No. 12-158

In the

Supreme Court of the United States

CAROL ANNE BOND, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

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

BRIEF OF *AMICI CURIAE* CATO INSTITUTE, CENTER FOR CONSTITUTIONAL JURISPRUDENCE, AND ATLANTIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

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

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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 Atlantic Legal Foundation is a nonprofit, nonpartisan public interest law firm. It provides legal representation, without fee, to scientists, parents, educators, other individuals, small businesses, and trade associations. The Foundation's mission is to

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

advance the rule of law in courts and before administrative agencies by advocating for limited and efficient government, free enterprise, individual liberty, school choice, and sound science. The Foundation's leadership includes distinguished scholars and practitioners from across the legal community. In pursuit of its mandate, the Foundation has served as counsel for distinguished public servants charged with, *inter alia*, the exercise of the foreign affairs power, including former President Gerald R. Ford; former Secretaries of State, Defense, Treasury, and Commerce; former National Security Advisors; presidential chiefs of staff; and senior members of Congress responsible for U.S. foreign policy, in *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000).

Amici Cato Institute and Center for Constitutional Jurisprudence filed briefs in the prior stages of this case—in its previous hearing before this Court, then before the Third Circuit on remand, and then on petition for writ of certiorari before this Court. Those briefs and this one derive largely from an article in the *Harvard Law Review*, written by *amici*'s counsel of record. *See* Nicholas Quinn Rosenkranz, *Executing The Treaty Power*, 118 Harv. L. Rev. 1867 (2005). This article was cited by the court below, *United States v. Bond*, 681 F.3d 149, 157 n.9 (3d Cir. 2012) (majority), and by Judge Ambro in concurrence, *id*. at 169 n.1, 170.

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.

SUMMARY OF ARGUMENT

The court below held that the Chemical Weapons Convention increased the power of Congress, empowering it to enact 18 U.S.C. § 229. 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 believed that it was bound to reach this conclusion by a single, conclusory sentence in *Missouri v. 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." *Missouri v. Holland*, 252 U.S. 416, 432 (1920).

But the Third Circuit was obviously uneasy with this conclusion: "with practically no qualifying language in *Holland* to turn to, we are bound to take at face value" that single sentence. *Bond*, 681 F.3d at 162. "[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 direct 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 164-65 (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 170 (Ambro, J., concurring) (quoting Rosenkranz, *supra*, at 1868 (2005)).

That one conclusory sentence from *Holland* implies 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 implies, in other words, that Congress's powers are not constitutionally fixed, but rather may be expanded by treaty.

In *Holland*, Justice Holmes provided neither reasoning nor citation for this proposition. It appears in that one conclusory sentence, in a five-page opinion that is primarily devoted to a different question. And this Court has never elaborated. The most influential argument supporting this proposition appears not in the *United States Reports* but in the leading foreign affairs treatise. This argument has largely short-circuited jurisprudential debate on the question. But 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 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 federal statutes unconstitutional. Finally, it creates a doubly perverse incentive: an incentive to enter into foreign entanglements simply to increase domestic legislative power.

Holland is wrong on this point and it should be overruled. This Court should hold that treaties cannot vest Congress with additional legislative power.

ARGUMENT

I. *HOLLAND* IS INCONSISTENT WITH CONSTITUTIONAL STRUCTURE

A. 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."). Under *Holland*, 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 Congress's legislative powers are not merely *somewhat* expandable by treaty; they are expandable *virtually without limit*. The President could, for example, enter into a treaty to regulate guns near schools—and then Congress could reenact Gun Free School Zones Act, despite *United States v. Lopez*, 514 U.S. 549 (1995). Indeed, that is the tip of the iceberg. "The Commerce Clause is not a general license to regulate an individual from cradle to grave," *Nat'l Fed'n of Indep. Bus. v. Sebelius,* 132 S. Ct. 2566, 2591 (2012), but under *Holland*, a treaty could be just such a license. The President might, ostensibly to foster better relations with another coun-

try, simply exchange reciprocal promises to regulate the citizenry so as to maximize the collective welfare. If *Holland* means what it seems to say, then such a treaty would confer upon Congress plenary legislative power.

That proposition is, of course, flatly inconsistent with the basic constitutional scheme of enumerated powers; it is in deep tension 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). And, of course, "enumeration presupposes something not enumerated." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824). 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*, 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." *United States v. Bond*, 131 S. Ct. 2355, 2364 (2011). This would be no protection at all if the legislative power were readily expandable by treaty. All of these propositions, from *Marbury* to *Bond*, are flatly inconsistent with *Holland*.

B. Congress Only Possesses the "Legislative Powers Herein Granted."

The point is reinforced by the juxtaposition of the three Vesting Clauses. 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). By contrast, Article I, Section 1, provides: "*All* legislative Powers *herein granted* shall be vested in a Congress of the United States." (emphases 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 may expand 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) (Jack-

son, J., concurring) (emphasis added). In other words, the scope of the executive power is not fixed; it is contingent on acts of Congress.

The judicial power is contingent in just the same way. 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*." U.S. Const. art. III, § 2, cl. 1. (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. Thus, 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, crucially, 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 in the Constitution are those that are enumerated, those that the document 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 the Vesting Clause of Article I and those of 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."). Congress can increase the President's power, *but the President cannot increase Congress's power in return*. If he could, the federal government as a whole would cease to be one of limited powers.

Moreover, to the extent that the jurisdiction of any branch may be increased, it is naturally left to *different* political actors to work the expansion. To entrust Congress to expand the 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 William Blackstone, *Commentaries* *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 treaty-makers—the President and Senate—to expand the power of lawmakers—the President and Senate, plus the House. Here, there is no ambition to counteract ambition; here, 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."); *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. 48*, at 309 (James Madison) (Clinton Rossiter ed., 1961) ("The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex."); *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 III 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." Tucker, *Limitations on the Treaty-Making Power* § 113, at 130 (1915).

C. *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 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 seems to say, 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 power of Congress may be increased not just by constitutional amendment but also by treaty.

The 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, . . . alter-

> able 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 achieves under the Necessary and Proper Clause exactly what *City of Boerne* rejected under Fourteenth Amendment. Read literally, *Holland* renders the Necessary and Proper Clause expandable by the political branches with the ratification of each new treaty. It thus 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*. This cannot be right:

> 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).

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

If it is strange to think that the legislative power can be *expanded,* not only by constitutional amendment, but also 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. 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).

Holland is inconsistent with that fundamental principle. Under *Holland*, some exercises of legislative power derive their authority not from the Constitution but from specific treaties. *See* Tribe, *supra* (treaties "may endow Congress with a source of legislative authority independent of the powers enumerated in Article I."). If so, then when such treaties are terminated, their implementing statutes presumably *become* unconstitutional. *See* Louis Henkin, *Foreign Affairs and the Constitution*, 408 n.105 (1st ed. 1972) ("in principle legislation to implement a treaty might cease to be valid if the treaty lost its effect"). Such

statutes are suddenly *rendered* unconstitutional—not by constitutional amendment but by the mere abrogation of a treaty. This is paradoxical. "The peculiar circumstances of the moment may render a measure more or less wise, but cannot render it more or less constitutional." *NFIB,* 132 S. Ct. at 2579 (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)).

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). The reason was simple: "[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*).") (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 governments can do this too.* Surely the Framers would have been surprised to learn that a federal statute—duly passed 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).

All these paradoxes can be resolved only if Congress's legislative power is, in fact, fixed by the Constitution and cannot be expanded by treaty.

E. Holland Creates Doubly Perverse Incentives—Incentives for More International Entanglements, Which in Turn Increase Domestic Legislative Power

The Framers were profoundly concerned about the tendency of legislative power to expand. *See The Federalist No. 48*, *supra*, at 309 ("The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex."); *The Federalist No. 49*, *supra*, at 313-14 ("[T]he tendency of republican governments is to an aggrandizement of the legislative at the expense of the other departments."); *see also* The Constitutional Separation of Powers Between the President and Congress, 20 Op. Off. Legal Counsel 124, 131 (1996) (Dellinger, Assistant Attorney General) ("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." (citing *Mistretta v. United States,* 488 U.S. 361, 411 n.35 (1989))).

The Framers were also deeply wary of international entanglements. *See, e.g.*, 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"); 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.").

If the Framers feared expanding legislative power and feared international entanglements, then *Hol-*

land would have been their worst nightmare. Under *Holland*, treaty-makers—the President and Senate—are given a wish-for-more-wishes power. They can increase their own legislative power (plus that of the House). All they need is a willing head of state, anywhere on the globe, and a new entangling alliance.

This constitutes a powerfully perverse incentive for the President and Senate to enter into treaties that reach beyond enumerated powers. After all, it is they themselves (plus the House of Representatives) who will be the beneficiaries of the increased domestic legislative power. Indeed, the treaty-makers apparently succumbed to just this temptation in *Holland* itself, as even its most ardent defenders concede: "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 construed to create this doubly perverse incentive—an incentive to enter foreign entanglements merely to attain the desired side effect of increased domestic legislative power. The Constitution should not be interpreted to encourage this sort of bad faith.

II. *HOLLAND* IS A DOCTRINAL ANOMALY

Holland is thus inconsistent with fundamental principles of constitutional structure. But it is also anomalous, even in relation to its closest doctrinal cousins. To see the doctrinal anomaly, it is useful to restate the general question. If a non-self-executing treaty promises that Congress will do something that it otherwise lacks power to do, what happens? Can the President (with the consent of the Senate), just by making such a promise, thus empower Congress to do that thing, even if Congress lacked the power to do so the day before? In short, can the treaty increase the legislative power of Congress?

Now, it is undisputed that treaties are important. And it is undisputed that the United States should generally keep its promises. Nevertheless—and notwithstanding the "uncompromising language used in *Holland*," *Bond*, 681 F.3d at 165—*it is also undisputed that the answer to this question is generally "no."*

If, for example, the treaty promised that Petitioner would be tried without presentment or indictment of a grand jury, the treaty would *not* thereby empower Congress to authorize a violation of the Fifth Amendment. Congress lacked that power before the treaty, and the treaty cannot confer it. *Reid*, 354 U.S. at 16-17.

If the treaty promised that Petitioner would be tried by military tribunal rather than by jury, the treaty would *not* thereby empower Congress to authorize a violation of the Sixth Amendment. Congress lacked that power before the treaty, and the treaty cannot confer it. *See id.*

And this principle extends beyond the Bill of Rights. If the treaty promised a violation of Article III, Congress is *not* thereby empowered to authorize a violation of Article III. Congress lacked that power before the treaty, and the treaty cannot confer it. *See id.* at 17-18.

Indeed this principle extends beyond express constitutional prohibitions and includes constitutional structure as well. If the treaty promised "a change in the character of the government, or in that of one of the states, or a cession of any portion of the territory of the latter, without its consent," Congress is *not* thereby empowered to accomplish such things. *De Geofroy v. Riggs*, 133 U.S. 258, 267 (1890). Congress lacked that power before the treaty, and the treaty cannot confer it.

And if, despite *Printz v. United States*, 521 U.S. 898 (1997), and *New York v. United States*, 505 U.S. 144 (1992), a treaty promised that Congress would commandeer state officials or state legislatures for its execution, then—even according to *Holland*'s preeminent defender—Congress would *not* thereby be empowered to commandeer them. *See* Henkin, *supra*, at 467 n.75 (2d ed.) ("Presumably, the United States could not command state legislatures, or 'coopt' state officials by treaty."). Congress lacked that power before the treaty, and the treaty cannot confer it.

This leaves only *Holland*—the one anomalous exception to an eminently sensible rule. If a treaty promises that Congress will regulate something that is beyond its enumerated powers—guns near schools, for example, *see United States v. Lopez*, 514 U.S. 549 (1995), or violence against women, *see United States v. Morrison*, 529 U.S. 598 (2000)—then, under *Hol-*

land, Congress *would* automatically attain that new legislative power, even though, under this Court's precedents, it lacks that power today.

This cannot be right. "[N]o 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.*" *Reid*, 354 U.S. at 16 (plurality opinion) (emphasis added). And as to this, there is no basis for distinguishing enumerated powers and the Tenth Amendment from the rest of the Constitution. "Federalism," no less than the Bill of Rights, "secures the freedom of the individual." *Bond*, 131 S. Ct. at 2364.

Reid is right, and *Holland* is wrong. A treaty cannot empower Congress to violate the Fifth Amendment, or violate the Sixth Amendment, or undermine Article III, or commandeer state officials, or subvert constitutional structure. Likewise, a treaty cannot empower Congress to exceed its enumerated powers and violate the Tenth Amendment. *See* John C. Eastman, *Will Mrs. Bond Topple* Missouri v. Holland*?*, 2010-11 Cato Sup. Ct. Rev. 185, 194-202 (2011).

The Court realized this long before *Holland,* in a case that Justice Holmes failed to cite. As this 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). Indeed, Justice Scalia made exactly the same point at oral argument just

last Term: "I don't think that powers that Congress does not have under the Constitution can be acquired by simply obtaining the agreement of the Senate, the President and Zimbabwe. I do not think a treaty can expand the powers of the Federal Government." Tr. of Oral Arg. at 32-33, Golan v. Holder, 132 S. Ct. 873 (2012) (No. 10-545).

At that time, less than a year ago, the Solicitor General was in "complete[] agreement." *Id*. at 33.

III. THE NECESSARY AND PROPER CLAUSE DOES NOT EXPAND WITH EACH NEW TREATY

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. *Bond*, 131 S. Ct. at 2367 (2011). The question is whether these two Clauses in conjunction somehow require all the anomalous results detailed above. To answer that question, it is essential to examine the text of the two clauses and determine how they 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 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, art. II, § 2.

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 "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 Presi-

dent 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).

But on the plain text of the conjoined clauses, the object of this necessary and proper legislation 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 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 "mak[ing]." Blackstone, *supra,* at *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 they share the key infinitive verb "to make" and because, as Chief Justice Marshall explained, a non-self-executing treaty (like the one at issue in this case) 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 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). This is exactly right—and it is flatly inconsistent with *Holland*. 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 of 1998" *implements* a treaty; it is neither necessary nor proper to *make* any treaty.

IV. 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; indeed, the legislative power does not "extend" at all. 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. *See supra*, Part I-B. And the Necessary and Proper Clause—even when conjoined with the "Power … to *make* treaties"—says nothing whatsoever about enforcing treaties already made. *See supra* Part III.

To these textual points, 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 (2d ed.) (emphasis added).

This is the most powerful form of argument from constitutional history, because it is so specific and

unambiguous. 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. This argument from drafting history would appear to be a complete answer to the textual arguments above; indeed it would appear to obviate the need for textual analysis altogether.

And so, unsurprisingly, this argument has proven quite influential. (It appeared in the first edition of Henkin's treatise, *see* Louis Henkin, *Foreign Affairs and the Constitution*, 408 n.105 (1st ed. 1972), and again, a generation later, in the second edition, *see* Louis Henkin, *Foreign Affairs and the United States Constitution*, 481 n.111 (2d ed. 1996).) Indeed, when this Court invoked *Holland* nine 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 this argument to oppose a motion to dismiss certain counts of the indictment—quoting this exact drafting history as set forth by Professor Henkin. JA 31. Neither *Lara* nor the Government's brief opposing the motion to dismiss carefully parsed or conjoined the text of the Treaty Clause and the Necessary and Proper Clause, *see supra* Part III, but this is perfectly understandable. (Indeed, the phrase "necessary and proper" and the phrase "to make treaties" never appear in the same sentence in the United States Reports.) After all, any such analysis of the actual constitutional text was obviated by Henkin's ostensibly dispositive drafting history.

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 from that Clause, because they never appeared in that Clause at all. The phrase "enforce treaties" was struck from the *Militia* Clause, which was apparently the source of Henkin's confusion. *See The Records of the Federal Convention of 1787*, at 323, 382 (Max Farrand ed., rev. ed. 1937). But *that* drafting history provides no support for *Holland*. *See* Rosenkranz, *supra*, at 1912-18.

In short, the leading treatise on the law of foreign affairs makes exactly one argument in support of *Holland*'s unreasoned assumption that treaties can increase the legislative power of Congress. This treatise has profoundly influenced debate on this question, and its argument from constitutional drafting history has, for decades, short-circuited any careful analysis of the actual constitutional text. But, as it turns out, the argument in the treatise is based on a historical premise that is simply, demonstrably false.

V. *HOLLAND* SHOULD NOT BE SUSTAINED ON *STARE DECISIS* GROUNDS

At first glance, *Holland* might appear to present the strongest possible case for application of *stare decisis*. It is 93 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 large 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))).

Moreover, while *Holland* is 93 years old, its holding concerning legislative power pursuant to treaty has been all but irrelevant for most of that time. Again, *Holland*'s key sentence on this point is this one: "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 in 93 years, this Court has *never once* quoted any part of that sentence. It can hardly be contended that there has been much reliance upon it.

The reason is clear. From 1937 to 1995, this Court did not strike down a single statute as beyond Congress's enumerated powers. Throughout the dec-

ades when the Commerce Clause power was construed to be essentially plenary, the question of expanding Congress's legislative power by treaty was almost entirely hypothetical. During those years, any legislation that Congress enacted to execute a treaty could almost certainly have also been sustained under the Commerce Clause or some other enumerated power.[2] *See* Tribe, *supra*, § 4-4, at 646 ("The importance of treaties as independent sources of congressional power has waned substantially in the years since . . . *Holland* . . . [;] the Supreme Court [in the intervening period has] so broadened the scope of Congress' constitutionally enumerated powers as to provide ample basis for most imaginable legislative enactments quite apart from the treaty power."). Only after *Lopez*, 514 U.S. 549 (1995), did *Holland*'s secondary holding, on the scope of treaty-related legislative power, recover potential practical significance. Thus, any supposed reliance of the political branches on this holding must be dated from 1995, not 1920.

Even since 1995, this Court has struck down only three statutes as beyond the enumerated powers of Congress. *See Morrison,* 529 U.S. at 627 (invalidating part of the Violence Against Women Act); *Flores*, 521 U.S. at 536 (invalidating part of the Religious

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[2] Earlier in this litigation, the government foreswore any reliance on the Commerce Clause. JA31 ("Section 229 was not enacted under the interstate commerce authority."). It seems inappropriate to allow the government to resuscitate the Commerce Clause argument at this late date. But even if the government is to be allowed to reverse course as to this argument (and confess error for the second time in this case), the proper place for it would be on remand. This Court should decide the treaty question addressed by the opinion below.

Freedom Restoration Act); *Lopez,* 514 U.S. at 567-68 (invalidating the Gun-Free School Zones Act). It can hardly be said, therefore, that the conduct of foreign affairs has been undertaken in substantial reliance on the rule that federal legislative power may be increased by treaty.

Scholars only now are discovering *Holland*'s potential for evading this Court's stated limits on congressional power. *See* Rosenkranz, *supra*, at 1871-73 & nn.19-25 (collecting articles). If the political branches should move to act on the proposals of these scholars, *that* would constitute unfortunate reliance on erroneous doctrine. But right now—while these proposals are in the law reviews and not in *Treaties in Force* or *Statutes at Large*—*Holland* may be overruled on this point without any dislocation of foreign relations or domestic law.

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 this Court 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 on this point, and it should be overruled.

CONCLUSION

A treaty cannot confer new legislative power on Congress, and so the treaty at issue here did not empower Congress to enact 18 U.S.C. § 229.[3] The Third Circuit's judgment should be reversed.

Respectfully submitted,

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[3] It is a quirk of the pleadings that Petitioner purports to challenge the statute "as-applied." That characterization may be inapt, because the gravamen of the claim concerns the scope of *congressional* power under the Necessary and Proper Clause, which would seem to be "facial" by nature. In any case, and regardless of the vexed "facial" / "as-applied" dichotomy, the important point is that her challenge is necessarily a challenge to *legislative* action. This Court should hold that *Congress* exceeded its power (and thus violated the Tenth Amendment), by *enacting* 18 U.S.C. § 229. *See Bond*, 131 S. Ct. at 2368 (Ginsburg, J., concurring) ("[A] law beyond the power of Congress … is no law at all. The validity of Bond's conviction depends upon whether the Constitution permits Congress to enact § 229."); *see generally* Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 Stan. L. Rev. 1209 (2010).

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May 15, 2013