No. 08-2677

IN THE
United States Court of Appeals for the Third Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee/Cross-Appellant,

v.

CAROL ANNE BOND,

Defendant-Appellant/Cross-Appellee.

On Remand from the Supreme Court of the United States

BRIEF *AMICI CURIAE* OF THE CATO INSTITUTE AND THE CENTER FOR CONSTITUTIONAL JURISPRUDENCE SUPPORTING DEFENDANT-APPELLANT/CROSS-APPELLEE AND REVERSAL

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INTEREST OF *AMICI CURIAE*[1]

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The Center for Constitutional Jurisprudence was established in 1999 as the public interest law arm of the Claremont Institute, the mission of which is to restore the principles of the American Founding to their rightful and preeminent authority in our national life, including the foundational proposition that the powers of the national government are few and defined, with the residuary of sovereign authority reserved to the states or to the people. In addition to providing counsel for parties at all levels of state and federal courts, the Center and its

[1] Pursuant to Fed. R. App. P. 29, both parties, through their respective counsel, have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part and no party or party's counsel made a monetary contribution to fund its preparation or submission.

affiliated attorneys have participated as *amicus curiae* or on behalf of parties in many cases addressing the constitutional limits on federal power, including *American Electric Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011), *Medellin v. Texas*, 552 U.S. 491 (2008), *Rapanos v. United States*, 547 U.S. 715 (2006), and *United States v. Morrison*, 529 U.S. 598 (2000).

The present case centrally concerns *amici* because it represents the federal government's most egregious attempt to exceed its constitutional powers.

SUMMARY OF ARGUMENT

In *Missouri v. Holland*, 252 U.S. 416 (1920), the Supreme Court seemed to say that if a treaty commits the United States to enact some legislation, then Congress automatically obtains the power to enact that legislation, even if it would otherwise lack such power. It seemed to say, in other words, that Congress's powers are not constitutionally fixed, but rather may be expanded by treaty.

Justice Holmes provided neither reasoning nor citation for this proposition. It appears in one conclusory sentence, in a five-page opinion that is primarily dedicated to a different question. And the Court has never elaborated. The most influential argument on the point, which has largely short-circuited jurisprudential debate, appears not in the *United States Reports* but in the leading foreign affairs

treatise. Recent scholarship has shown that the historical premise of this argument is simply, demonstrably false.

The proposition that treaties can increase the power of Congress is inconsistent with the text of the Treaty Clause and the Necessary and Proper Clause. It is inconsistent with the fundamental structural principle that "[t]he powers of the legislature are defined, and limited." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803). It implies, insidiously, that that the President and the Senate can increase their own power by treaty. And it implies, bizarrely, that the President alone—or a foreign government alone—can decrease Congress's power and render statutes unconstitutional. Finally, it creates a doubly perverse incentive—an incentive to enter into treaties simply to increase legislative power.

This single errant sentence in *Holland* is unsound. Treaties cannot vest Congress with additional legislative power.

ARGUMENT

I. THE SUPREME COURT HAS INSTRUCTED THIS COURT TO CONSIDER AFRESH THE RELATIONSHIP BETWEEN THE TREATY CLAUSE AND THE NECESSARY AND PROPER CLAUSE

Appellant contends that Congress exceeded its power by enacting 18 U.S.C. § 229. As the Supreme Court says: "The ultimate issue of the statute's validity turns in part on whether the law can be deemed 'necessary and proper for carrying

into Execution' the President's Article II, § 2 Treaty Power." *Bond v. United States*, 131 S. Ct. 2355, 2367 (2011).

The Supreme Court might easily have addressed this "ultimate issue" itself. It might simply have said: "If the treaty is valid, there can be no dispute about the validity of the [implementing] statute under Article I, § 8, as a necessary and proper means to execute the powers of government." *Missouri v. Holland*, 252 U.S. 416, 432 (1920). But it said no such thing. Instead, it wrote: "This Court expresses no view on the merits of that argument. It can be addressed by the Court of Appeals on remand." *Bond*, 131 S. Ct. at 2367.

It is striking that the Court chose to remand on this issue. After all, it took two sentences to "express[] no view" and "remand"; quoting *Holland* would have required only one. If that one sentence from *Holland* were the answer, judicial economy should have prompted the Court to say so, but it did not. Under these circumstances, the remand is a pointed invitation to consider afresh the relationship between the Treaty Clause and the Necessary and Proper Clause.

It is always appropriate for a circuit court to give its unvarnished view of a Supreme Court opinion—particularly an opinion like *Holland* that includes no reasoning of its own on the point at issue. *Cf. Payne v. Tennessee*, 501 U.S. 808, 827 (1991) ("[W]hen governing decisions are . . . badly reasoned, 'this Court has never felt constrained to follow precedent.'" (quoting *Smith v. Allwright*, 321 U.S.

649, 665 (1944))). As this Court said in its prior opinion in this case: "[modern scholarly] debate suggests mounting interest for reconsideration of the rationale for *Holland*'s holding, especially arguments rooted in the text and history of the Constitution." *United States v. Bond*, 581 F.3d 128, 135 n.4 (3d Cir. 2009). Whether or not *Holland* ultimately controls the disposition here, this Court should analyze the question from first principles.

II. TREATIES CANNOT INCREASE CONGRESS'S LEGISLATIVE POWER[2]

The question presented is whether a treaty may increase Congress's power. In 1920, the Supreme Court seemed to answer that question with a single sentence: "If the treaty is valid, there can be no dispute about the validity of the [implementing] statute under Article I, § 8, as a necessary and proper means to execute the powers of government." *Holland*, 252 U.S. at 432.

Justice Holmes provided neither reasoning nor citation for that proposition. Indeed, the entire opinion takes up all of five pages in the *United States Reports*. Yet that one conclusory sentence has radical implications that are inconsistent with basic constitutional principles.

[2] The arguments that follow are developed more comprehensively in Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 Harv. L. Rev. 1867 (2005).

This sentence seems to imply that if a treaty commits the United States to enact some legislation, then Congress automatically obtains the power to enact that legislation, even if it would lack such power in the absence of the treaty. The implication is that Congress's powers are not fixed by the Constitution, but rather may be expanded by treaty. And if the conventional wisdom is correct that there are no subject-matter limitations on the scope of the treaty power, *see* Restatement (Third) of the Foreign Relations Law of the United States § 302 cmt. c (1987), then it would follow from *Holland* that treaties may increase congressional power virtually without limit.

This implication is in deep tension with constitutional text, history, and structure, and with the fundamental principle of limited and enumerated legislative powers.

A. The President Cannot, by Entering into a Treaty, Thereby Increase Congress's Power under the Necessary and Proper Clause

As the Supreme Court explained, the "ultimate issue" in this case turns on the relationship between the Necessary and Proper Clause and the Treaty Clause. *Bond*, 131 S. Ct. at 2367. The first step is to understand how these clauses fit together. Article I provides:

> The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

U.S. Const. art. I, § 8.

The Treaty Clause provides:

> [The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.

U.S. Const. art. II, § 2, cl. 2. By echoing the word "Power," the Treaty Clause leaves no doubt: the treaty power is an "other Power[]" referred to in the Necessary and Proper Clause.

That much is implicit in *Holland*, although Justice Holmes did not quote either clause, let alone discuss how they fit together. But, as the Court now realizes, *see Bond*, 131 S. Ct. at 2367, the conjunction of the two clauses is essential to analyzing whether a treaty may increase congressional power. Here, then, is the way that these two clauses fit together as a matter of grammar:

> The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution . . . [the President's] Power, by and with the Advice and Consent of the Senate, to make Treaties.

U.S. Const. art. I, § 8; U.S. Const. art. II, § 2.

By neglecting to quote these two clauses, Justice Holmes misconstrued the scope of this power. But when the two clauses are properly conjoined, it becomes clear that the key term is the infinitive verb "to make." The power granted to Congress is emphatically not the power to make laws for carrying into execution

"the treaty power," let alone the power to make laws for carrying into execution "all treaties." Rather, on the face of the conjoined text, Congress has power "To make all Laws which shall be necessary and proper for carrying into Execution . . . [the] Power . . . *to make* Treaties."

This power would certainly extend to laws appropriating money for the negotiation of treaties. As Rep. James Hillhouse explained in the House of Representatives, "the President has the power of sending Ambassadors or Ministers to foreign nations to negotiate Treaties . . . [but] it is . . . clear that if no money is appropriated for that purpose, he cannot exercise the power." 5 Annals of Cong. 673-74 (1796). And this power would likewise embrace any other laws necessary and proper to ensuring the wise use of the power to enter treaties. These might include, for example, appropriations for research into the economic or geopolitical wisdom of a particular treaty. *See* David E. Engdahl, *The Necessary and Proper Clause as an Intrinsic Restraint on Federal Lawmaking Power*, 22 Harv. J.L. & Pub. Pol'y 107, 107 (1998) ("[T]he Necessary and Proper Clause enables Congress to create offices and departments to help the President carry out his Article II powers.").

But on the plain text of the conjoined clauses, the object itself is limited to the "Power . . . to *make* Treaties" in the first place. This is not the power to implement treaties already made.

Nor will it do to say that the phrase "make Treaties" is a term of art meaning "conclude treaties with foreign nations and then give them domestic legal effect." There is no indication that that the phrase "make Treaties" ever had such a meaning. British treaties at the time of the Founding were non-self-executing, requiring an act of Parliament to create enforceable domestic law, *see* Carlos Manuel Vazquez, *Laughing at Treaties*, 99 Colum. L. Rev. 2154, 2158 (1999) ("[T]reaties in Great Britain lacked the force of domestic law unless implemented by Parliament."), and yet Blackstone wrote simply of "the *king's* prerogative *to make treaties*," without any suggestion that Parliament had a role in the making. 1 William Blackstone, *Commentaries* *249 (emphases added); *see also id.* at *243 ("[T]he king . . . may *make* what treaties . . . he pleases." (emphasis added)); *id.* at *244 ("[T]he king may *make* a treaty." (emphasis added)). Blackstone understood the difference between *making* a treaty, which the King could do, and giving it domestic legal effect, which required an act of Parliament. The "Power . . . to make Treaties" is exhausted once a treaty is ratified; implementation is something else altogether.

The Supreme Court saw that textual point clearly when construing a statute with similar language. In *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), the Court construed a statute regarding the "'right . . . to make . . . contracts.'" *Id.* at 176 (alterations in original) (quoting 42 U.S.C. § 1981 (1988) (current version at

42 U.S.C. § 1981(a) (2000)). This statutory phrase is textually and conceptually parallel to the constitutional "Power . . . to make Treaties" both because of the key infinitive verb "to make" and because, as Chief Justice Marshall explained, a non-self-executing treaty is itself in the nature of a contract. *See Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) ("[W]hen the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the court."). This is what the Court said in *Patterson*:

> [T]he right to *make* contracts does not extend, as a matter of either logic or semantics, to conduct . . . *after* the contract relation has been established, including breach of the terms of the contract . . . . Such *postformation* conduct does not involve the right to *make* a contract, but rather implicates the *performance* of established contract obligations . . . .

Patterson, 491 U.S. at 177 (emphases added). Just so here. The "Power . . . to make Treaties" does not extend, as a matter of logic or semantics, to the implementation of treaties already made.

The title of the present statute suffices to finish the point. The "Chemical Weapons Convention Implementation Act" *implements* a treaty; it is neither necessary nor proper to *make* any treaty.

B. Congress's Legislative Power Can Be Increased Only by Constitutional Amendment, Not by Treaty

Under *Holland*, some statutes would be beyond Congress's power to enact absent a treaty, but within Congress's power given a treaty. This implication runs counter to the textual and structural logic of the Constitution.

First, and most important, it means that Congress's powers are not constitutionally fixed, but rather may be increased by treaty. *See* 1 Laurence H. Tribe, *American Constitutional Law*, § 4-4, 645-46 (3d ed. 2000) ("By negotiating a treaty and obtaining the requisite consent of the Senate, the President . . . may endow Congress with a source of legislative authority independent of the powers enumerated in Article I."). If so, the legislative power is not limited to the subjects enumerated in the Constitution; it can extend to all of those subjects, plus any others that may be addressed by treaty. And according to the Restatement (Third) of the Foreign Relations Law of the United States:

> [T]he Constitution does not require that an international agreement deal only with "matters of international concern." The references in the Constitution presumably incorporate the concept of treaty and of other agreements in international law. International law knows *no limitations on the purpose or subject matter of international agreements*, other than that they may not conflict with a peremptory norm of international law. States may enter into an agreement on *any matter of concern to them*, and international law does not look behind their motives or purposes in doing so. Thus, the United States may make an agreement on *any subject suggested by its national interests* in relations with other nations.

Restatement § 302 cmt. c (emphases added) (citation omitted).

If this is so, then the legislative powers are not merely *somewhat* expandable by treaty; they are expandable *virtually without limit*. In theory, the United States might, ostensibly to foster better relations with another country, simply exchange reciprocal promises to regulate the citizenry so as to maximize the collective welfare. If *Holland* means what it says, then such a treaty would confer upon Congress plenary power.

That proposition is in deep tension with the basic constitutional scheme of enumerated powers; it is inconsistent with the Tenth Amendment's premise of reserved powers; and it stands contradicted by countless canonical statements that Congress's powers are fixed and defined. It is axiomatic that "[T]he Constitution[] confer[s] upon Congress . . . not all governmental powers, but only discrete, enumerated ones . . . ." *Printz v. United States*, 521 U.S. 898, 919 (1997). In Chief Justice Marshall's words: "[t]he powers of the legislature are *defined, and limited*; and that those limits may not be mistaken, or forgotten, the constitution is written." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) (emphasis added). Indeed, in this very case, the Supreme Court explained: "By *denying any one government complete jurisdiction over all the concerns of public life*, federalism protects the liberty of the individual from arbitrary power." *Bond*, 131 S. Ct. at 2364. This would be no protection at all if the legislative power were infinitely expandable by

treaty. So all of these propositions, from *Marbury* to *Bond*, are flatly inconsistent with *Holland*.

1. Congress only possesses the "legislative powers herein granted."

Chief Justice Marshall's view is reinforced by the juxtaposition of the three Vesting Clauses. Article I, Section 1, provides: "*All* legislative Powers *herein granted* shall be vested in a Congress of the United States." (emphases added). By contrast, Article II, Section 1, provides that "*[t]he* executive Power shall be vested in a President of the United States of America," (emphasis added), and Article III, Section 1, provides that "*[t]he* judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." (emphasis added).

There is a simple explanation for this difference in the Vesting Clauses. Congress is the first mover in the mechanism of U.S. law. It "*make[s]* . . . Laws." U.S. Const. art. I, § 8, cl. 18 (emphasis added). By contrast, the executive branch subsequently "execute[s]" the laws made by Congress, *see* U.S. Const. art. II, § 3, and the judicial branch interprets those laws. The scope of the executive and judicial power is, therefore, *contingent* on acts of Congress.

For example, the Constitution provides that the President "shall take Care that the Laws be faithfully executed." *Id.* By passing a new statute, therefore, Congress expands the President's powers by giving him a new law to execute. As

Justice Jackson explained, "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right *plus all that Congress can delegate.*" *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (emphasis added).

This structural fact explains the difference in phrasing between the first sentence of Article I and the first sentence of Article II. Vesting in the President only the executive power "herein granted" would have confused matters, because some executive powers are, in a sense, granted not by the Constitution but by acts of Congress. The subject-matter jurisdiction of the executive power can be expanded by acts of Congress; it is not fixed by the Constitution.

By contrast, the scope of the legislative power is not contingent on the acts of the other branches. It is fixed and defined by the Constitution. *See Marbury*, 5 U.S. (1 Cranch) at 176 ("[t]he powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written."). Congress has the enumerated powers "herein granted" and no others. *See United States v. Lopez*, 514 U.S. 549, 592 (1995) (Thomas, J., concurring) ("Even before the passage of the Tenth Amendment, it was apparent that Congress would possess only those powers 'herein granted' by the rest of the Constitution.").

But if the legislative power may be expanded by treaty, then the textual difference between Article I and Articles II and III would make no sense; the subject-matter jurisdiction of the legislative power, like the executive and judicial powers, would not be fixed and limited to those powers "herein granted," but would be expandable by the President and the Senate by treaty, just as the executive and judicial power can be expanded by act of Congress.

Indeed, Article III is even more telling. It provides that the judicial power shall "extend" to certain sorts of cases and controversies. *See* U.S. Const. art. III, § 2, cl. 1. The verb "to extend" suggests today just what it signified in 1789: stretching, enlarging. *See, e.g.*, Samuel Johnson, *A Dictionary of the English Language* (London, W. Strahan et al., 4th ed. 1773) ("To EXTEND . . . 1. *To stretch out* towards any part. . . . 5. *To enlarge*; to continue. . . . 6. To encrease in force or duration. . . . 7. To enlarge the comprehension of any position. . . . 9. To seize by a course of law." (emphases added)). And as Article III provides, "[t]he judicial Power shall *extend* to all Cases, in Law and Equity, arising under this Constitution, [and] *the Laws of the United States.*" U.S. Const. art. III, § 2, cl. 1 (emphases added). Thus, the scope of the judicial power—like the executive power, but unlike the legislative power—is not entirely fixed by the Constitution but may be enlarged by acts of Congress. Therefore, it would not have made sense

to vest in the judiciary only the judicial powers "herein granted." A new federal law can give the judiciary something new to do, thus expanding its power.

Even more to the point, "[t]he judicial Power shall *extend* to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, *and Treaties made, or which shall be made, under their Authority.*" *Id.* (emphases added). This clause expressly provides that the scope of the judicial power may be expanded not only by statute but also by treaty. A new treaty, like a new statute, gives the judiciary something new to do, thus expanding its jurisdiction. So, again, it would not have made sense to limit the federal courts to the powers "herein granted," because the scope of the judicial power may be expanded, not only by statute but also by treaty.

But Article I has no such provision. The legislative power does not "extend . . . to Treaties made, or which shall be made." *Id.* Indeed, the legislative power does not "extend" at all. Rather, the only legislative powers provided for in the Constitution are those that it enumerates, those that it says are "herein granted." The scope of the legislative power—unlike the scope of the executive and judicial powers—does not change with the passage of statutes or the ratification of treaties.

This textual dichotomy between Article I and Articles II and III is consistent with the underlying theory of separation of powers. To create a tripartite government of limited powers, it is logically necessary that at least one of the

branches have fixed powers—powers that cannot be increased by the other branches. As one would expect, that branch is Congress. Congress is the first branch of government, the first mover in American law, the fixed star of constitutional power. *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1443 n.71 (1987) ("Congress remained in many ways *primus inter pares.* Schematically, Article I precedes Articles II and III. Structurally, Congress must exercise the legislative power before the executive and judicial powers have a statute on which to act." (citations omitted)). Congress can increase the power of the President, but the President cannot increase the power of Congress in return. If he could, the federal government as a whole would cease to be one of limited power.

Moreover, to the extent that the jurisdiction of any branch may increase, it is naturally left to a *different* branch to work the expansion. To entrust Congress to expand the subject-matter jurisdiction of the executive and the judiciary is consistent with the theories of Montesquieu and Madison, because Congress has no incentive to overextend the powers of the other branches at its own expense. *See* 1 Blackstone at *142 ("[W]here the legislative and executive authority are in distinct hands, the former will take care not to entrust the latter with so large a power, as may tend to the subversion of [its] own independence, and therewith of the liberty of the subject."). But it is quite another matter to entrust treatymakers—the

President and Senate—to expand the subject-matter jurisdiction of lawmakers—the President, Senate, and House. Here, there is no ambition to counteract ambition; here, ambition is handed the keys to power. *See* Charles de Secondat, Baron de Montesquieu, *The Spirit of the Laws* bk. XI, ch. IV, at 161 (photo. reprint 1991) (J.V. Prichard ed., Thomas Nugent trans., G. Bell & Sons 1914) (1748) ("[E]very man invested with power is apt to abuse it, and to carry his authority as far as it will go."). As Henry St. George Tucker wrote five years before *Holland*, "[s]uch interpretation would clothe Congress with powers beyond the limits of the Constitution, with no limitations except the uncontrolled greed or ambition of an unlimited power." Henry St. George Tucker, *Limitations on the Treaty-Making Power* § 113, at 130 (1915).

None of this is consistent with the text of the Constitution or with its underlying theory of separation of powers. *See INS v. Chadha*, 462 U.S. 919, 947 (1983) (noting "the profound conviction of the Framers that the powers conferred on Congress were the powers to be most carefully circumscribed"); *The Federalist No. 49*, at 313-14 (James Madison) (Clinton Rossiter ed., 1961) ("[T]he tendency of republican governments is to an aggrandizement of the legislative at the expense of the other departments.").

The Court realized this long before *Holland*, in a case that Justice Holmes failed to cite. As the Court explained in 1836: "The government of the United

States . . . is one of limited powers. It can exercise authority over no subjects, except those which have been delegated to it. Congress cannot, by legislation, enlarge the federal jurisdiction, *nor can it be enlarged under the treaty-making power.*" *Mayor of New Orleans v. United States*, 35 U.S. (10 Pet.) 662, 736 (1836) (emphasis added).

2. *Missouri v. Holland* enables the circumvention of Article V.

Another way to put the point is that *Holland* permits evasion of Article V's constitutional amendment mechanism. As a general rule, the subject matter of the legislative power can be increased only by constitutional amendment. This expansion has happened several times. *See* U.S. Const. amend. XIII, § 2; amend. XIV, § 5; amend. XV, § 2; amend. XIX, cl. 2; amend. XXIII, § 2; amend. XXIV, § 2; amend. XXVI, § 2.

The process provided by the Constitution for its own amendment is, of course, far more elaborate than the process for making treaties. *Compare* U.S. Const. art. II, § 2, cl. 2, *with* U.S. Const. art. V. But if *Holland* means what it says, then treaties may "provide Congress with a new basis for subject-matter jurisdiction." David Golove, *Human Rights Treaties and the U.S. Constitution*, 52 DePaul L. Rev. 579, 590 n.38 (2002). In other words, the legislative subject-matter jurisdiction of Congress may be increased not only by constitutional amendment but also by treaty.

The Court rejected an analogous implication in *City of Boerne v. Flores*, 521 U.S. 507 (1997). In that case, the Court considered whether the object of legislation under Section 5 of the Fourteenth Amendment—"to enforce . . . the provisions of" that Amendment—could be expanded by act of Congress:

> If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be "superior paramount law, unchangeable by ordinary means." It would be "on a level with ordinary legislative acts, and, like other acts, . . . alterable when the legislature shall please to alter it." Under this approach, it is difficult to conceive of a principle that would limit congressional power. Shifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V.

Id. at 529 (citations omitted) (quoting *Marbury*, 5 U.S. (1 Cranch) at 177).

In other words, under Section 5, the *nexus* between the legislation and its object may be relatively loose, but the object *itself* cannot be expanded by the political branches. If the object of such legislation—"to enforce . . . the provisions of" the Fourteenth Amendment—could be expanded by the political branches, the result would be an impermissible expansion of legislative power outside of Article V's amendment mechanism.

The situation is the same with treaties. Read literally, *Holland* renders an object of the Necessary and Proper Clause expandable with the ratification of each new treaty. Such an interpretation, in turn, allows for an expansion of legislative power by the President and Senate, which "effectively circumvent[s] the difficult

and detailed amendment process contained in Article V." *Id*; *see also Reid v. Covert*, 354 U.S. 1, 17 (1957) (plurality opinion) ("It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights—let alone alien to our entire constitutional history and tradition—to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions. In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V.").

C. Either the President or a Foreign Government Can Unilaterally Abrogate a Treaty—But Neither the President Nor a Foreign Government Can Thereby Decrease Congress's Power and Render U.S. Laws Unconstitutional

If it is strange to think that the legislative power may be *expanded*, not by constitutional amendment, but by an action of the President with the consent of the Senate, it is surely stranger still to think that the legislative power may be *contracted* by the President alone. Yet this too is an implication of *Holland.*

As a general matter, "[i]f [a] statute is unconstitutional, it is unconstitutional from the start," The Attorney General's Duty To Defend and Enforce Constitutionally Objectionable Legislation, 4A Op. Off. Legal Counsel 55, 59 (1980). And, conversely, if a statute is constitutional when enacted, it generally can be *rendered* unconstitutional only by a constitutional amendment.

The Supremacy Clause confirms the point: "This Constitution, and the Laws of the United States which shall be *made* in Pursuance thereof . . . shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2 (emphasis added). Once a constitutional law is made, it is the supreme law of the land from that moment forth, until it is repealed or the Constitution is amended. In other words, "[a] statute . . . must be tested by powers possessed at the time of its enactment." *Newberry v. United States*, 256 U.S. 232, 254 (1921).

Yet *Holland* creates an anomalous exception to this rule. It implies that some exercises of legislative power derive their authority not from the Constitution but from specific treaties. If so, then when such treaties are terminated, their implementing statutes presumably *become* unconstitutional. Such statutes are suddenly rendered unconstitutional—not by constitutional amendment but by the mere abrogation of a treaty.

And if it is strange to think of a statute *becoming* unconstitutional, surely it is stranger still to think that the President may render a statute unconstitutional *unilaterally and at his sole discretion*. Yet this is what follows from *Holland.* The President has power to abrogate treaties unilaterally. *See* Validity of Congressional-Executive Agreements That Substantially Modify the United States' Obligations Under an Existing Treaty, 20 Op. Off. Legal Counsel 389, 395 n.14 (1996) ("the President possesses the authority to terminate a treaty in accordance

with its terms by his unilateral action."). If so, then the President, by renouncing a treaty, could unilaterally render an implementing act of Congress unconstitutional.

This result is inconsistent with the basic proposition that "repeal of statutes, no less than enactment, must conform with [Article] 1." *Chadha*, 462 U.S. at 954. Thirteen years ago, the Supreme Court did not hesitate to strike down a statute that "authorize[d] the President himself to effect the repeal of laws, for his own policy reasons, without observing the procedures set out in Article I, § 7." *Clinton v. City of New York*, 524 U.S. 417, 445 (1998). As the Court said in that case, "[t]here is no provision in the Constitution that authorizes the President . . . to repeal statutes." *Id*. at 438. Yet under *Holland*, legislation that reaches beyond enumerated powers to implement treaties is, in effect, subject to a different rule. Here, in essence, the President has a unilateral power "to effect the repeal of laws, for his own policy reasons." *Id.* at 445. Whenever he chooses, he may abrogate a treaty and thus render any implementing legislation unconstitutional.

And that is not the worst of it. The President is not the only one who can terminate a treaty. Our treaty partners can likewise renounce treaties. *See* Louis Henkin, *Foreign Affairs and the United States Constitution* 204 (2d ed. 1996) ("[A treaty] is not law of the land if it . . . has been terminated or destroyed by breach (whether by the United States or by the other party or parties)."). Under *Holland*, therefore, it is not only the President who can, at his own discretion, render certain

statutes unconstitutional by renouncing treaties. *Foreign governments can do this too.* Surely the Founders would have been surprised to learn that a federal statute—duly enacted by both Houses of Congress and signed by the President—may, under some circumstances, be rendered unconstitutional at the discretion of, for example, the King of England. After all, ending the King's capricious control over American legislation was the very first reason given on July 4, 1776, for the Revolution. *See* The Declaration of Independence paras. 2-4 (U.S. 1776). Yet this too is a consequence of *Holland*.

All these paradoxes can be resolved only if Congress's legislative power cannot be expanded or contracted by treaty.

III. THE MOST INFLUENTIAL ARGUMENT SUPPORTING *MISSOURI V. HOLLAND* IS BASED ON A MISREADING OF CONSTITUTIONAL HISTORY

Justice Holmes set forth no arguments whatsoever for the proposition that treaties can increase Congress's legislative power. And subsequent scholars and courts have generally contented themselves with a citation to *Holland*. But one eminent scholar has presented a substantive argument in support of this proposition, based upon the drafting history of the Constitution. It is ostensibly an extremely forceful argument, and one with inherent authority because it appears in

the leading treatise on the constitutional law of foreign affairs. Indeed, it is the *only* argument on this point in that treatise.

As discussed above, the legislative power, unlike the judicial power, does not expressly "extend to . . . Treaties made, or which shall be made." U.S. Const. art. III, § 2, cl. 1. Rather, the legislative power is limited by the Constitution to those powers that it enumerates—those that are "herein granted." U.S. Const. art. I, § 1. To this point, though, Professor Louis Henkin has an apparently devastating reply based on constitutional drafting history: *"The 'necessary and proper' clause originally contained expressly the power 'to enforce treaties' but it was stricken as superfluous."* Henkin, *supra*, at 481 n.111 (emphasis added).

If words were struck from the draft Constitution as superfluous during the Convention, then the words that remained should probably be interpreted to cover the ground of the words that were struck. The inference here is that the Framers actually turned their attention to the precise question at issue in *Holland*. On this drafting history, it would appear that the Framers specifically considered whether the Necessary and Proper Clause—in its final form, without those crucial words—still signifies the power "to enforce treaties" beyond the other enumerated powers. It appears to follow that the final text of the Necessary and Proper Clause must convey the power to make laws "to enforce treaties."

Unsurprisingly, this argument has proven quite influential. For example, when the Second Circuit was confronted with this question, its entire analysis boiled down to citations to *Holland* and its predecessor *Neely v. Henkel*, 180 U.S. 109 (1901)—followed by the crucial citation to Henkin. *United States v. Lue*, 134 F.3d 79, 82 (2d Cir. 1998). Indeed, when the Supreme Court itself invoked *Holland* seven years ago, it too cited Henkin's treatise. *United States v. Lara*, 541 U.S. 193, 201 (2004). Likewise, in this very case, the Government relied on exactly this argument, quoting the crucial historical argument of Professor Henkin. Government's Resp. to Mot. To Dismiss Counts One and Two of the Indictment at 7-8, *United States v. Bond*, No. 07-528 (E.D. Pa. appeal docketed June 11, 2008), ECF No. 30.

But Professor Henkin was wrong. As recent scholarship has demonstrated, he simply misread the constitutional history. The words "to enforce treaties" *never appeared in any draft of the Necessary and Proper Clause*. They were never struck as superfluous to that Clause, because they never appeared in that Clause at all. Rather, the phrase "enforce treaties" was struck as superfluous *from the Militia Clause*, which was apparently the source of Henkin's confusion. But *that* drafting history provides no support for *Holland*. *See* Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 Harv. L. Rev. 1867, 1912-18 (2005).

In short, the leading treatise on the law of foreign affairs makes exactly one argument in favor of *Missouri v. Holland*'s crucially important, unreasoned statement that Congress has automatic power to enforce treaties. This treatise, and this argument, have profoundly influenced—and short-circuited—debate on this question. Yet Professor Henkin's only argument on this point is based on a historical premise that is simply, demonstrably false.

The words "enforce treaties" never appeared in the Necessary and Proper Clause. And there is no reason in constitutional history to believe that the clause as ratified entails power, beyond the other enumerated powers, to enforce treaties.

IV. *MISSOURI V. HOLLAND* IS A STRUCTURAL AND DOCTRINAL ANOMALY

A. *Missouri v. Holland* Is in Tension with *Reid v. Covert*

If treaties cannot confer legislative power, then a treaty might commit the United States to enact legislation even though Congress would have no power to fulfill the promise.

At first glance, this might seem an anomalous result, but the truth is that this result already obtains from *Reid v. Covert*, 354 U.S. 1 (1957). Under current doctrine, the President may, by non-self-executing treaty, promise that Congress will violate the Bill of Rights. Entering into such a treaty does not violate the Constitution, because a non-self-executing treaty has no domestic legal effect. But,

as the Supreme Court made clear in *Reid*, Congress is not thereby empowered to violate the Bill of Rights. *Id.* at 16-17 (plurality opinion). It is already true, therefore, that the President may make political promises by treaty that Congress lacks the legal power to keep absent a constitutional amendment.

> [T]he Government contends that [the statute at issue] can be sustained as legislation which is necessary and proper to carry out the United States' obligations under the international agreements made with those countries. The obvious and decisive answer to this, of course, is that no agreement with a foreign nation can *confer power on the Congress*, or on any other branch of Government, *which is free from the restraints of the Constitution.*

Id. at 16 (plurality opinion) (emphases added).

Reid is right, and it is *Holland* that creates the anomaly. The President has theoretical power to enter into a treaty promising that Congress will violate the Bill of Rights, but such a treaty does not empower the Congress to do so. Likewise, the President has theoretical power to enter into a treaty promising that Congress will exceed its legislative powers, but again, the treaty does not and cannot empower Congress to do so. *See* John C. Eastman, *Will Mrs. Bond Topple* Missouri v. Holland*?*, 2010-11 Cato Sup. Ct. Rev. 185, 194-202 (2011).

B. *Missouri v. Holland* Creates Doubly Perverse Incentives—Incentives for More International Entanglements, Which in Turn Increase Legislative Power

It might be argued that the rule of *Holland* allows desirable flexibility in the conduct of foreign affairs. But the flexibility afforded by the rule is entirely insidious.

The domestic "flexibility" afforded by treaties that reach beyond enumerated powers will of course be tempting to the President and the Senate. After all, they, plus the House of Representatives, will be the beneficiaries of the increased legislative power. Indeed, this prospect will constitute a powerfully perverse incentive to enter into treaties that go beyond enumerated powers. This is just the sort of self-aggrandizing "flexibility" that the Constitution was designed to prohibit. "Although the founders were concerned about the concentration of governmental power in any of the three branches, their primary fears were directed toward congressional self-aggrandizement." The Constitutional Separation of Powers Between the President and Congress, 20 Op. Off. Legal Counsel 124, 131 (1996) (Walter Dellinger, Assistant Attorney General) (citing *Mistretta v. United States*, 488 U.S. 361, 411 n.35 (1989)).

Under current doctrine, "[i]t is not difficult to hypothesize possible abuses of the treaty power." Golove, *supra*, at 1298 n.756. There is, in fact, a trend toward treaties that encroach on the traditional domains of the states. These treaties can be

very vague, *see* Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 Mich. L. Rev. 390, 443 (1988) ("[T]reaties, especially multilateral treaties, may be more likely than domestic legislation to contain vague and aspirational language, making their effect on state prerogatives harder to anticipate during the ratification process."), and even if they are not so vague, at least one circuit court has concluded that implementing legislation need only bear a "rational relationship" to the treaty that it is ostensibly designed to execute. *See Lue*, 134 F.3d at 84.

The Constitution should not be construed to create this doubly perverse incentive—an incentive to enter "entangling alliances," merely to attain the desired side effect of increased legislative power. *See* Thomas Jefferson, First Inaugural Address (Mar. 4, 1801), *in* Thomas Jefferson, *Writings* 1136-39 (Merrill D. Peterson, ed.) (calling for "peace, commerce, and honest friendship with all nations, entangling alliances with none"); *see also* George Washington, Farewell Address (Sept. 17, 1796), *in Presidential Documents* 18, 24 (J.F. Watts & Fred L. Israel eds., 2000) ("It is our policy to steer clear of permanent alliances with any portion of the foreign world . . . ."). Indeed, the treatymakers apparently succumbed to just this temptation in *Holland* itself: "If ever the federal government could be charged with bad faith in making a treaty, this had to be the case."

Golove, *supra*, at 1256. The Constitution should not be interpreted to create a doubly perverse temptation to indulge this sort of bad faith.

CONCLUSION

A treaty cannot confer new power on Congress, and so the treaty at issue here did not and could not empower Congress to enact 18 U.S.C. § 229.

Respectfully submitted this 23rd day of September, 2011,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,889 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Third Circuit Local Appellate Rule 29.1(b).
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3. Pursuant to Third Circuit L.A.R. 28.3(d), I certify that my co-counsel Ilya Shapiro and I are members of the Bar of this Court.
4. Pursuant to Third Circuit L.A.R. 31.1(c), I certify that the foregoing E-Brief and the hard copies of the Brief have identical text, that a virus detection program (Microsoft Security Essentials) was run on the E-Brief file, and that no virus was detected.

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Dated: September 23, 2011

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I hereby certify that I caused the foregoing brief to be electronically filed with the Clerk of Court using the CM/ECF system, which will send a notification of such filing to the appropriate counsel.

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