Extensive dicta on such a critical constitutional issue would have been, literally and figuratively, injudicious. We cannot and should not, therefore, try to draw any firm conclusions about Holmes's view of issues beyond those he addressed. Indeed, far from offering needless, imprudent speculation in *Holland*, the dicta in Holmes's brief opinion served only to reinforce the limited scope of his decision. Properly understood, Holmes's analysis does not conflict with the principle that the Constitution established a federal government of delegated, limited powers.

Holmes predicated his analysis in *Holland* on an Article II treaty.[207] The

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204. *See* Hollis, *supra* note 179, at 1373-75. The federalism clause in the International Labor Organization's Constitution encouraged federal states, such as the United States, Australia, and Canada, to seek similar clauses in other international agreements. The United States inserted federal-state clauses in the 1967 Protocol to the Convention Relating to the Status of Refugees and the Cybercrime Convention. *Id*. at 1375-76; *see also* David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1273 (2000).

205. "The United States and Latvia have not in fact negotiated such a treaty. Why not? Could it be that countries do not enter into treaties that regulate internal matters because they have no reason to do so?" *Bond v. United States*, ERIC POSNER (June 2, 2014), http://ericposner.com/bond-v-united-states. Posner is likely correct that the "unstated target of the [concurrence] is the international human rights treaty." *Id*. The ghost of Senator Bricker lives on. Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341 (1995).

206. Bond v. United States, 134 S. Ct. 2077, 2101 (2014) (Scalia, J., concurring in the judgment).

207. Because *Holland*'s doctrine is limited to Article II treaties, the federalism issue it raises

decision's logic is properly limited to that context. Holmes presupposed that Article II establishes a federal lawmaking power in the President and Senate that is conceptually and in its scope distinct from that of Congress under Article I. That is why, Holmes argued, an act of Congress to implement an Article II treaty may sometimes accomplish what an act of Congress under Article I, Section 8, alone, may not. Beyond doubts in some scholarly quarters about the constitutionality of other types of U.S. international agreements,[208] it is therefore clear that neither congressional-executive nor sole executive agreements suffice under *Holland*. Henkin aptly summarized Holmes's logic in this regard:

> What he said, simply, was that the Constitution delegated powers to various branches of the federal government, not only to Congress; the Treaty Power was delegated to the federal treaty-makers, a delegation additional to and independent of the delegations to Congress. Since the Treaty Power was delegated to the federal government, whatever is within its scope is not reserved to the states: the Tenth Amendment is not material. Many matters, then, may appear to be 'reserved to the States' as regards domestic legislation if Congress does not have power to regulate them; but they are not reserved to the states so as to exclude their regulation by international agreement.[209]

In other words, certain matters fall within the domain of the treaty power, and hence the federal government, even though they do not fall within the domain of congressional power.

Henkin's insight posits two additional legal limits on *Holland*'s doctrinal scope. First, *Holland* "did not say that there were no limitations on the Treaty Power in favor of the states, only that there were none in any 'invisible radiation' from the Tenth Amendment."[210] The phrase "invisible radiation" is a rhetorical flourish, but Holmes's essential point is clear. The general terms of the Tenth Amendment (reserving to the states or the people what the Constitution does not delegate to the federal government) do not establish a nebulous penumbra of state authority that limits the treaty power. Scholars have argued, however, that *specific* federalism constraints exist, for example, that the federal government may not, by treaty, cede state territory to a foreign nation without that state's consent, deny to any state a republican form of government, or abolish state militias.[211] We take no position on these issues here, except to say that we see no basis for the limitation suggested by Justice Thomas in *Bond*, and by Hughes and others before him, namely, the supposed distinction between "proper" international and (qualitatively distinct) domestic issues.[212]

Second, *Holland*'s doctrine is limited to the structural *allocation* of power

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will almost always arise in the context of what Hughes, Jefferson, and others have described as "genuine" or "proper" international treaties. Lawson & Seidman, *supra* note 41, at 14; *cf. Bond*, 134 S. Ct. at 2110 (Thomas, J., concurring in the judgment). The principal exception is the international human rights treaty, which does not conform to the contractual model dominant in earlier centuries. *Cf.* Henkin, *Ghost of Senator Bricker*, *supra* note 205.

208. *See, e.g.*, Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995).

209. HENKIN, *supra* note 24, at 191.

210. *Id*. at 193.

211. *See* HENKIN, *supra* note 24, at 193 & nn.72-75. Nor, almost surely, could a treaty deprive a state of its voice in the Senate. *See* U.S. CONST. art. V.

212. 134 S. Ct. at 2110 (Thomas, J., concurring in the judgment).

between the federal and state governments. "Many matters," Henkin wrote, "may appear to be 'reserved to the States' as regards domestic legislation if Congress does not have power to regulate them; but they are not reserved to the states so as to exclude their regulation by international agreement."[213] Justice Holmes interpreted the Treaty Clause relative to the Tenth Amendment, not any other provision of the Constitution. In particular, he neither said nor implied anything about the Bill of Rights. As the Court has since held, no treaty may infringe individual rights, such as the right to grand jury indictment, jury trial, and freedom of expression. Note, therefore, that after *District of Columbia v. Heller*,[214] not only would a hypothetical gun treaty with Latvia, as a political matter, stand no chance of being concluded, it would also, as a legal matter, be presumptively unconstitutional under *Reid* insofar as it infringed upon the right to possess a handgun for lawful purposes as affirmed in *Heller*.

It may be objected, as it has been, that there is no principled basis upon which to limit *Holland* to the Tenth Amendment alone, insulating the rights of individuals, but not states, from the doctrine's ambit. Not so. *Holland* speaks to a structural issue raised by the Tenth Amendment about the allocation of federal and state authority. It does not increase the aggregate power of government within the United States (state and federal) at the expense of the governed. In other words, *Holland* holds that treaties may adjust *which* government has authority to exercise a particular power.[215] But nowhere does Holmes suggest that treaties confer on government, state or federal, any power that the Constitution otherwise denies to government in the aggregate.

Consider *Holland* itself: it established that to the extent necessary to carry out treaty obligations to the United Kingdom, federal rather than state government had the power to regulate migratory birds. Absent the 1916 treaty, the same power existed; it is just that the power would have remained with the states rather than the federal government. No one argued (it would have been absurd) that the Constitution protects the people from governmental regulation of migratory birds—as it protects the people from, for example, deprivation of liberty without due process of law. Nor did Justice Holmes suggest that the 1916 treaty gave government, state and federal, any power it would otherwise lack under the Constitution. In *Bond*, similarly, Bond challenged the *federal* government's right to make it a crime to prosecute her for a "purely local" assault with a chemical weapon.[216] She did not dispute that Pennsylvania, the

213. HENKIN, *supra* note 24, at 191.

214. 554 U.S. 570 (2008).

215. From an originalist perspective, this limitation on *Holland*'s doctrine makes sense. The Tenth Amendment deals with an issue of structure and the allocation of authority. The reasonable person of 1789 surely understood that one of the virtues of the new Constitution would be its amelioration of the problems created by state refusal under the Articles of Confederation to abide by national treaty obligations. Because international law, today as in 1789, regards nations, not their political subdivisions, as the repository of state responsibility, *see* Articles on Responsibility of States for Internationally Wrongful Acts, *in* Report of the International Law Commission on the Work of its Fifty-third Session art. 4, U.N. GAOR, 56th Sess., Supp. No. 10 at 44, U.N. Doc. A/56/10 (2001), violation of, for example, the Jay Treaty, would have placed the nation as a whole at risk, potentially the risk of war, in 1789, *see* THE FEDERALIST NO. 28, at 102 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). Enabling treaties to ameliorate this risk by empowering the federal government, under a treaty, to exert greater authority relative to the states than usual would be a logical response to this risk.

216. Bond v. United States, 134 S.Ct. 2077, 2087-88 (2014).

relevant *state* government, had the power to make precisely the same conduct a crime and to prosecute her under its laws. The Court agreed: "It is . . . clear that the laws of the Commonwealth of Pennsylvania (and every other State) are sufficient to prosecute Bond. Pennsylvania has several statutes that would likely cover her assault. . . . And state authorities regularly enforce these laws in poisoning cases."[217] All this is to reaffirm from another perspective the abiding truth of Justice Black's reassurance in *Reid v. Covert*.[218]

Finally, *Holland* may not have proclaimed as broad a doctrine as some of its critics suppose. To see why, reconsider two passages from the opinion. First, early in the analysis, Holmes wrote:

> We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way. It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, 'a power which must belong to and somewhere reside in every civilized government' is not to be found. *Andrews v. Andrews*, 188 U.S. 14 (1902). What was said in that case with regard to the powers of the States applies with equal force to the powers of the nation in cases where the States individually are incompetent to act.[219]

Later, he concluded:

> Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. . . . It is not sufficient to rely upon the States. The reliance is vain, and were it otherwise, the question is whether the United States is forbidden to act.[220]

These passages may suggest a narrower legal doctrine, which, quite apart from the political safeguards of federalism, does not necessarily place traditional state powers at the mere whim of the federal government. Holmes began with the "general question" of the test of the treaty power's scope in the face of a claimed Tenth Amendment "exemption." He rejected the argument that the Tenth Amendment, *as such*, creates an omnibus exemption. Article II, he observed, delegates the treaty power to the federal government, and hence, "whatever is *within its scope* is not reserved to the states: the Tenth Amendment is not material."[221] That observation need not, and presumably does not, mean that just anything is "within its scope"; if anything, it implies the contrary. Holmes said only that the limits of the treaty power "must be ascertained in a different way."[222] But with reference to the rationale of *Andrews* and *Holland*'s language, that way may depend on the ability of the United States to vindicate national interests in circumstances where, first, effective regulation necessitates "national action in concert with that of another power"; and, second, either the states would be "incompetent to act" or reliance upon them would be "vain"—a more circumscribed conception of *Holland*'s doctrinal reach.

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217. *Id*. at 2092.
218. 354 U.S. 1, 3, 16 (1957).
219. Missouri v. Holland, 252 U.S. 416, 433 (1902).
220. *Id*. at 435.
221. HENKIN, *supra* note 24, at 191 (emphasis added).
222. *Holland*, 252 U.S. at 433.

Holmes, again, took a pragmatic view of constitutional adjudication. He saw "nothing in the *Constitution* that compels the Government" to stay its hand despite the manifest inability of the states to handle a pressing national issue.[223] The Constitution establishes a functional and durable government for the whole nation. It should not be interpreted to deprive government in the aggregate, state and federal, of the ability to act effectively to address a critical national need. In *Andrews*, as we saw above, Justice White confronted a situation in which the interaction of the Full Faith and Credit Clause and a Massachusetts state law might yield the conclusion that neither federal nor state government could effectively regulate a vital legal issue—the institution of marriage, as it was understood at the time. Holmes therefore quoted *Andrews* for the proposition that "it is not lightly to be assumed that, in matters requiring national action, 'a power which must belong to and somewhere reside in every civilized government' is not to be found . . . . What was said in that case with regard to the powers of the States applies with equal force to the powers of the nation in cases where the States individually are incompetent to act."[224]

Both *Andrews* and *Holland* thus resolved perceived conflicts between state and federal power *internal* to the Constitution. We need not, in other words, read the passages in these cases about "civilized government" and the like to refer to extraconstitutional conceptions of law inherent in sovereignty or nationhood.[225] Nor should we. It is well-known that Holmes disdained such metaphysical or transcendental conceptions of natural law.[226]

Because the Constitution establishes a government intended to endure and

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223. *Id*. at 435 (emphasis added).

224. *Id*. at 433.

225. It would be mistaken to read *Holland* to endorse any doctrine comparable to Justice Sutherland's notoriously flawed theory in *United States v. Curtiss-Wright Export Corp*., 299 U.S. 304 (1936), especially insofar as it suggests plenary presidential power in foreign affairs. We have both critiqued *Curtiss-Wright* elsewhere. Michael J. Glennon, *Two Views of Presidential Foreign Affairs Power:* Little v. Barreme *or* Curtiss-Wright*?* 13 YALE J. INT'L L. 5 (1988); Robert D. Sloane, *Is* Curtiss-Wright*'s Characterization of Executive Power Correct*?*: The Puzzling Persistence of Curtiss-Wright Based Theories of Executive Power*, 37 WM. MITCHELL L. REV. 5072 (2011). And the Supreme Court recently rejected the broad reading of *Curtiss-Wright* long advocated by the executive branch. Zivotofsky v. Kerry*,* 135 S. Ct. 2076 (2015). The most plausible, which is not to say persuasive, argument in favor of presidentialism today is a functional claim about the national security needs of the nation since World War II. Functionalism takes two different forms, however, only one of which we attribute to Holmes. The first is a claim that, in the event of ambiguity, the Constitution should be construed in a manner that allows it to work—to create a competent government that integrates, rather than contravenes, the structural values that animate the instrument as a whole. Among those values, institutional pluralism is preeminent. That functionalist claim, however, is quite distinct from the kind of functionalist argument that Sutherland advanced for extraconstitutional presidential power beyond what Article II spells out. As Justice Brandeis reminded us, "[t]he doctrine of the separation of powers was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy." Myers v. United States, 272 U.S. 52, 293 (1926). There is nothing functional in this regard about sweeping presidential power; to the contrary, it is *dysfunctional* from a U.S. constitutional perspective: it institutionalizes the executive role by deinstitutionalizing the roles of the legislature and courts. Valorization of the president's potential capacities and resources in foreign affairs may be factually true (e.g., he has greater access to information, the ability to respond more quickly and decisively than Congress, and so forth). But the Framers deliberately rejected this vision of functionalism and efficiency, and the Constitution should not be interpreted to the contrary.

226. Oliver Wendell Holmes, Jr., *Natural Law*, 32 HARV. L. REV. 40 (1918); *cf*. Southern Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917).

function for ages to come, it would be dysfunctional for the Constitution—hence "not lightly to be assumed"—to disable the federalist system it establishes from enabling *government*, state or federal as the case may be, from meeting real though unforeseen, and perhaps unforeseeable, challenges. *Holland*, read in light of *Andrews*, construed the treaty power to extend to situations where the nation seeks to vindicate an interest of "very nearly the first magnitude"; reliance upon the states would be in vain; and action in concert with another country would empower government to address the issue effectively. There is no reason to construe the Constitution to disallow *Holland*'s reading of the treaty power based on an "invisible radiation from the general terms of the Tenth Amendment."[227]

Holland's doctrine therefore does not, as a matter of law, risk the kind of expansion of federal power at the expense of the states that worries its critics. *Andrews* and *Holland* alike imply legal, as well as political, limits on the latter's doctrine. Justice Black's opinion in *Reid* suggests the same, for its consistency with *Holland* rests on Black's statement that *Holland* had not been concerned with "any specific provision of the Constitution," only the scope of the Tenth Amendment.[228]

V. *HOLLAND* AND THE MODERN LAW OF TREATIES

A. *After* Bond*: The Treaty Power and Federalism in Contemporary Perspective*

Scholars have, as noted, criticized *Holland* on historical, structural, textual, and other grounds.[229] Many of these critiques can be, and have been, answered on their own terms,[230] persuasively or not, and it would be superfluous to rehearse them. Yet the scholarly debate over *Holland* has taken place largely within the confines of constitutional methodologies that Justice Holmes would have rejected. Consequently, they tend to miss the force of *Holland*'s abiding functionalist, adaptivist rationale.

Holmes was a pragmatist.[231] His methodology of constitutional adjudication reflected it,[232] as, of course, did *Holland*. The decision relied, as Holmes candidly wrote, on a vision of the Constitution as an organic document that has adapted, as it should, to evolving national conditions in the light of history, practice, and experience. Constitutional adjudication should preserve and contribute to the strong foundation established by the Constitution for the United States as "a *nation*."[233] Holmes did not believe the Tenth Amendment

227. Missouri v. Holland, 252 U.S. 416, 434 (1920).

228. Reid v. Covert, 354 U.S. 1, 18 (1957).

229. *See, e.g.*, Lawson & Seidman, *supra* note 41; Michael D. Ramsey, Missouri v. Holland *and Historical Textualism*, 72 MO. L. REV. 969 (2008); Rosenkranz, *supra* note 7.

230. *See, e.g.*, Edward T. Swaine, *Putting* Missouri v. Holland *on the Map*, 73 MO. L. REV 1007 (2008); Carlos Manuel Vazquez, Missouri v. Holland*'s Second Holding*, 73 MO. L. REV. 939 (2008).

231. *See* LOUIS MENAND, THE METAPHYSICAL CLUB 432-33 (2002).

232. *See* RICHARD POSNER, *Introduction*, *in* THE ESSENTIAL HOLMES, at xi (Richard Posner ed., 1992).

233. Missouri v. Holland, 252 U.S. 416, 433 (1920) (emphasis added).

froze in time a static set of rights reserved to thirteen agrarian states in a precarious seaboard republic of 3.5 million people.[234]

Echoing Chief Justice Marshall, he wrote of the Constitution as a foundational but organic document, constitutive of a nation, and "intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs."[235] The Constitution therefore does not establish a set of "immutable rules," which could disable the nation's government from responding to future "exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur."[236] To the contrary, like Justice White in *Andrews*, Justice Holmes sought to interpret the Constitution to *work*—to function as durable, foundational law for the system of government it establishes, including, but not limited to, the federal structure of the United States. *Holland* interpreted the Article II treaty power to enable a functional, but interstitial, adjustment of the allocation of authority between the states and the federal government, which the Constitution, respectively, presupposed and established.

One may, of course, reject Holmes's jurisprudential approach. By describing it, we do not blithely dismiss critiques of *Holland* that sound in other approaches to constitutional adjudication. We do, however, consider it appropriate to assess *Holland* on its own terms. Assuming, as Holmes did, that the Constitution is a document "intended to endure for ages to come"[237]—that it must adapt to "exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur"[238]—what might be the consequences for the nation of abandoning *Holland*? If *Bond* effectively eviscerated *Holland*, as we have argued, what effects might we expect in the future?

Despite *Holland*'s periodic citation by the courts,[239] its real-world effects to date, as noted earlier, have been modest. In part, the reason for this is historical and traces to the post-New Deal expansion of congressional power. But the reason is also diplomatic, reflecting the federal government's reluctance to conclude treaties that intrude on traditional state functions. When it has concluded such treaties, it has often included federalism clauses or textual reservations intended to reassure the states or protect traditional state authority.[240] If the federal government's practices in this regard continue, the issue in *Holland* may not arise frequently.

B. *What the Future Holds*

Yet *Holland*'s limited influence in the past may be an unreliable barometer of its impact in the future. Today, more than ever before, the nation's

234. *Id*. at 434.

235. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819).

236. *Id*.

237. *Id*.

238. *Id*.

239. *See* Duncan B. Hollis, *Executive Federalism: Forging New Federalist Constraints on the Treaty Power*, 79 S. CAL. L. REV. 1327, 1353-54 (2006).

240. *See id*. at 1361-62, 1372-75.

needs often require state deference to federal foreign-affairs interests. If this historical trajectory continues, *Bond*'s effects may begin to look both serious and unwelcome.[241] The federal government had substantial reasons for submitting a brief that implored the Court not to overrule *Holland*.[242] Whether *Holland* remains good law might "alter U.S. positions in international negotiations."[243] Why is that a problem? The federal government, as noted, has long sought, often successfully, to accommodate state concerns and interests in the course of treaty negotiations; and the political safeguards of federalism all but guarantee that the government's practices in this regard will persist. Furthermore, if, as we suggested earlier, the most common concerns have been overstated, and if, as we also noted earlier, the effect of *Holland* has thus far been marginal, why might the *Holland* doctrine nonetheless prove to be of more than academic interest? The answer revolves around postwar changes in international law, in particular, the modern law of treaties, which constitute the predominant source of international law today, in contrast to custom's predominance in the past.[244]

C. *The Postwar Evolution of Treaty Law*

It is a truism that international law now governs far more than relations between nations. What some scholars call transnational law includes issues of trade, foreign investment, war, international crime, national security, international organizations, jurisdiction, global commons, human rights, and international administrative law. It also subsumes the full spectrum of international dispute resolution: the International Court of Justice; WTO panels; the International Tribunal for the Law of the Sea; private international arbitral tribunals for commercial, investment, and other disputes; ad hoc, hybrid, and permanent international criminal courts; and diverse committees and quasi-judicial bodies established by treaty. The United States participates in all these areas of international law. As the world's largest economic and military power, it has an especially strong interest in its ability to shape and sustain them.

Today, however, the principal source of international law is no longer custom but treaties, often multilateral treaties. Some treaties, such as the U.N. Convention on the Law of the Sea,[245] comprehensively regulate fields that were once governed by custom. The law of treaties has also evolved substantially since 1789, as reflected in the Vienna Convention on the Law of

241. *Cf.* John C. Yoo, *Globalization and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 1956-58 (1999) (observing that modern treaties permeate virtually every aspect of international law, with growing effects on domestic law, including in the realms of environmental, trade, and human rights).

242. Brief for Respondent at 47-55, Bond v. United States, 134 S. Ct. 2077 (2014) (No. 12-158).

243. *See* INTERNATIONAL LAW: NORMS, ACTORS, PROCESS 256 (Jeffrey Dunoff et al. eds., 3d ed. 2010).

244. Yoo, *supra* note 241, at 1956-57; *see also* Duncan B. Hollis, *Why State Consent Still Matters—Non-State Actors, Treaties, and the Changing Sources of International Law*, 23 BERKELEY J. INT'L L. 137 (2005).

245. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 183 U.N.T.S. 397 [hereinafter UNCLOS].

Treaties.[246] Many contemporary treaties differ from the contractual paradigm of the nineteenth century.[247] Some multilateral treaties, chiefly international human rights treaties, also govern how a nation treats its own citizens or other traditionally domestic matters.

The idea that only properly international issues may be the subject of treaties—as Charles Evans Hughes, Thomas Jefferson, and others once suggested—is anachronistic. It assumes an unrealistic (and often arbitrary) brightline distinction between domestic and international issues.[248] Most treaties still do not intrude upon "purely local" issues within the realm of traditional state functions. But some do—and as in 1789, reliance on the states to carry out, or uniformly interpret, national treaty obligations may sometimes be in vain. Modern multilateral treaties that deal with matters such as trade, investment, the environment, and international organizations, among other issues, may entail obligations that involve, which need not mean intrude upon, traditional state functions.

With more and more issues requiring international cooperation—for example, global warming—the need to avoid brightline subject-matter limitations on treaties is more pressing than ever. Absent *Holland*'s sensible doctrine, the limitations imposed by the Tenth Amendment would risk undermining confidence in the United States as a treaty partner, as the United States emphasized in its brief in *Bond*.[249] The United States can sometimes accommodate or allay the concerns of potential treaty partners by crafting federalism clauses or including reservations—but not always. Reservations may be at odds with the object and purpose of the treaty. This might be true, for example, of a treaty requiring intrastate environmental regulations. Yet even before *Bond*, the Court suggested that federal regulation of an intrastate body of water might well be in violation of the Tenth Amendment.[250] Other reservations might be excluded by the terms of the treaty, as they are, for

246. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

247. *See, e.g.*, United States v. Old Settlers, 148 U.S. 427, 467 (1893); Whitney v. Robertson, 124 U.S. 190, 194 (1888); The Amiable Isabella, 19 U.S. (6 Wheat.) 1, 21 (1821). The International Court of Justice's (ICJ) *Reservations to the Genocide Convention* advisory opinion notably led international lawyers to replace the traditional principle of unanimity, requiring each party to agree precisely on the treaty's terms, with a less contractual, more flexible model, authorizing reservations subject to a modest limitation based on the object and purpose of the treaty. Reservations to Convention on Prevention and Punishment of Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 24 (May 28).

248. *But see* Bond v. United States, 134 S. Ct. 2077, 2110 (Thomas, J., concurring in the judgment) (suggesting that "hypothetical difficulties in line-drawing are no reason to ignore a constitutional limit on federal power").

249. Brief for Respondent at 47-55, Bond v. United States, 134 S. Ct. 2077 (2014) (No. 12-158). One example of a post-*Lopez* situation in which *Holland* influenced treaty negotiations is U.S. opposition to the draft Framework Convention on Tobacco Control. INTERNATIONAL LAW: NORMS, ACTORS, PROCESS, *supra* note 243, at 256. The treaty "would have prohibited the distribution of free tobacco samples to children, because the federal government allegedly lacked authority to regulate the samples under the Commerce Clause," culminating in the treaty's revision to the softer language "prohibit or promote the prohibition." Yet if the United States were to ratify the treaty (it has signed but not ratified), and if *Holland* no longer remains good law, it is still unclear whether it would be constitutional for the federal government to require the states to take action under the treaty as opposed, for example, to merely exhorting them to act. *See id.*; *cf.* Peter Spiro, *Resurrecting Missouri v. Holland*, 73 MO. L. REV. 1029, 1040 (2008); Vazquez, *supra* note 230, at 965 (2008).

250. Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001).

example, by the Convention on the Law of the Sea.[251]

These changes reinforce the need to preserve *Holland*'s doctrine. It alone enables the Treaty Clause to deal flexibly with powers and rights that might otherwise be deemed integral state functions and hence immune from, even vital, national regulation. On balance, then, we suggest that it would have been at least valuable, and may well turn out to be critical, to preserve *Holland*. The United States must remain able to adapt to an era in which most international law is based on treaties and in which participation in the international legal system will at times require flexibility in the allocation of federal and state power. Flexibility is imperative in the practice of diplomacy no less than in the Court's own case law concerning diplomacy. Indeed, one consequence of abandoning *Holland* is evident in its effect on one of the most significant Supreme Court decisions on U.S. treaty law in decades, *Medellín v. Texas*.[252] *Bond* has rendered it all but incoherent.

D. Medellín*'s New Incoherence*

Beginning with the International Court of Justice's (ICJ) decision in *Breard*[253] and, as a consequence, the Court's brief opinion in *Breard v. Greene*,[254] the ICJ decided a trio of cases under the Optional Protocol to the Vienna Convention on Consular Relations (Optional Protocol).[255] In each, states had convicted and sentenced foreign nationals to death following their convictions in trials in which the defendants were denied the right to consular assistance under Article 38 of the Vienna Convention on Consular Relations (VCCR).[256] The United States is a party to the VCCR, and Article 38 is self-executing in that it imposes obligations on the United States, including all relevant federal and state officials who act on the nation's behalf, without the need for implementing legislation.[257] Article 38 is, under the Supremacy Clause, the "Law of the Land."[258] In *Avena*, the last of the ICJ cases, the ICJ held that the United States was under an obligation to allow some fifty Mexican nationals on death row in various states, all of whom had been denied their Article 38 right to consular assistance under the VCCR, to have their convictions and sentences reviewed and reconsidered.[259] The ICJ also held that the requirement of review and reconsideration should be carried out by the

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251. UNCLOS, *supra* note 245, arts. 309-10.

252. 552 U.S. 491 (2008).

253. Case Concerning the Vienna Convention on Consular Relations (Para. v. U.S.), 37 I.L.M. 810 (1998).

254. 523 U.S. 371 (1998).

255. The other two are *LaGrand* (Ger. v. U.S.), 1999 I.C.J. 9, Order (Mar. 3), and *Avena and Other Mexican Nationals* (Mex. v. U.S.), Judgment, 2004 I.C.J. 12 (Mar. 31). These cases led to numerous decisions in both state and federal U.S. courts, including, in addition to *Breard*, *Medellín v. Texas*, 552 U.S. 491 (2008), *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006), and *Federal Republic of Germany v. United States*, 526 U.S. 111 (1999).

256. Vienna Convention on Consular Relations art. 38, Apr. 24, 1963, 23 U.S.T. 3227, 500 U.N.T.S. 95.

257. *Medellín*, 552 U.S. at 505.

258. U.S. CONST. art. VI.

259. *Avena*, 2004 I.C.J. ¶¶ 57, 105.

judiciary.[260]

After *Avena*, President George W. Bush withdrew from the Optional Protocol,[261] which had supplied the ICJ with the jurisdiction to decide the VCCR disputes.[262] But under the U.N. Charter, "[e]ach Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party."[263] As a matter of international law, the United States therefore remained under a treaty obligation to comply with the ICJ's final judgment in *Avena*,[264] which the Court rendered before U.S. withdrawal from the Optional Protocol. President Bush accordingly issued a statement indicating that he had determined that in order to give effect to the ICJ's decision, state courts that had sentenced the Mexican nationals named in *Avena* should give effect to the ICJ requirement of review and reconsideration by applying general principles of comity.[265] Many states refused, even though every state official (governors, state court judges, attorney generals, line prosecutors, and so forth) is part of, and acts on behalf of, the United States as a nation—the legal entity to which the ICJ properly directed its judgment under international law.[266]

Most states either did not recognize the international obligation as legally binding or simply refused to abide by it,[267] conduct that cannot fail to call to mind the problems experienced by the nation under the Articles of Confederation. But apart from President Bush's unilateral directive, the federal government, too, failed to take action to respect the international obligation imposed by *Avena* (in combination with the VCCR, the Optional Protocol, and the U.N. Charter): Congress did not try to enact legislation authorizing compliance; the U.S. Attorney General did not bring suit to compel enforcement of the international obligation against recalcitrant state officials; and both federal and state judicial officers, by and large, gave the ICJ's judgment, at best, the "respectful consideration" that the Supreme Court had suggested in its brief per curiam opinion from 1998 denying Breard's application for a stay of execution based on a prior provisional order of the

260. *Id.* ¶ 122.

261. Steve Charnovitz, *Correcting American's Continuing Failure to Comply with the* Avena *Judgment*, 106 AM. J. INT'L L. 572, 573, 579 (2012).

262. Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, art. 1, *opened for signature* Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

263. U.N. CHARTER art. 94(1).

264. Medellín v. Texas, 552 U.S. 491, 504 (2008).

265. Charnovitz, *supra* note 261, at 573.

266. Before *LaGrand*, the ICJ had never held clearly that provisional measures were binding. State (and federal) officials therefore arguably had the discretion to decline to abide by them. But in *LaGrand*, the ICJ held that provisional measures are binding, LaGrand, (Ger. v. U.S.), 1999 I.C.J. 9, ¶ 29 (Mar. 3), and so in *Avena*, both the Court's provisional measures and the final judgment it rendered bound the United States, including everyone who acts for the United States under U.S. law. *Cf.* Louis Henkin, *Provisional Measures, U.S. Treaty Obligations, and the States*, 92 AM. J. INT'L L. 679, 680 (1998).

267. *See* Robert D. Sloane, *Measures Necessary to Ensure: The ICJ's Provisional Measures Order in* Avena and Other Mexican Nationals, 17 LEIDEN J. INT'L L. 673, 688 (2004); Letter from Advocates for Human Rights et al., on the Implementation of the *Avena* Decision, to Attorney Gen., Eric Holder and Secretary of State, Hillary Clinton, http://www.constitutionproject.org/pdf/375.pdf.

ICJ.[268]

When these issues reached the Supreme Court, it too declined to see itself as under a direct obligation to give judicial effect to the ICJ's judgment, in part because it found the U.N. Charter (the treaty that imposed the obligation on the United States to undertake to comply with *Avena*) non-self-executing.[269] It further held that President Bush's directive to the state courts to effectuate the decision by reviewing the convictions and sentences in conformity with general principles of comity exceeded his power: "The President has an array of political and diplomatic means available to enforce international obligations, but unilaterally converting a non-self-executing treaty into a self-executing one is not among them. The responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress."[270] Nor, the Court held, did the President have power, in effect, to rewrite state judicial standards—that is, rules of decision—to be applied to pending (or any) criminal cases.[271]

Medellín is, in our view, problematic in many respects; what is relevant here, however, is not its arguable doctrinal deficiencies but its conclusion that responsibility for effectuating U.S. international obligations under *Avena* "falls to Congress."[272] In particular, the Court held that the United States may give "domestic effect to an international treaty obligation under the Constitution" in two potential ways—but in either case, compliance "requires joint action by the Executive and Legislative Branches: The Senate can ratify a self-executing treaty made by the Executive, or, if the ratified treaty is not self-executing, Congress can enact implementing legislation approved by the President."[273]

This resolution seems plausible under *Holland*: Congress could exercise its Necessary and Proper Clause powers to enact federal law to carry into effect U.S. treaty obligations under the U.N. Charter (emanating from the final *Avena* judgment), and the implementing legislation would bind the states even if, absent treaty obligations, Congress would lack the power to require state courts to review and reconsider the relevant capital convictions and sentences of Mexican nationals. After *Bond*, however, this route to discharging the *Avena* judgment's obligations would be unconstitutional. After *Bond*, had the federal government sought to effectuate the international obligation imposed by Article 94 of the U.N. Charter, which the Supreme Court found to be non-self-executing,[274] by passing implementing legislation, that law would have violated the Tenth Amendment. As the *Bond* Court said, a treaty's implementing legislation, that is, "the statute—unlike the Convention—must be read consistent with principles of federalism inherent in our constitutional structure."[275] It is difficult to imagine a state function more integral or

268. Breard v. Greene, 523 U.S. 371, 375 (1998).
269. Medellín v. Texas, 552 U.S. 491, 517-18 (2008).
270. *Id*. at 525-26.
271. *Id*. at 530.
272. *Id*. at 525-26.
273. *Id*. at 527 (internal quotation marks and alterations omitted).
274. *See id*. at 508-10.
275. Bond v. United States, 134 S. Ct. 2077, 2088 (2014).

traditional than the general police power to define and punish "purely local" crimes.[276] The criminal law at issue in *Bond*, as the Court there insisted, would ordinarily be of "the sort . . . regulated by the States."[277]

The Mexican nationals within the ambit of *Avena* had likewise been convicted and sentenced under "purely local" state criminal laws. As horrendous as their capital crimes were, none of them fell within the scope of the federal government's power under Article I, Section 8—or any other delegated federal power. Absent the interpretation given to the Treaty Clause's interaction with the Tenth Amendment in *Holland*, the federal government lacks power to interfere with purely local criminal laws and their administration. Congress has no power to compel state courts to review and reconsider state criminal convictions and sentences under a retroactive standard. The *only* way in which Congress could have carried out acknowledged U.S. international obligations emanating from the treaties at issue, as the *Medellín* Court held that it alone could do,[278] would have been by resorting to the Necessary and Proper Clause.[279] In particular, it would have needed to enact legislation necessary and proper to implement the international obligation incurred by the United States based on the combination of four treaties: the VCCR, the Optional Protocol, the *Avena* decision, and the U.N. Charter.

Had *Holland* survived *Bond*, then the means by which the *Medellín* Court suggested that the United States could discharge non-self-executing treaty obligations would at least be intelligible. Congress would have the authority to enact legislation to require the states to carry out U.S. international obligations—notwithstanding that, absent the treaties at issue, authority over "purely local" criminal laws would remain within the reserved powers of the states under the Tenth Amendment. But if *Holland* is no longer good law, then the Supreme Court has held in *Medellín* that the United States, as a nation, is incapable of complying with its international legal obligations under *Avena*—*or any similar obligation in the future*: the President cannot bring the nation into compliance by unilateral declaration.[280] The federal courts cannot require compliance because of the doctrine of non-self-executing treaties, as interpreted in *Medellín*.[281] And now, after *Bond*, Congress too, despite what the Court said in *Medellín*, cannot enforce the nation's international obligations under *either* Article I, Section 8, *or* Article I in combination with the Article II treaty power. *Holland*'s doctrine—that "there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could"[282]—was the sole route to compliance with the ICJ's judgment. *Bond* has blocked that route.

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276. *Id*. at 2090.

277. *Id*. at 2111 (Alito, J., concurring in the judgment); *see also id*. at 2088 (opinion of Roberts, C.J.) (enumerating similar federalism presumptions).

278. *Medellín*, 552 U.S. at 520.

279. *Id*. at 526.

280. *Id*. at 529-30.

281. *Id*. at 504.

282. Missouri v. Holland, 252 U.S. 416, 433 (1920).

E. *U.S. Treaty Practice After* Bond

Avena aptly illustrates the predicament the United States faces today because of the complexity and nature of modern treaty law.[283] Today, as in 1789 and before, the states cannot always be relied upon to carry out the international obligations of the United States. The resistance of the states to treaty obligations they found distasteful—a paramount motivation for the Philadelphia Convention culminating in the Constitution—did not cease in 1789. And although the United States is obviously not at risk of war with Mexico, the states in *Avena* placed the nation in an awkward, diplomatically harmful situation. To paraphrase Hamilton's remark in *The Federalist*, after *Bond* and contrary to the clear intent of the Framers, "the peace of the WHOLE" may now indeed "be left at the disposal of a PART."[284]

In *Bond*, the Court reasoned that Pennsylvania criminal law would suffice to carry out the nation's CWC international obligation to punish violations under the treaty. Perhaps. But that is merely adventitious. Another state might not have enacted a law that suffices to carry out CWC prosecution obligations—or those contained in other treaties that require conduct in legal domains traditionally deemed "purely local." Why should the ability of the United States to comply with a legitimate treaty obligation depend on the fortuity of whether a state happens to have passed a law sufficient for that purpose?

Avena also reinforces the contemporary need to understand the Tenth Amendment within the context of a functional Constitution—one that respects federalism and preserves its value in our constitutional order but does not set it up as a constraint on the nation's ability to act internationally or adhere to international obligations. Justice Holmes's words in *Holland* still ring true today: "We must consider what this country has become in deciding what that Amendment has reserved."[285] By abandoning *Holland*, as the wreckage of *Medellín* suggests, the Supreme Court took a potentially dangerous step backwards toward recreating one of the foremost problems that beset the new nation under the Articles of Confederation. The Framers sought to resolve that problem by making treaties the supreme law of the land and vesting the treaty power exclusively in the federal government, thus giving it the power to enforce international obligations against recalcitrant states. *Bond* makes that not only more difficult but, at times, unconstitutional.

CONCLUSION

"[I]t is not lightly to be assumed," Holmes wrote, "that, in matters requiring national action, 'a power which must belong to and somewhere reside in every civilized government' is not to be found."[286] To have found a Tenth

283. *Avena*, recall, involved an international obligation that arose from (1) the U.N. Charter, triggered by (2) *Avena*, which had been litigated under (3) the Optional Protocol based on violations of (4) the VCCR, and then decided under (5) the Statute of the ICJ—also a treaty.

284. THE FEDERALIST NO. 80, at 535 (Alexander Hamilton) (Jacob E. Cook ed., 1961).

285. 252 U.S. at 432-34.

286. *Id*. at 433 (1920) (quoting Andrews v. Andrews, 188 U.S. 14, 33 (1903)).

Amendment impediment to a treaty regulating migratory waterfowl would have denied the federal government the authority to make that agreement. It would have required would-be treaty partners to negotiate with the forty-eight states of the Union instead—forty-eight different negotiations, state by state. That cannot be the system established by the Framers under the Constitution.

True, the federal government retains domestic discretion to refuse to implement a treaty. But the option of dishonoring U.S. obligations internationally ought not be cavalierly embraced. Vindicating the high purposes of the Constitution, so eloquently set forth in its Preamble, depends upon preserving the nation's credibility. It does not do to waive off this enduring imperative, as the *Bond* Court did, with a thin, formal reference to Congress's discretion to disregard U.S. international obligations—all the while purporting to apply a mere (but, after *Bond*, mandatory) canon of construction to laws implementing treaties.[287] Preserving national credibility requires honoring rather than betraying treaty commitments. This, in the final analysis, is *Holland*'s *raison d'être*, to which *Bond* is oblivious.

Treaty law in the United States, like so much else in U.S. foreign relations law, has always been shaped by history, tradition, principle, and practice—by experience, as Holmes wrote elsewhere, rather than logic alone.[288] Nothing in the experience of the United States revealed a need to abandon *Holland*. And if experience establishes the need, at times, to make treaties that arguably intrude on traditional conceptions of the boundaries of federalism in domestic circumstances, it is difficult to see why the constitutional law of treaties is not properly read to accommodate the needs of the nation that the Constitution established for ages to come. *Bond* debilitated *Holland*. The Court—and, we fear, the nation—will come to regret it.

Yet *Holland* can likely be salvaged without retreating explicitly from *Bond*. Precisely because the Court did not expressly overrule *Holland*, it need not reverse itself again in a future decision in order to revive *Holland*. As we have suggested, the Court could have, as indeed it should have, treated background principles and statutory canons of federalism as incorporating the Court's own interpretation of those principles in *Holland*. The Court could simply make clear that, consistent with what it held in *Holland*, the federalism principles that Congress should be presumed to bear in mind when it legislates *include* Justice Holmes's analysis of the interaction between the Article II treaty power and the Tenth Amendment.

Like other structural principles of the Constitution, such as the separation of powers, federalism cannot be reduced to brightline rules or formulae. The Court should, as it has in the past, consider the values that the principles of federalism serve in the U.S. constitutional system. In the spirit of *McCulloch*, those principles must be adapted to the exigencies, needs, and global context of the nation the Constitution established "to endure for ages to come."[289] The spirit of *McCulloch* is also the spirit of *Holland*.

287. Bond v. United States, 134 S.Ct. 2077, 2089, slip op. at 13 (2014).
288. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881).
289. 17 U.S. (4 Wheat.) 316, 415 (1819).