No. 12-158

In the

Supreme Court of the United States

CAROL ANNE BOND, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF *AMICI CURIAE* CATO INSTITUTE AND CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONER

JOHN C. EASTMAN
ANTHONY T. CASO
Center for Constitutional Jurisprudence
c/o Chapman University School of Law
One University Drive
Orange, CA 92886
(877) 855-3330 x2
jeastman@chapman.edu

NICHOLAS QUINN ROSENKRANZ
Counsel of Record
600 New Jersey Ave., NW
Washington, DC 20001
(202) 662-4245
nqr@law.georgetown.edu

ILYA SHAPIRO
Cato Institute
1000 Mass. Ave., NW
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

Counsel for Amici Curiae

QUESTION PRESENTED

Can the President increase Congress's legislative power by entering into a treaty?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Constitutional Provisions

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs.

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. The Center and its affiliated attorneys have participated as *amicus curiae* or on behalf of parties in many cases addressing the constitutional limits on federal power.

The present case concerns *amici* because it represents an opportunity to clarify that Congress's power is limited by the Constitution and may not be increased by treaty.

---

[1] Pursuant to this Court's Rule 37.3(a), all parties consented to the filing of this brief and were given timely notice of intent to file. Pursuant to Rule 37.6, *amici* affirm that no counsel for any party authored this brief in any manner, and no person other than *amici*, their members, or their counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

In *Missouri v. Holland*, 252 U.S. 416 (1920), this 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 this 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. And recent scholarship has shown that the historical premise of this academic argument is simply, demonstrably false.

The proposition that treaties can increase the power of Congress is inconsistent with the text of the Treaty Clause, the Necessary and Proper Clause, and the Tenth Amendment. 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 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 in-

centive to enter into entangling alliances simply to increase legislative power.

Holland is wrong and should be overruled. This Court should grant certiorari, and it should hold that treaties cannot vest Congress with additional legislative power.

ARGUMENT

I. THIS COURT SHOULD GRANT CERTIORARI TO RECONSIDER AN IMPORTANT AND ERRONEOUS PRECEDENT

In the court below, the Third Circuit held that the Chemical Weapons Convention increased the power of Congress. It held, in other words, that Congress is not limited to those powers enumerated in the Constitution; rather, those powers may be increased by treaty. The Third Circuit felt bound to reach this conclusion by a single, conclusory sentence in *Holland*: "If the treaty is valid there can be no dispute about the validity of the [implementing] statute under Article I, Section 8, as a necessary and proper means to execute the powers of the Government." *Holland*, 252 U.S. at 432.

But the Third Circuit was obviously uneasy with this conclusion: "[W]ith practically no qualifying language in *Holland* to turn to, we are bound to take at face value" that single sentence. *United States v. Bond*, 681 F.3d 149, 162 (3d Cir. 2012). "[I]t may be that there is more to say about the uncompromising language used in *Holland* than we are able to say, but that very direct language demands from us a di-

rect acknowledgement of its meaning, even if the result may be viewed as simplistic. If there is nuance that has escaped us, it is for the Supreme Court to elucidate." *Id*. at 165 (footnote omitted).

Judge Ambro was even more explicit in concurrence:

> I write separately to urge the Supreme Court to provide a clarifying explanation of its statement in . . . *Holland* . . . . I hope that the Supreme Court will soon flesh out '[t]he most important sentence in the most important case about the constitutional law of foreign affairs,' and, doing so, clarify (indeed curtail) the contours of federal power to enact laws that intrude on matters so local that no drafter of the Convention contemplated their inclusion in it.

Id. at 169-70 (Ambro, J., concurring) (quoting Nicholas Quinn Rosenkranz, *Executing The Treaty Power*, 118 Harv. L. Rev. 1867, 1868 (2005)).

Admittedly, there may not be a *sharp* circuit split on this question—but, if so, that is only because no such split can arise given that one errant sentence from *Holland*. Indeed, a sharp split is improbable when all circuit courts are bound by this "very direct" and "uncompromising" language. *Id.* at 164. The closest thing to a sharp circuit split under these circumstances is exactly what is presented here: circuit judges following *Holland*, but with palpable reluctance—decrying its "simplistic" results, and "urg[ing this] . . . Court to provide a clarifying explanation." *Id.* at 169 (Ambro, J., concurring).

This Court should grant certiorari because that one conclusory sentence from *Holland* is of great theoretical and practical importance, and it is in deep tension with the fundamental constitutional principle of limited and enumerated legislative powers. This Court should clarify that treaties cannot vest Congress with new legislative power.

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

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

As this Court explained when it first encountered this case, the "ultimate issue" here turns on the conjunction of the Necessary and Proper Clause and the Treaty Clause. *United States v. Bond*, 131 S. Ct. 2355, 2367 (2011). Indeed, this much is implicit in *Holland,* although Justice Holmes did not quote either clause, let alone discuss how they fit together. 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, art. II, § 2.

---

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

When the two clauses are properly conjoined, it becomes clear that the key term is the infinitive verb "to make." This power is emphatically not the power to make laws for carrying into execution "all treaties." Rather, what may be carried into execution is 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 1796, "the President has the power of sending Ambassadors … to foreign nations to negotiate Treaties, . . . [but] if no money is appropriated for that purpose, he cannot exercise the power." 5 Annals of Cong. 673-74 (1796).

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 Framing were non-self-executing, requiring an act of Parliament to create enforceable domestic law, see, e.g., *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 274 (1796), 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.

This Court saw that textual point clearly when construing a statute with similar language, to wit, the "right . . . to make . . . contracts." 42 U.S.C. § 1981 (1988) (current version at 42 U.S.C. § 1981(a) (2006)). This statutory "right . . . to make . . . contracts" 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, … 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 Court explained:

> [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 v. McLean Credit Union, 491 U.S. 164, 177 (1989) (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 are 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, because it means that Congress's powers are not constitutionally fixed. 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 the conventional wisdom has it 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.

If this is so, then the legislative powers are not merely *somewhat* expandable by treaty; they are expandable *virtually without limit*. In theory, the President 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 legislative 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 "the 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: "The powers of the legislature are *defined, and limited;* and that those limits may not be mistaken, or forgotten, the constitution is written." *Marbury*, 5 U.S. (1 Cranch) at 176 (emphasis added). Indeed, in this very case, this 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 expandable by treaty. 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 …." U.S. Const. art. I, § 1 (emphases added). By contrast, Article II, Section 1, provides that "*[t]he* executive Power shall be vested in a President …," U.S. Const. art. II, § 1 (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," U.S. Const. art. III, § 1 (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, therefore, is *contingent* on acts of Congress.

For example, the Constitution provides that the President "shall take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. By passing a new statute, 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* (*Steel Seizure*), 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (emphasis added).

Likewise, the judicial power is also contingent—indeed, it is expressly contingent, not only on statutes but also on treaties. Article III 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, in particular, "[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 by treaty. A new (self-executing) treaty, like a new statute, can give the judiciary something new to do, thus expanding its jurisdiction. So 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. The legislative power alone is fixed rather than contingent, and so it alone is limited to an enumeration of powers "herein granted."

Indeed, this structural fact, reflected in the textual dichotomy between Article I and Articles II and III, coheres perfectly 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." (internal citations omitted)). Congress, when acting pursuant to its own delegated powers, 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* Blackstone, *supra*, 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; instead, 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."); see also *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."). As Henry St. George Tucker wrote in his treatise on the treaty power 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).

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. *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 endow Congress with a source of legislative authority independent of the powers enumerated in Article I." Tribe, *supra*. In other words, the legislative subject-matter jurisdiction of Congress may be increased not just by constitutional amendment but also by treaty.

This Court rejected an analogous implication in *City of Boerne v. Flores*, 521 U.S. 507 (1997):

> 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).

Holland presents the same problem. Read literally, it renders an object of the Necessary and Proper Clause expandable with the ratification of each new treaty. Such an interpretation, in turn, allows the President and Senate to work an expansion of legislative power, which "effectively circumvent[s] the difficult and detailed amendment process contained in Article V." *Id*. But as the plurality explained in *Reid v. Covert*:

> 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.

Reid v. Covert, 354 U.S. 1, 17 (1957) (plurality).

C. If *Holland* Were Correct, Then the President—or a Foreign Sovereign—Could Decrease Congress's Power and Render U.S. Laws Unconstitutional

If it is strange to think that the legislative power can 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, if a statute is constitutional when enacted, it generally can be *rendered* unconstitutional only by a constitutional amendment. 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). See also *Nat'l Fed'n of Indep. Bus. v. Sebelius,* 132 S. Ct. 2566, 2579 (2012) ("The peculiar circumstances of the moment may render a measure more or less wise, but cannot render it more or less constitutional." (quoting Chief Justice John Marshall, *A Friend of the Constitution*, Alexandria Gazette, July 5, 1819, *reprinted in John Marshall's Defense of McCulloch v. Maryland* 190-191 (Gerald Gunther ed., 1969))).

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 mere treaty abrogation.

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 Executive Branch takes the position that 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. O.L.C. 389, 395 n.14 (1996). 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. This 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 this Court underscored, "[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. Our treaty partners, too, can 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*).") (emphasis added). Under *Holland*, therefore, it is not only the President who can, at his own discretion, render certain statutes unconstitutional by renouncing treaties. *Foreign sovereigns 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 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 *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 single substantive argument in support of this proposition, based upon the drafting history of the Constitution.

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 textual 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).

On this drafting history, it would certainly appear that the Necessary and Proper Clause—in its final form, without those crucial words—still subsumes the power "to enforce treaties" beyond the other enumerated powers. And so, unsurprisingly, this argument has proven quite influential. Indeed, when this Court invoked *Holland* eight years ago, it 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 analysis of Professor Henkin. Government's Resp. to Mot. To Dismiss Counts One and Two of the Indictment 7-8.

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 because they were never part of that Clause. *See* Rosenkranz, *supra*, at 1912-18; *The Records of the*

Federal Convention of 1787, at 323, 382 (Max Farrand ed., rev. ed. 1937).

In short, the only historical argument in favor of *Holland* is based on a premise that is simply, demonstrably false.

IV. *HOLLAND* IS A STRUCTURAL AND DOCTRINAL ANAMOLY

A. *Holland* Is in Tension with *Reid*

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*. Under current doctrine, the President may, by non-self-executing treaty, promise that Congress will violate the Bill of Rights. Such a treaty would not itself violate the Constitution, because a non-self-executing treaty has no domestic legal effect. Nevertheless, it certainly does not follow that Congress is thereby empowered to violate the Bill of Rights. *Reid,* 354 U.S. 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 … international agreements …. 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) (emphases added).

Reid is right, and it is *Holland* that creates the anomaly. Under *Reid*, 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 and cannot empower 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, *contra Holland*, 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. *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 constitutes 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. *See 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 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* Writings 1136-39 (Merrill D. Peterson, ed. 1984) (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 treaty-makers 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." David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 Mich. L. Rev. 1075, 1256 (2000). The Constitution should not be interpreted to create a doubly perverse incentive to indulge this sort of bad faith.

C. *Holland* Should Not Be Sustained on *Stare Decisis* Grounds

At first glance, *Holland* might appear to present a strong case for application of *stare decisis*. It is 92 years old. It was written by Justice Holmes. And it is canonical.

But the argument for *stare decisis* is not nearly as compelling as it may first appear. The opinion may be canonical, but on the point at issue—Congress's power to legislate pursuant to treaty—it is also utterly unreasoned. The *stare decisis* force of an opinion turns, in part, on the quality of its reasoning and diminishes substantially if it provides no reasoning at all. *See 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))).

This Court has not hesitated to reconsider a canonical opinion when new scholarship in the *Harvard Law Review* demonstrates that the conventional historical account was simply wrong. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 72-73 n.5 (1938) (citing Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789,* 37 Harv. L. Rev. 49, 51-52, 81-88, 108 (1923)). And it has not hesitated to overrule such an opinion when it becomes clear that the opinion is fundamentally inconsistent with constitutional structure. *Erie*, 304 U.S. at 77 (overruling *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842)). This is just such a case. *See* Rosenkranz, *supra.*

In short, *Holland* may be canonical, but it does not present a strong case for *stare decisis*. It was wrongly decided and should be overruled.

CONCLUSION

A treaty cannot confer new power on Congress, and so the treaty at issue here did not empower Congress to enact 18 U.S.C. § 229. This Court should grant a writ of certiorari and then reverse the Third Circuit's judgment.

Respectfully submitted,

JOHN C. EASTMAN
ANTHONY T. CASO
Center for Constitutional Jurisprudence
c/o Chapman University School of Law
One University Drive
Orange, CA 92886
(877) 855-3330 x2
jeastman@chapman.edu

NICHOLAS QUINN ROSENKRANZ
Counsel of Record
600 New Jersey Ave., NW
Washington, DC 20001
(202) 662-4245
nqr@law.georgetown.edu

ILYA SHAPIRO
Cato Institute
1000 Mass. Ave., NW
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

August 31, 2012