

## THE BOND COURT'S INSTITUTIONAL TRUCE

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As many readers are aware, *Bond v. United States*<sup>1</sup> is a quirky case. The federal government prosecuted under the implementing legislation for the Chemical Weapons Convention (CWC) a betrayed wife who used chemical agents to try to harm her husband's lover. The wife argued that, as applied to her, the implementing legislation violated the Tenth Amendment. She thus raised difficult questions about the scope of the treaty power and of Congress's authority to implement treaties through the Necessary and Proper Clause. The *Bond* Court avoided those questions with a clear statement rule: "we can insist on a clear indication that Congress meant to reach purely local crimes, before interpreting the statute's expansive language in a way that intrudes on the police power of the States."<sup>2</sup> This resolution betrays the Court's ambivalence about the appropriate limits of the treaty power and about the Court's own capacity to define those limits.

The clear message from *Bond* is that the Court is troubled by the federalism implications of an overly expansive treaty power but feels ill-equipped to delimit that power itself. Consider the three approaches that were easily available to the Court but not taken. First, the Court did not just apply the implementing legislation's seemingly plain but expansive language to reach Bond's conduct. All nine Justices thought that, as applied to Bond, the legislation risked intruding too heavily on the federalism interests at stake.

Second, neither did the Court decide that the CWC's implementing legislation exceeded the federal government's authorities. *Missouri v. Holland* was itself premised on the idea that regulating migratory birds was an international, not a purely local, affair. Bond picked up on that distinction. It went out of its way to characterize Bond's conduct as "purely local" and to minimize the national and international interests at stake. As Marty Lederman<sup>3</sup> has explained, these moves are questionable. Yet even as the Court made them, it declined to find that the CWC's implementing legislation exceeded the federal government's treaty-related authorities.

Third, the Court also declined to establish a generalized standard for limiting those authorities in future cases. Even the concurring opinions that try to establish a limiting principle are, in the end, unconvincing. Justice Scalia's opinion adopts the position, articulated by Professor Rosenkranz in 2005,<sup>4</sup> that the Necessary and Proper Clause authorizes legislation to "make" treaties but not to "implement" them. Yet Scalia does not even try to grapple with the historical evidence to the contrary.<sup>5,6,7</sup> And he fails to offer a principled reason for adopting his interpretation, given that the Treaty Clause enables the government not just to make but also to

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<sup>1</sup> *Bond v. United States*, 134 S.Ct. 2077 (2014).

<sup>2</sup> *Id.* at 2090.

<sup>3</sup> Marty Lederman, *Seven Observations About the Oral Argument in Bond*, OPINIO JURIS (Nov. 6, 2013).

<sup>4</sup> Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867 (2005).

<sup>5</sup> Carlos Manuel Vázquez, *Missouri v. Holland's Second Holding*, 73 MO. L. REV. 939 (2008).

<sup>6</sup> Edward T. Swaine, *Putting Missouri v. Holland on the Map*, 73 MO. L. REV. (2008).

<sup>7</sup> Jean Galbraith, *Congress's Treaty-Implementing Power in Historical Practice*, 56 WM. & MARY L. REV. 59 (2014).

implement treaties—by declaring them to be self-executing. Justice Thomas’ opinion focuses on the treaty power itself. He argues that the treaty power may be used to “arrange intercourse with other nations, but not to regulate purely domestic affairs.”<sup>8</sup> But Thomas then “acknowledge[s] that the distinction between matters of international intercourse and matters of purely domestic regulation may not be obvious in all cases.”<sup>9</sup> And he does not explain why the task of identifying the issues that are suited for international regulation falls to the Court. As Bill Dodge<sup>10</sup> explains, this task is probably best left to the political branches of government.

The approach that the Court took in *Bond* ultimately allows the Court to police the use of the treaty power without defining its scope—both in this case and in future cases. The clear statement rule purportedly directs Congress to be explicit when it uses the treaty power to regulate matters that have traditionally fallen within the states’ police powers. But of course, Congress has a strong incentive *not* to be explicit on this point. The scope of the federal government’s treaty-related authorities is still uncertain, and at least three Justices are prepared to limit those authorities in the interests of federalism. To assert that a treaty’s implementing legislation is intended to regulate purely local matters is simply to tee up the legislation for judicial review, with potentially negative and far-reaching consequences. Moreover, as a practical matter, Congress rarely needs to push the envelope on the treaty power; it can almost always justify its implementing legislation under its better-established Article I powers. (Even the application of the CWC’s implementing legislation can, in most cases, be justified under the Commerce Clause or the Define and Punish Clause.<sup>11</sup>) As a result, Congress is highly unlikely to try to satisfy the clear statement test in future cases. For similar reasons, the Executive branch has an incentive to exercise restraint when cases raise serious federalism questions. Rather than assert federal authority and invite judicial review, the Executive might just stay its hand.

Finally, to the extent that cases testing the treaty power continue to come before the Court, the Court can resolve them case—specifically, as it resolved *Bond*. *Bond*’s method of analysis is fairly straightforward, even though its application in any particular case depends on the Court’s perception that the regulated conduct is “purely local.” If it is, then the conduct is beyond the implementing legislation’s reach—unless Congress takes the foolish and unlikely step of stating explicitly that the legislation is intended to govern the conduct. In the end, then, *Bond* establishes a potentially stable truce among the three branches of the federal government: so long as the political branches do their part to attend to federalism interests when they use or apply the treaty power, the Court can tinker around the edges without trying to define or impose constraints on that power. For now, at least, all three branches seem to have an interest in maintaining that truce.

<sup>8</sup> *Bond*, 134 S.Ct. 2077, 2103 (Thomas, J. concurring).

<sup>9</sup> *Id.* at 2110.

<sup>10</sup> William S. Dodge, *Bond v. United States and Congress’s Role in Implementing Treaties*, 108 AJIL UNBOUND 86 (2014).

<sup>11</sup> Sarah H. Cleveland & William S. Dodge, *Defining and Punishing Offenses Under Treaties*, 124 YALE L.J. 2202 (2015).