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Reimagining Congress's Treaty-Implementing Authority: An Originalist Case for the Unexplored Middle Ground

by

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Abstract

This Article addresses Congress's prerogative to implement non-self-executing treaties. In construing Congress's Necessary and Proper Clause authority in this area, most commentators have argued that it is either virtually plenary or virtually nugatory. I explore part of the vast middle ground. I assume as true Justice Scalia's key argument in *Bond v. United States*, that implementing a treaty cannot be necessary and proper to making it, for it is completely made once the president ratifies it. Though this appears to eliminate congressional authority, I argue that Congress derives treaty-implementation power from the Necessary and Proper Clause because implementing current treaties facilitates making future beneficial treaties. Implementing a treaty need not be necessary and proper to making *that* treaty because it is necessary and proper to making future ones. Congress's power to implement treaties is not unlimited, however, and the approach herein expects it to account for its efforts to accommodate state interests.

Key-words

Treaty implementation, non-self-executing, U.S. Constitution, Necessary and Proper Clause

1. Introduction

"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…." (*Golan* 2012: Transcript at 32-33).

"We completely agree[] with that, Justice Scalia" (*Id.*: 33).

The exchange above between Justice Scalia and United States Solicitor General Donald B. Verrilli, a moment of levity in a dry copyright case, summarizes the two men's views on a deeply consequential and controversial matter. Since the early days of the Republic, the Supreme Court has held that certain treaties are not self-executing (*Foster* 1829). The treaties alone, while still law, are not enforceable in United States courts absent accompanying legislation that implements the treaty obligations.[I] Therefore, assuming that the Treaty Clause grants the federal government power to make treaties free from typical federalism constraints on the federal government's authority,[II] does Congress necessarily have authority to pass laws that implement such treaties, regardless of whether the implementing laws fall within Congress's traditional Article I powers? To what extent, if at all, can Congress pass legislation otherwise beyond the scope of its constitutionally enumerated authority in order to implement an Article II treaty?

In *Missouri v. Holland*, the Supreme Court upheld legislation implementing the Migratory Birds Treaty against Missouri's federalism-based challenge to the implementing act's regulation of hunting seasons, practices, and permitted species targets. The *Holland* Court endorsed a sweeping view of the Treaty Clause in its five-page disposition of the case. It also penned the following line: "if the treaty is valid[,] there can be no dispute about the validity of the statute [implementing the treaty] under Article 1, Section 8, as a necessary and proper means to execute the powers of the Government" (*Holland* 1920: 432). Just five years earlier, courts had struck down the Weeks-McLean Act, the purely domestic-legislation predecessor to the Migratory Birds Act at issue in *Holland*, on the grounds that it exceeded Congress's constitutional authority (*McCullagh* 1915). Holding the Migratory Birds Act valid meant that Congress's power to legislate increased due to the treaty. Despite this unusual outcome, Professor David Golove has observed that the Necessary and Proper

Clause analysis is "the least controversial portion of [the *Holland*] opinion" (Golove 2000: 1100).[III]

A controversy over exactly that matter recently reemerged, however, and General Verrilli likely came to regret his off the cuff answer to Justice Scalia quoted at the beginning of the Article. He soon returned to the Supreme Court to defend the United States' view that a valid treaty does expand Congress's power to legislate. The case, *Bond v. United States*, challenged The Chemical Weapons Convention Implementation Act of 1998, which makes it a crime for a person knowingly to "develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon."[IV] The Act implemented the non-self-executing portions of the Chemical Weapons Convention.[V] Carole Bond was convicted of violating the implementing act when she attempted to poison her friend after finding out that her friend was pregnant with Ms. Bond's husband's child (*Bond* 2014: 2085). On appeal, Bond argued that the implementation act exceeded Congress's constitutional authority, reawakening the theretofore uncontroversial *Holland* question.

The *Bond* case was ultimately decided on statutory grounds.[VI] But the question of Congress's implementation authority, which the Supreme Court raised and then refused to answer, remains of the highest importance. Following *Bond*, the tally on the *Holland* question is as follows: two Justices (admittedly, one now deceased) have called for *Holland* to be overturned; Justice Alito appears agnostic on the question; and not one full-throated *Holland* defender has emerged on the Court. Given these circumstances, it is high time to scrutinize the *Holland* argument once more.

In Part II, I will provide a brief overview of the literature on this topic, which has generally urged either near-plenary or near-nugatory treaty-implementation power. In Part III, I will examine the *Bond* case and the opinions it produced in order to demonstrate the consequences of the debate over treaty implementation authority. In Part IV, I will contend that both sides of the debate—both the expansionists who urge essentially plenary Necessary and Proper Clause authority to implement treaties and the restrictionists who argue that no treaty implementation authority can be drawn from the Necessary and Proper Clause—fail to account for crucial arguments. I will adopt arguendo a premise that Justice Scalia defended in *Bond*: once the President ratifies a treaty, it is not susceptible of any more "making," and therefore Congress cannot give a treaty domestic legal effect by

relying on its necessary and proper powers to facilitate the making of that treaty, which is completely made once it is ratified (*Bond* 2014: 2099). My argument will be geared toward those who hold this view, as I contend that even on this narrow understanding, the Necessary and Proper Clause still grants Congress certain implementation authority that it would otherwise lack because implementing past treaties is necessary to and proper for preserving the ability to make future ones, and therefore necessary to and proper for preserving the treaty power itself.

On the other hand, proponents of a broad treaty-implementation power often fail to contend with the Supreme Court's Necessary and Proper Clause case law, and seem to assume that if Congress can sometimes rely on the Necessary and Proper Clause to implement a treaty otherwise beyond its Article I authority, it always can (Golove 2014: 9-10).[VII] This view is incorrect as well; Congress's treaty-implementation power is not plenary. The new means of evaluating implementation authority that I propose confers upon Congress maximum implementation authority when the political branches have shown attentiveness to federalism values through mechanisms such as attaching RUDs to treaty provisions that conflict with federalism values, ratifying treaties following the passage of implementing legislation that includes a full debate on federalism concerns, and passing implementing legislation that closely resembles the text of the treaty. Furthermore, when Congress bypasses these safeguards, its reasoning for doing so may be scrutinized by courts under a slightly elevated rational-basis standard, consistent with the Court's Necessary and Proper Clause case law.

2. Literature Review

Most scholars have argued that the Necessary and Proper Clause provides either broad, almost plenary authority to implement treaties, or no authority at all beyond Congress's other enumerated powers. Proponents of the former view, such as Professor David Golove, generally rely on structural arguments about the Constitution. Professor Golove has argued that while the courts should take their guardianship of the boundaries between federal and state powers seriously, state interests disappear in the treaty context, when the United States acts as a single entity on the global stage rather than an amalgamation of fifty smaller sovereigns (Golove 2000: 1091). Furthermore, at the Founding, treaty violations

were a principal cause of war, so by necessity the United States government had to have the power to force states to comply with treaties (Jay 1961: 42). A rogue state could throw the entire nation into war.

Supporters of expansive implementation power also have made textual arguments, suggesting that because the treaty power in the Constitution lacks subject-matter limitations (Hathaway et al. 2013: 247-50), and because the Supremacy Clause of the Constitution says that "all" treaties are the supreme law of the land (Art. VI, Cl. 2), Congress must have ample authority to enforce non-self-executing treaties. Lastly, proponents of the expansionist view make use of the history of actual treaty enactment and argue that the structural checks built into the process—such as requiring, as prerequisite to ratification, super-majority support in the Senate, the body that weights all states as equal sovereigns and was originally elected by the states—are sufficient to protect states against intrusion into their sphere of regulatory authority (Hathaway et al. 2013: 304-24).

These arguments will be discussed in great detail in the remainder of the Article, but their main defect is that they prove too much. If Congress's implementation authority truly comes from its duty to avert war, for instance, or if "all" treaties must be enforceable as the supreme law of the land, then why should any congressional legislation in pursuit of a treaty ever be unconstitutional? It seems that Congress could, by treaty-implementation statute, contravene the First Amendment, abridge states' sovereign immunity, or create a unicameral legislature if a treaty so required.[VIII] Moreover, at the Founding, treaties typically addressed nations' obligations to each other and each other's citizens; in the modern period, treaties have become detailed pacts with broad regulatory sweep into individual citizens' lives (*Bond* 2014: 2100). For example, *Bond* concerned how the United States would enforce a treaty against its own citizens. If the United States were reluctant to enforce the Chemical Weapons Convention against Ms. Bond, perhaps other nations would have enforced the treaty less vigorously against their own citizens as well—an undesirable result, to be sure—but no one would have gone to war with the United States. The war-avoidance justification may not apply to many treaties today.

Conversely, restrictionists typically hold that the Necessary and Proper Clause provides no treaty-implementation authority because the Constitution discusses only the power to "make" treaties, a process distinct from implementing them, so the Necessary and Proper Clause may supplement only Congress's powers of treaty-making, and not treaty-

implementing (Cato Institute 2014: 23-25). Restrictionists also rely on slippery-slope-style arguments. If Congress can implement treaties that otherwise go beyond its Article I authority, there is no principled mechanism to limit this power.

Most scholarly approaches to treaty implementation power sit near the extremes, as the foregoing arguments demonstrate. Offering a middle-ground approach, Professor Carlos Manuel Vázquez has suggested that Congress has virtually unlimited power to implement specific treaty guarantees, but less power to act when it comes to what he labels "aspirational" treaties (Vázquez 2008). These vaguer treaties might commit the United States to ending discrimination against women or to ending gun violence, but Congress could not use these capacious goals to pass implementing legislation otherwise beyond its power (to protect a right to abortion all throughout pregnancy, perhaps, or to do away with the right to bear arms).

Having surveyed the scholarly literature, I next turn to *Bond*.

3. The *Bond* Opinions, the Stakes of the Treaty-Implementation Authority Question, and the Threat of Severe Restrictions on That Authority

The Supreme Court held 9-0 to vacate Bond's conviction. The lopsided tally is belied by the deep fracture on the proper rationale for vacature. The majority opinion held that the implementation act did not criminalize Bond's local, non-terrorism-related chemical weapons usage. Justice Scalia, joined by Justice Thomas, concurred in judgment only. Justice Scalia argued that the implementation act clearly covered Bond's actions (*Bond* 2014: 2094). Thereby required to reach the question of the implementing act's constitutionality, he would have held it unconstitutional as beyond Congress's Necessary and Proper Clause authority (*Bond* 2014: 2098).

Justice Scalia argued that a treaty is "made" under Article II once the Senate has consented to it and the President has ratified it (*Bond* 2014: 2099). Giving a treaty domestic legal effect is a separate process, distinct from making the treaty. Congress's Necessary and Proper Clause powers apply only to facilitating the making of treaties, not giving them domestic legal effect, for it is the power to make treaties alone that the Constitution discusses and therefore only that power that Congress can effectuate using the Necessary

and Proper Clause. Once the President has ratified a treaty, it is not susceptible of any more making, and Congress's power to do what's necessary and proper to assist in the making of treaties drops out of the picture. Therefore, in order to give a treat domestic legal effect, Congress must rely upon its enumerated Article I powers (*Bond* 2014: 2099). Justice Alito joined part I of Justice Scalia's opinion only, meaning that he expressed his assent to the proposition that the implementing act did cover Bond's infraction, and withheld his vote from the constitutional analysis.

Justice Thomas joined Justice Scalia's opinion in full, while "writ[ing] separately to suggest that the Treaty Power is itself a limited federal power" (*Bond* 2014: 2103). In other words, beyond simply not permitting aggrandizement of Congress's implementation power based on treaties, Justice Thomas would require that treaties "be used to arrange intercourse with other nations, but not to regulate purely domestic affairs (*Bond* 2014: 2103).

Justice Alito added a brief concurrence, writing just for himself. Despite that it runs only nine sentences, it is a remarkably slippery opinion. He expressed agreement with Justice Thomas's view of the Treaty Clause (*Bond* 2014: 2111). He then acknowledged that control of true chemical weapons "is a matter of great international concern," but urged that "insofar as the Convention may be read to obligate the United States to enact domestic legislation criminalizing conduct of the sort at issue in this case, which typically is the sort of conduct regulated by the States, the Convention exceeds the scope of the treaty power" (*Bond* 2014: 2111). Given that the text of the implementing legislation copies almost exactly the text of the treaty, it is apparent that it does require the United States to enact the domestic legislation that it did, which means that Justice Alito cast a vote to partially invalidate an Article II treaty on federalism grounds.

Why was Justice Alito willing to commit himself to invalidating a treaty that no one else was interested in discussing, and neither party had challenged, rather than joining all of Justice Scalia's opinion disposing of the case on the Necessary and Proper Clause issue that was briefed and argued by the parties? I suspect that he may have understood, and been discouraged by, the radical restrictions on the federal government's authority that would come to pass if both Justice Scalia's opinion and Justice Thomas's opinion became law. Consider a non-self-executing treaty. For it to have domestic legal effect under the Scalia-Thomas formulation, it must first pertain to matters of international relations in order to

be a valid Article II treaty. Then, in order for Congress to be able to give it domestic legal effect, the treaty must also touch on matters that Congress can regulate under its traditional Article I powers. In other words, if a non-self-executing treaty is to have domestic legal effect, it must exist at the intersection of the "regulation of international affairs" box and the "within Congress's Article I powers" box.

To help illustrate this principle, consider the Vienna Convention on Consular Relations (VCCR). In *Medellin v. Texas*, Medellin sought to enforce the International Court of Justice's decision that he was entitled to habeas review of his state-court conviction for capital murder because the United States had violated his rights under the Vienna Convention on Consular Relations. The Supreme Court declined to give the ICJ's decision domestic and judicially enforceable legal effect, holding that it and the VCCR were non-self-executing (*Medellin* 2008: 519). To respond to the dissent's objections that the Court's decision rendered this treaty and others like it useless, the Court offered that "Congress could elect to give [such treaties] wholesale effect … through implementing legislation, as it regularly has" (*Medellin* 2008: 519). Justices Scalia and Thomas joined the Chief Justice's opinion for the Court without qualification, but it is far from clear that it coheres with their understanding of Congress's implementing authority as expressed in *Bond*.

The treaty obligation at issue in *Medellin* was that the State of Texas had not informed Medellin of his right to have the Mexican consulate notified that Medellin, a Mexican national, was being held in an American jail (Vienna Convention on Consular Relations, art. 36(1)(b)). Congress has many enumerated constitutional powers that touch on foreign relations, such the power to regulate commerce with foreign nations (Art. I, § 8, Cl. 3), the power to provide a uniform rule of naturalization (Art. I, § 8, Cl. 4), the power to declare war (Art. I, § 8, Cl. 11), and others. But it has no explicit right to regulate all aspects of foreign affairs and all matters that have international implications. One must wonder, then, under what enumerated power could Congress give domestic effect to the VCCR and require states to follow certain procedures after arresting people for violating state criminal law?

It seems quite plausible that Justices Scalia and Thomas would find legislation implementing the VCCR to be unconstitutional. The non-self-executing treaty would then lack domestic legal effect, even though it involves a quintessential treaty matter: the regulation of how sovereigns are to treat each other's citizens when they leave their home

nations, particularly within the criminal justice system. The treaty would certainly pass muster under Justice Thomas's understanding of the treaty power because it regulates sovereigns' treatment of one another's citizens, but still would not have domestic legal effect. The ability of the United States to comply with many criminal-justice treaties is thrown into doubt under the Scalia-Thomas view of the law.[IX]

These are the stakes of the battle over Congress's implementation authority. Luckily for advocates of a less restrictive view, Justice Scalia's reading of the text of the Necessary and Proper Clause and the distinction between making and implementing treaties need not foreclose Congress from relying on the Necessary and Proper Clause in order to implement treaties.

4. The Necessary and Proper Clause Justifies Treaty-Implementing Legislation that Demonstrates to International Treaty Partners that the United States Will Honor Its Treaty Obligations

The main goal of the Article is to demonstrate that, even assuming Justice Scalia's interpretation of the distinction between making treaties and giving them domestic legal effect is correct, the Necessary and Proper Clause still grants Congress authority to pass statutes to implement treaties that it otherwise could not have passed because Congress can reasonably determine that abiding by current treaty commitments will assist in the process of making future treaties. Such an interpretation is consistent with the Supreme Court's modern Necessary and Proper Clause jurisprudence, which, although relatively sparse, clearly indicates the correctness of such a construction of the Clause.

Next, I will contend that one must be careful not to read the Clause too broadly, for the case law, text, and structure of the Constitution require Congress to give due deference to the prerogatives and police powers of the states. Because the Framers placed no substantive limits on the Treaty Clause (Corwin 1913) and envisioned most treaties to be self-executing (Vázquez 1999: 2157),[X] however, the best methods for ensuring congressional respect for federalism are procedural. I will suggest several such procedures, including structuring treaties so that they do not enter into force until implementing legislation has been passed; the use of reservations, understandings, and declarations; and, when these measures are not observed, modest scrutiny of why they were not.[XI]

4.1. Implementing Treaties Is Necessary and Proper for Making Future Treaties

Congress must have the authority to determine that giving domestic effect to the United States' treaty commitments is necessary to and proper for facilitating future treaty agreements. This argument has been only lightly engaged in the literature. I will analyze in turn the textual, precedent-based, and structural arguments for and against this interpretation of the Necessary and Proper Clause.

4.1.1. The Constitution's Text

Justice Scalia did not address the argument I am putting forth in his concurrence in *Bond*, but the most prominent academic defender of the restrictionist view of treaty implementation, Nicholas Quinn Rosenkranz, has discussed it briefly (Rosenkranz 2005). First, he labeled the argument that future treaty negotiations would be aided by present treaty adherence as "speculative" (and presumably not "necessary," then, within the meaning of the Necessary and Proper Clause) (Rosenkranz 2005: 1889). This far understates the argument, and improperly applies the Supreme Court's Necessary and Proper case law. Congress need not *prove* that a certain regulation assists in executing its enumerated powers in order to be able to effect that regulation under the Necessary and Proper Clause.

In *McCulloch v. Maryland*, the original and still-seminal case on the Necessary and Proper Clause, the Court held that Congress has the power to enact laws that are "convenient, or useful," or "conducive" to the enumerated power's "beneficial exercise." This argument meets the bar of usefulness or conduciveness: flouting treaties may lead to hostile international relations; abiding by them is surely useful to productive international relationships. The Framing generation was certainly quite aware of this and assessed the violation of treaties to be a principal cause of war (Graebner et al. 2011: 119; Jay 1961: 42).[XII] It takes no large leap to determine that behaving in a way likely to lead to war damages the ability to cooperate with nations through future treaties, and therefore that Congress can facilitate such cooperation by ensuring compliance with the United States' treaty obligations. In more modern times, Andrew Guzman has written that when a state with treaty-compliance problems "seeks to enter into agreements in the future, its potential partners will take into account the risk that the agreement will be violated, and will be less

willing to offer concessions …. If there is enough suspicion, potential partners may simply refuse to deal with the state" (Guzman 2005: 596).

Viewing Professor Rosenkranz's argument charitably, one can admit that it is at least slightly speculative that flouting current treaty obligations will impede future treaty negotiations. In the narrow sense, it is at least a bit speculative because no one can say for sure *how much* it will impede future treaty negotiations. More broadly, one can imagine an argument that the United States' cooperation will still be highly sought after on the international stage, even if it occasionally ignores treaties, because of its economic and military might. Even this potentially meritorious argument misses the point, for it is not a constitutional argument. Defenders of this view are free to attempt to convince Congress that adhering to treaty obligations does not matter. Congress may well agree and not implement a treaty out of indifference to whether the states abide by it. But if Congress makes the judgment that implementing a treaty *is* conducive to the beneficial exercise of the treaty power in future cases, nothing in the Supreme Court's Necessary and Proper Clause jurisprudence would allow it to second-guess that decision. It is that case law that I turn to next.

4.1.2. The Supreme Court's Case Law

One might raise a second objection that the Necessary and Proper Clause cannot grant Congress the power to do thing *X* in contemplation of enumerated power *Y* when *X* and *Y* are as indirectly related as they are here, at least in the sense that when Congress implements a treaty, it is not assisting in the "making" of that particular treaty, which has already been made, but only in the making of future treaties. Each treaty that Congress chooses to give domestic effect to has only a small influence over the negotiation of all future treaties. Does my argument permit Congress to continue implementing past treaties even if, for instance, the United States decides that it will not enter into any Article II treaties for ten years, thereby making any connection between today's implementing legislation and the post-moratorium treaties of ten years from now quite remote? In order to ground this in the Supreme Court's case law, consider that when it upheld the charter of the National Bank in *McCulloch*, it observed that the bank *assists with* "the power to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies" (*McCulloch* 1819: 407).

not *guarantee* the smoothness and mutual satisfaction of the making of future treaties in order to be constitutional.

A somewhat remote connection between the regulation at issue and the enumerated power does not prevent Congress from exercising its Necessary and Proper Clause authority. The Court's decision in *Sabri v. United States* is most relevant to the method of regulation I propose here. *Sabri* concerned the constitutionality of a federal law that proscribes bribery of state, local, and tribal officials of entities that receive at least $10,000 in federal funds, regardless of whether a connection exists between the particular bribe or bribed official and any federal dollars. Sabri, the defendant, challenged precisely that element of the law, arguing that for it to be constitutional as an exercise of power collateral to the government's Spending Clause authority (Art. I, § 8, Cl. 4), there must be a connection between the federal funds and the bribe. In particular, the statute's application to all entities that received $10,000 in federal funds, whether or not the particular bribe involved federal money, was too tenuous (*Sabri* 2004: 603-04). Unimpressed, the Supreme Court held that although not every bribe the statute covers "will be traceably skimmed from specific federal payments …. the corruption does not have to be that limited in order to affect the [federal] interest" (*Sabri* 2004: 605-06).

In other words, it is sufficient that prosecuting people like Sabri generally "protect[ed] the integrity of the vast sums of money distributed through Federal programs," regardless of whether Sabri himself misused federal funds (*Sabri* 2004: 606). Prosecuting all bribery cases *near* federal funding helped facilitate that funding and contributed to the efficiency of that funding in other instances. Analogously, implementing a treaty does not help carry out Article II treaty-making authority with respect to that particular treaty, which has already been made, but it contributes to the efficiency and effectiveness of the treaty-making process in other cases.

Though the Court's overarching jurisprudence on the Necessary and Proper Clause has been ambiguous, the treaty-implementing power I have proposed here would be permissible under any test it has embraced. Chief Justice Marshall's famous formulation of the Necessary and Proper Clause in *McCulloch v. Maryland* remains good law (*McCulloch* 1819: 421).[XIII] He stressed that Congress may choose among the appropriate means plainly adapted to a constitutional end (*McCulloch* 1819: 410), and so it is difficult to believe that he

would have had trouble upholding the authority to implement treaties as necessary to and proper for the making of future treaties.

In the leading modern case on the Necessary and Proper Clause, however, the Court adopted a somewhat different test. In *United States v. Comstock*, the Court considered whether the Necessary and Proper Clause permits a federal law that provides for the civil commitment of a mentally ill, sexually dangerous state prisoner beyond the date he would otherwise be released. Premising its opinion on five considerations—the broadness of the Necessary and Proper Clause, historical precedent for federal prison-related mental health statutes, the reasonableness of the link between Congress's selected means and its desired end, the law's accommodation of state interests, and the connection between the law and an enumerated Article I power—the Court upheld the statute (*Comstock* 2010: 133-46).

Congress's Necessary and Proper Clause authority to implement a treaty would prevail under the *Comstock* test. Two of the Court's requirements—regarding the link between Congress's selected means and its desired end, and the activity's connection to an Article I power—spring from the Court's admonition that it will not "pile inference upon inference" in order to sustain an exercise of Article I authority (*Lopez* 1995: 567). No such piling is required here. As previously addressed, the only inference necessary is the utterly plausible one that the Nation's treaty negotiations will be better served if it adheres to its existing treaty obligations. In terms of the historical practice factor, ample evidence supports the view that Congress had authority to implement at least some treaties based on the Necessary and Proper Clause (Golove et al. 2014: 10-17; Galbraith 2014: 87-97); *Missouri v. Holland* then explicitly blessed that practice.[XIV] I will take up the factor concerning accommodation of state interests in the next Section.

Justice Kennedy wrote separately in *Comstock* to suggest that instead of avoiding inference-piling, "[w]hen the inquiry is whether a federal law has sufficient links to an enumerated power to be within the scope of federal authority, the analysis depends not on the number of links in the congressional-power chain but on the strength of the chain" (*Comstock* 2010: 150). Once more, since the link between carrying out current treaty obligations and entering into future beneficial treaty obligations seems so clear, my proposed grounding of Congress's treaty implementation authority coheres with Justice Kennedy's formulation of the Necessary and Proper Clause.

Even Justice Scalia, when pressed in *Bond* to marshal the strongest precedent supporting his restrictionist view, came up only with the *McCulloch* dicta that no "great substantive and independent power [can] be implied as incidental to other powers" (*Bond* 2014: 2101). But a non-self-executing treaty is already the law of the land. The Supremacy Clause states that "all" treaties are (Art. VI, Cl. 2). Justice Scalia is already asking Chief Justice Marshall's dicta to bear enormous weight; the citation becomes all the more implausible when one asks whether the power to take what is already law and render it judicially enforceable is truly of a piece with the "great substantive and independent power[s]" that Chief Justice Marshall cautioned against impliedly reading into the Constitution.

The many strands of the Supreme Court's modern Necessary and Proper Clause jurisprudence all coalesce around the conclusion that Congress has the requisite authority to implement non-self-executing treaties.

4.1.3. Constitutional Structure

In addition to arguments from text and from precedent, proponents of the restrictionist view offer arguments about the Constitution's structure, namely, the dual state-federal system. Before addressing those arguments in the next Section, however, I focus on one structural objection to my argument that pertains not to the dual-sovereign system, but to the power that my proposal allows foreign governments to acquire over United States law.

Professor Rosenkranz has argued that the expansionist view of the Necessary and Proper Clause leads to an "anomalous" result because it permits certain grants of Congress's legislative authority to come from treaties, not the Constitution (Cato Institute 2014: 16-18). If the President unilaterally withdraws from a treaty, he also renders its implementing legislation unconstitutional at his sole discretion because the legislation would no longer be necessary and proper to anything. This is a strange result. Stranger yet, a foreign sovereign can render a United States law unconstitutional by withdrawing from a bilateral treaty that the law implements.

But this situation is simply a feature of law making in the international arena.[XV] Consider a bilateral self-executing treaty. Once the United States has entered into it, it is binding on the United States, the constituent states, and U.S. citizens. It is enforceable in

domestic courts, as any other statute would be. If the other sovereign abrogates it, however, this all changes. There is no longer a treaty that one can bring to court as the basis for vindicating one's rights, just as one could bring any other statute. Another sovereign can change United States domestic law by abrogating a self-executing treaty. This is inherent in the process of making and dissolving contracts between parties.[XVI]

If it seems strange that foreign sovereigns (and possibly the President acting unilaterally) can render a law not just inoperative, but *unconstitutional*, this understandable concern also proves misplaced. Just as the power of foreign sovereigns is a feature and not a bug of international law making, the impermanent nature of what the Necessary and Proper Clause tolerates is a feature and not a bug of that Clause. Consider *Comstock*. One of the reasons that the federal government enacted a civil-commitment statute was that the cost of committing sexually dangerous persons was prohibitive for some states (*Comstock* 2010: 179).[XVII] If the states suddenly became awash in money and eager to spend it on civil commitment programs, that must weaken the federal government's claim that its own civil commitment statute is necessary and proper. Justice Scalia has succinctly summarized "the nature of the Necessary and Proper Clause" as "empower[ing] Congress to enact laws in effectuation of its enumerated powers that are not within its authority to enact in isolation" (*Raich* 2005: 39). One should readily admit that the power to implement non-self-executing treaties does not spring from the plain text of the Constitution in the way that the authority to regulate commerce among the several states does (Art. I, § 8, Cl. 3). But that is precisely the type of power that the Necessary and Proper Clause does confer—regulatory authority not plainly discussed in the Constitution.

Justice Scalia, the plain text of the Clause, and the Court's precedent all contemplate that circumstances beyond the four corners of the Constitution will affect what qualifies as necessary and proper. Although unusual in our constitutional system, this quality inheres in the Necessary and Proper Clause, and it has been recognized since the Nation's earliest days. Chief Justice Marshall wrote in *McCulloch* that the Necessary and Proper Clause contemplates "such powers as are most suitable and fitted to the object, such as are best and most useful in relation to the end proposed" (*McCulloch* 1819: 410). It is self-evident that if a President or foreign sovereign abrogates a treaty, the law implementing it is no longer suitable to, or useful in relation to, demonstrating that the United States abides by

its treaty obligations. No constitutional defect arises from determining that the statute then becomes unconstitutional.

Professor Rosenkranz offers a final structural rebuttal to challenge that Congress can implement treaties as an exercise of authority necessary and proper to making future treaties. He asserts that such an argument proves too much, for if Congress can act in contemplation of future treaties, it could pass a law beyond its authority before a treaty is enacted if the treaty partner demanded it as a condition for entering into treaty negotiations, and that if we applied this construction of the Necessary and Proper Clause to other enumerated powers, it would wreak havoc (Rosenkranz 2005: 1890). For instance, if a President refuses to discharge his authority to make appointments (Art. II, § 2, Cl. 2) until Congress reinstitutes the Gun-Free School Zones Act (GFSZA) invalidated on Commerce Clause grounds in *United States v. Lopez*, Congress cannot reinstitute the invalidated statute pursuant to its Necessary and Proper Clause authority to facilitate presidential appointments (Rosenkranz 2005: 1890). Similarly, Congress could not reinstitute the invalidated statute pursuant to the treaty power, even if France promised the United States more favorable terms in a treaty the two countries were negotiating if the United States banned guns near schools.

This argument, while powerful, functions in a different way than the other objections to I have considered. If giving domestic legal effect to a treaty never has anything to do with the treaty-making process, Congress can draw no treaty-implementation authority whatsoever from the Necessary and Proper Clause; it must look elsewhere altogether. If the American system of government never permits a foreign sovereign's behavior to influence what is constitutional, Congress can draw no treaty-implementation authority whatsoever from the Necessary and Proper Clause because any law passed pursuant to that Clause would become unconstitutional if the treaty dissolves. Again, Congress would have to look elsewhere altogether. The same conclusion does not follow from this final argument, however. If Congress does not have the *plenary* Necessary and Proper Clause treaty implementation authority that this argument disdains, it does not imply that Congress has *no* Necessary and Proper Clause treaty implementation authority. Professor Rosenkranz's argument operates orthogonally to mine: I suggest that the Necessary and Proper Clause provides Congress some treaty-implementation authority. I share his

discomfort with the *Lopez*/GFSZA scenario, and I agree with him that there are limits on that authority. I turn to those limits in the next Section.

4.2. The Constitution Permits Scrutiny of the Federal Government's Attempt to Accommodate State Interests When Implementing Treaties

Proponents of expansionist-treaty implementation power frequently raise the argument that the Framers believed that honoring international obligations was of paramount importance (Vázquez 2008: 940; Golove 2000: 1103-04). This is certainly true. But it does not necessarily follow that the federal government may enter into and then enforce any treaty it pleases. Perhaps sometimes the solution is that the federal government, out of deference to state prerogatives, simply should not conclude a treaty that treads on state sovereignty. That the President and the Senate can be the first movers in the constitutional treaty game should not grant them the privilege of entering into any obligations they choose and then forcing compliance because international obligations must be respected. The burden and the risk of landing the United States in a situation where it cannot comply with its treaty obligations could just as easily be placed on the federal government as on the states, perhaps with a rule of thumb such as "the President and the Senate should not, on their own accord, enter into international obligations that regulate conduct on the margins of federal authority to reach." That would also solve the problem of not having a war-causing treaty violation.

One might reply that the history of the Constitution's framing indicates a clear choice by the Founders not to place a subject-matter limitation on the treaty power (Corwin 1913: 71).[XVIII] This is true, but it is equally apparent that the Framers did not believe the treaty power to be unlimited. Madison said that "[t]he exercise of the [treaty] power must be consistent with the object of the delegation [...]. The object of treaties is the regulation of intercourse with foreign nations and is external" (Corwin 1913: 70-71). While the Framers declined to saddle the treaty power with subject-matter limitations that would bind all future generations, they expected the political branches to observe certain limits on that power.

Some have suggested that the structural checks embedded in the Constitution—such as the supermajority requirement for consent in the Senate—are sufficient to protect federalism interests (Hathaway et al. 2013: 304-20). Whatever merits the argument has, it

seems unlikely to persuade the target audience of this Article—those who believe that implementing a treaty is a distinct process constitutionally from ratifying one, and thus must be done only in accordance with Congress's other powers. In particular, the argument that procedural checks embedded in the Constitution are sufficient to constrain the treaty power seems unlikely to persuade important judges skeptical of the treaty power. At oral argument in *Bond*, Chief Justice Roberts pressed Solicitor General Verrilli on just how far Congress's authority to criminalize local conduct could extend if supported by a treaty. (*Bond* Argument Transcript 2014: 27-28). In response to one such question, General Verrilli replied "that it seems unimaginable that a convention of th[e] kind [of sweeping federal power proposed by the Chief Justice] would be ratified [sic] by two-thirds of the Senate" (*Bond* Argument Transcript 2014: 28). Justice Kennedy cut in to chastise the Solicitor General that "[i]t also seems unimaginable that you would bring this prosecution" (*Bond* Argument Transcript 2014: 28). Justice Alito, who pointedly did not join Justice Scalia's opinion clamping down on Congress's Necessary and Proper treaty implementation authority, also seemed displeased with reliance on internal checks on Congress. When General Verrilli protested that the hypotheticals being posed were not real cases, Justice Alito retorted that "they're not real cases because you haven't prosecuted them yet" (*Bond* Argument Transcript 2014: 37). He followed up that if General Verrilli "told ordinary people that [he was] going to prosecute Ms. Bond for using a chemical weapon, they would be flabbergasted" (*Bond* Argument Transcript 2014: 28). If any Justice of any ideological bent thought political checks sufficed to restrain the federal government from overzealously implementing non-self-executing treaties, none has said so.

In the Section that follows, I propose three possible means of respecting state prerogatives in the treaty implementation process, some of which are already in use, as a sampling of methods that the federal government can employ to demonstrate respect for state interests. Others are possible, and I intend for the ones outlined below to be neither necessary nor sufficient for treaty-makers to undertake in order to demonstrate a respect for states' rights, but instead to offer a sketch of what the "accommodation of state interests" factor of the *Comstock* test might mean in the treaty-implementing context (*Comstock* 2010: 144-45).

4.3. Mechanisms of Respecting State Interests in Implementing Treaties

Aside from simply not entering into treaties that endanger state regulatory prerogatives, I offer three ways by which the federal government can show respect to such prerogatives in the treaty-making process. First, Congress can pass implementing legislation before any treaty is entered into, eliminating the risk that failure to pass treaty legislation will throw the United States into violation of its already-undertaken treaty obligations were these steps to happen in the opposite order. Second, the President and the Senate can attach reservations, understandings, and declarations (RUDs) to treaties in order to make clear that aspects of the treaties that conflict with the federal system in the United States do not bind the United States. Lastly, Congress should hew closely to the text of treaties when passing legislation implementing the treaties in order to avoid the slippery slope that Justice Scalia outlined in *Bond*, whereby the government enters into broad treaties (a commitment to make schools safe, for instance), and Congress can then pass any legislation it wishes, free from federalism constraints, to implement the treaty obligations (the Gun-Free School Zones Act) (*Bond* 2014: 2101-02).

First, courts could expect that the President wait to ratify a treaty until Congress has passed implementing legislation, which would take effect conditional on the treaty's ratification. This has the advantage of permitting legislators to debate the legislation without the risk that failure to pass legislation will cause the United States to violate its treaty obligations, a risk so substantial that it might induce legislators to pass laws that they otherwise would not have.[XIX] The expectation that legislation should be debated before a treaty commitment is made removes from consideration the prospect of permitting treaty obligations to go unenforced: either Congress will pass legislation to enforce the treaty, or the treaty will not be ratified. That treaty obligations will not go unenforced absent legislation will lead to a fuller and less constrained debate over any implementing legislation, without the shadow cast by the possibility of unfulfilled treaty obligations. The government could also condition ratification on Congress's passing implementing legislation, so if no legislation is passed, no treaty obligation is created, and no treaty obligation will be flouted. The United States has entered into treaties in such a manner in the past.[XX] In and of itself, without any substantive decree that certain areas are beyond Congress's reach in treaty implementation, this method elevates states' rights arguments to a place of greater prominence.

Second, and perhaps most straightforwardly, the United States can attach RUDs to treaty obligations that impinge on state sovereignty. RUDs are a common mechanism to signal a country's objection to a particular aspect of a treaty, and to signal that it does not intend to be bound by it. They are almost universally accepted, both domestically and internationally (Chung 2015: 2). In the *Bond* case, for example, the United States could have attached a RUD stating that nothing in the Chemical Weapons Convention would be interpreted to dislodge the states' prerogative to prosecute crimes local in nature and effect. This RUD would have had the advantages of showing respect for state interests and permitting the federal prosecution of Bond to go forward anyway since state authorities repeatedly failed to respond to or investigate her behavior (United States 2014: 4-5). Moreover, such a RUD would parallel the situation in *Comstock*, where Justice Breyer pointed out that the federal law permitted states to assert jurisdiction over, and take responsibility for the civil commitment of, dangerous sexual predators if they so wished, and the federal government became involved only if states passed on the opportunity themselves (*Comstock* 2010: 144-45).

Third, courts can expect implementing legislation to track closely the text of treaties that they purport to implement, and be suspicious when such alignment does not exist. In *Bond*, Justice Scalia posed a hypothetical scenario in which Congress desires authority over the law of intestacy (*Bond* 2014: 2101-02).[XXI] To gain that authority, it enters into a non-self-executing treaty with another country that requires a national law of intestacy, and then can work out the details as it chooses in implementing legislation far more specific than the text of the treaty (and of course implementing legislation, in contrast with treaty legislation, requires only a bare majority in each house of Congress (Art. I, § 7, Cl. 2.)). Justice Scalia acknowledges that the United States may perhaps constitutionally enter into a self-executing treaty nationalizing intestacy law, but to the extent that such a treaty is sufficiently specific to be self-executing, it would essentially require inducing two-thirds of the Senate to agree to a comprehensive probate code, obviously a daunting task (*Bond* 2014: 2101-02).

To the extent that a non-self-executing treaty is used as the authority for a statute, the statute should contain language similar to the treaty's language in order to avoid the problem of ratifying general treaties with unobjectionable provisions and using them as the basis for detailed federal regulation of state prerogatives. Carlos Manuel Vázquez has

referred to such treaties as "aspirational" treaties, and has similarly argued that they present a greater danger to federalism interests (Vázquez 2008). They pose less danger, however, if implementing legislation can be only as specific as the language of the treaty (unless Congress can rely on its ordinary Article I authority to regulate more comprehensively, of course). In effect, expecting an equal level of specificity requires that the President, the House, and *two-thirds* of the Senate agree to a regulation before it can be implemented pursuant to a non-self-executing treaty. The Chemical Weapons Convention would easily pass the equal specificity test, as its implementing legislation copied large portions from the treaty itself.[XXII]

I conclude this Section with two final notes. First, each method of respecting state interests proposed here has the benefit of consisting of primarily procedural, rather than substantive, checks on federal power. On the procedure-substance continuum, some of the mechanisms I propose require more interrogation of substance than others. The timing of passing implementing legislation versus ratifying the treaty is a purely procedural matter. Looking at the content of RUDs is substantive, but examining a treaty to see if RUDs have been attached in a manner that shows federal attentiveness to and concern for state prerogatives is primarily procedural. In other words, nothing I propose categorically limits the treaty-implementation power. This is consistent with the Framers' design that the treaty power not have subject-matter limitations (Corwin 1913: 70-71).

Second, I do not mean to suggest that observing one or more of these methods is necessary for all treaty implementing legislation that otherwise exceeds Congress's Article I powers. *Comstock* refers only to "accommodating state interests" without giving a precise roadmap of how that is to be done (*Comstock* 2010: 144). Moreover, as previously discussed, accommodation of state interests is only one element of a five-part test, and how each of the five is to be weighed against the others is also indeterminate. In other words, many other creative mechanisms of accommodating state interests in treaty implementation are possible and would be approved under a *Comstock* regime.

Conversely, the federal government could eschew any of the methods that I proposed here if a significant national or international interest so required. Attaching a RUD, for instance, may require that the United States make concessions in other areas that it wishes to avoid. In such cases, the federal government would be expected to identify and explain the national or international interest that prevented it from using one of the federalism-

respecting mechanisms described here. The weightiness of that interest would be judged, consistent with the Court's Necessary and Proper Clause jurisprudence, under a standard somewhat more stringent than the Court's ordinary rational basis review, but still with much deference to the political branches and their role in managing international affairs (*Comstock* 2010: 144). While there are too few cases on the Necessary and Proper Clause to know exactly how such a test would work, the Court has applied a somewhat elevated level of rational basis review in other contexts, and sufficiently often that it has acquired its own name: "rational basis with bite" (Holoszyc-Pimentel 2014). Under such a test, the federal government would still have a wide array of options for entering into and implementing treaties, but it could be called to account for its various decisions and how it accommodated state interests throughout the process when a particular treaty regulates matters traditionally left to the states.

5. Conclusion

This Article has attempted to fill a need in the literature: given that many Justices seem unwilling to cede their authority to determine the propriety of treaty-implementing legislation, but that scholars have mostly lined up in support of plenary Necessary and Proper authority, or none at all, can a middle ground exist? I urge that it can. I have assumed arguendo that the narrowest reading of the treaty power and the Necessary and Proper Clause is correct: "make treaties" really means only making them, and not implementing them. Even then, Congress can rely on broad authority to implement treaties. But I have also demonstrated that there are real limitations on Congress's Necessary and Proper authority to implement non-self-executing treaties. These limits have teeth—and the political branches already customarily observe some of them by, for instance, passing implementing legislation simultaneously to consenting to the treaty—but they should not be read to hamstring the power of the national government to enter into treaties consistent with the national and international interests that it is tasked with assessing. This understanding of the Necessary and Proper Clause coheres with the text and structure of the Constitution as well as with the Supreme Court's broader Necessary and Proper Clause jurisprudence.

Many fruitful areas of research remain. To name several examples, I have addressed only a few of several possible ways that the political branches can accommodate state interests in the treaty implementation process. One could also wonder whether the Court's recent turn toward presuming against the self-execution of treaties[XXIII] justifies a broader understanding of Congress's implementation authority given that the Framers might have more readily considered treaties to be self-executing (Vázquez 1999).[XXIV] Another angle to consider is whether the Seventeenth Amendment to the United States Constitution, providing for the direct election of United States Senators, should reduce our comfort level with political and structural checks on implementing authority since directly elected Senators will be less responsive to states' rights than those elected by state legislatures (Amend. XVII).

Each of these questions calls to be grappled with further, and each informs the contours and boundaries of the treaty-implementing authority. Simply adopting a textualist methodology, however, does not in and of itself set the boundaries of the treaty-implementing power. Judicial proponents of an extensive treaty-implementing authority were on the defensive in *Bond*; only Justices Scalia and Thomas were willing to state explicit views on the Necessary and Proper Clause constitutional question, and theirs was a truly narrow view of that Clause. But textualists can and should boldly advocate for a broader construction of the treaty-implementing power, one consistent with both the Constitution and the case law. In this Article, I have put forth just such a construction.

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I In Edye v. Robertson, for instance, the Supreme Court wrote that, "[a] treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it." 112 U.S. 580, 598 (1884).

II While of course this assumption is debatable, James Madison observed that, although the treaty power must be exercised consistently with the other powers delegated by the Constitution, he did not think it possible to enumerate all the cases in which treaty regulation might be necessary, so the Treaty Clause lacked a subject-matter limitation (Corwin 1913: 70-71). Other scholars have similarly argued that the text and structure of the Constitution militate in favor of nearly unconstrained power to enter into treaties (Golove 2000), though with some dissenting views as well (Bradley 1998).

III Professor Golove is not alone in this characterization. A prominent foreign relations treatise has characterized it the same way (Bradley et al. 2006: 419).

IV The Chemical Weapons Convention Implementation Act, Pub. L. NO. 105-277, 112 Stat. 2681-2856 (codified at 18 U.S.C. § 229(a)(1)) et seq.

V Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, S. Treaty Doc. 103-21, 1974 U.N.T.S. 317.

[VI] The Court held that, despite the broad language of the implementation act, it did not cover Ms. Bond's local, non-terrorism-related behavior, so her conduct was not criminal under federal law.
[VII] Golove argued that "[o]ne of the principal goals of the new Constitution was . . . to ensure that the new nation would be fully capable of making good on its international commitments," an argument for congressional authority that, if adopted, seems to grant Congress plenary treaty implementation power.
[VIII] *But see* Hathaway et al. 2013: 266-79. The authors attempt to draw some affirmative limits on the treaty power, but mostly rely on the *ipse dixit* of various 20th century jurists to explain that no one thinks a treaty can abridge fundamental rights, rather than refuting the claim that many arguments for expansive treaty powers imply that they can.
[IX] For another example of the jeopardy in which the Scalia-Thomas view would place criminal law treaties, consider Baldwin v. Franks, 120 U.S. 678 (1887), wherein the Court held that Congress had the power to punish individuals guilty of depriving Chinese people in the United States of any of the rights guaranteed to them by treaties between the two countries. It is difficult to see an Article I foundation for this law other than the Necessary and Proper Clause.
[X] To be sure, Professor Vázquez has his opponents on this question, perhaps most prominently, Professor John Yoo, who argued that the Framers assumed that treaties would not operate as binding domestic law (Yoo 1999).
[XI] It is worth pointing out that the Necessary and Proper Clause, if conjoined with the Supremacy Clause, might also grant Congress treaty-implementation authority. The Supremacy Clause explicitly states that "all" treaties shall be the supreme law of the land, so one might contend that implementing legislation assists treaties in gaining their constitutionally supreme status (Art. VI, Cl. 2). But the Necessary and Proper Clause grants Congress authority to "carry[] into Execution the foregoing *Powers*, and all other *Powers* vested by this Constitution in the Government of the United States…." (Art. I, § 8, Cl. 18) (emphasis added). The Supremacy Clause is evidently not a power—it simply sets forth a hierarchy of laws—so it could not appropriately be conjoined with the Necessary and Proper Clause.
[XII] For instance, William Davie, a delegate to North Carolina's constitutional convention, remarked that "[a] due observance of treaties . . . is the only means of rendering less frequent those mutual hostilities which tend to depopulate and ruin contending nations." Writing in *The Federalist*, John Jay assessed the risk of violating treaties as follows: "The just causes of war, for the most part, arise either from violations of treaties or from direct violence."
[XIII] Chief Justice Marshall famously wrote, "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."
[XIV] Professors Galbraith and Golove cite and discuss historical claims of Congress's broad treaty implementation authority from the Founding through *Holland*.
[XV] One need not even consider international law to see the weakness of Professor Rosenkranz's argument. The President cannot constitutionally begin a war with Spain today. If Spain attacks the United States tomorrow, the President can begin a war with Spain. *See generally* The Prize Cases, 67 U.S. (2 Black) 635 (1863) (discussing the President's inherent Article II authority to defend the nation). Ergo, what was unconstitutional became constitutional based on the behavior of a foreign sovereign.
[XVI] The same argument would apply mutatis mutandis to the President's seemingly strange authority to unilaterally render a law inoperative: he can do it by withdrawing from a self-executing treaty.
[XVII] *See* United States v. Comstock, 560 U.S. 126, 179 (2010) (observing that certain states appeared as amici on behalf of the Federal Government because they would prefer not to pay for a commitment program).
[XVIII] Madison remarked that he did "not think it possible to enumerate all the cases in which such external regulations [involving intercourse with foreign nations] would be necessary."
[XIX] One might object that to the extent that implementing legislation is passed before the treaty is ratified, the rationale I have proposed that undergirds the Necessary and Proper Clause authority to implement treaties falls apart. If there is not yet a treaty when the implementing legislation is passed, then passing implementing legislation does not facilitate entering into future treaties because failure to pass implementing legislation does not flout any treaty currently in force. Viewed this way, passing implementing legislation is no longer necessary and proper to carrying out any enumerated power.
There is less to this argument than meets the eye. First, by the time a treaty is in sufficiently definite form that implementing legislation can be passed, enormous resources will have been expended to negotiate it, leaving treaty partners unhappy if the United States repeatedly pulls out from such agreements at the final

opportunity. This means that passing implementing legislation still can contribute to future successful negotiations. Second, because the temporal order of passing implementing legislation before ratification is not a constitutional mandate, it may be abandoned at any time. Indeed, not even every treaty today follows this pattern, including the Chemical Weapons Convention. *See Bond*, 134 S. Ct. at 2083, 2085 (noting that the United States ratified the Convention in 1997 and passed implementing legislation in 1998). In these cases, the argument about facilitating future agreements applies with its full force.

[xx] One example is the Convention Between the United States of America and His Majesty the King of the Hawaiian Islands, Commercial Reciprocity, U.S.-Haw. art. V, June 3, 1875, 19 Stat. 625.

[xxi] *See* Bond v. United States, 134 S. Ct. at 2101-02 (Scalia, J., concurring).

[xxii] The definition of chemical weapons contained in the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, S. Treaty Doc. 103-21, 1974 U.N.T.S. 317, art. II, ¶ 1 (defining chemical weapons), is materially identical to the definition in the implementing legislation, The Chemical Weapons Convention Implementation Act, tit. II, § 229(f)(1), Pub. L. NO. 105-277, 112 Stat. 2681-2856 (codified at 18 U.S.C. § 229F(1)). Both definitions include a toxic chemical and its precursors, a device designed to cause death or other harm through toxic properties of those toxic chemicals, or equipment designed for use in connection with such chemicals or devices.

[xxiii] This had been the trend for a number of years, but was accelerated by Medellin v. Texas, 552 U.S. 491 (2008), which held that a treaty does not constitute binding domestic law unless Congress passes implementing legislation or the treaty itself conveys the intention to be self-executing and is ratified with that understanding.

[xxiv] As set forth elsewhere, *supra* footnote 10, it is not uncontroversial or universally accepted that the Founders presumed nearly all treaties would be self-executing.

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