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 FOR PROFESSORS DAVID M. GOLOVE, MARTIN S. LEDERMAN AND JOHN MIKHAIL AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICI CURIAE*

Amici teach and write about constitutional law and have extensively studied the scope and history of the treaty power and Congress's authority under the Necessary and Proper Clause.[1] *Amici* are:

- David M. Golove, Hiller Family Foundation Professor of Law, New York University School of Law
- Martin S. Lederman, Associate Professor of Law, Georgetown University Law Center
- John Mikhail, Professor of Law, Georgetown University Law Center

SUMMARY OF ARGUMENT

The Chemical Weapons Convention (CWC) requires the United States to prohibit all persons within the United States from "us[ing]" chemical weapons, "including" by "enacting penal legislation with respect to such activity." CWC arts. I(1)(b), VII(1)(a), U.S. Br. App. 5a, 29a-30a. Because the Question Presented assumes the CWC is a "valid treaty," Pet. Br. i, the principal issue before the Court is whether Congress has the power to implement that treaty obligation by enacting a law categorically prohibiting the "use" of "chemical weapon[s]." 18 U.S.C. § 229(a)(1).[2]

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[1] All parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part and no person other than *amici* or their counsel made any monetary contribution to its preparation or submission.

[2] Petitioner argues that the CWC does not cover her particular use of toxic chemicals. Pet. Br. 52-53. We express no view on that question. But if the Court agrees with petitioner, then pe-

Missouri v. *Holland*, 252 U.S. 416 (1920), answers that question. The implementing statute in *Holland*, like the statute here, closely tracked the relevant provisions of a treaty obligation. Once this Court held that the treaty was valid, it followed that "there can be no dispute about the validity of the statute under Article I, Section 8, as a necessary and proper means to execute the powers of the Government." *Id.* at 432.

Petitioner is correct that *Holland* does not stand for the proposition that Congress may enact implementing legislation so "wildly 'out of proportion to'" the treaty "'that it cannot be understood as' a meaningful, let alone constitutional, effort to implement it." Pet. Br. 58 (quoting *City of Boerne* v. *Flores*, 521 U.S. 507, 532 (1997)). The Necessary and Proper Clause, Art. I, § 8, cl. 18, is not a license for such grossly overbroad, self-evidently pretextual legislation.

This case, however, provides no occasion for the Court to decide how far Congress may go in implementing a valid treaty, because the relevant provisions of the federal statute here are narrowly tailored to—indeed, virtually coterminous with—the terms of the CWC itself.

Amici Cato Institute, *et al.*, unlike petitioner, contend that the Necessary and Proper Clause does not give Congress *any* authority to implement valid treaties. In their view, Congress' power to implement treaties therefore is strictly limited to legislation it could enact in the absence of the treaty under one of

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titioner's conduct would also fall outside the statutory prohibition, because Congress plainly intended to adopt in the statute the treaty's definition of "chemical weapon."

its other enumerated Article I authorities. *Amici* acknowledge that this would require overruling *Holland*.

This Court should decline *amici*'s invitation. Although *amici* characterize the holding in *Holland* as a "conclusory" bolt from the blue not warranting *stare decisis* deference, that holding was, in fact, deeply rooted in history and precedent. Indeed, the question of Congress's power to enact Necessary and Proper legislation to implement a valid treaty was settled and uncontroversial by 1920, reflecting a shared understanding of this Court, both political branches, and virtually all leading authorities, extending back to the founding.

Amici insist that *Holland* must nevertheless be mistaken, because it effectively affords the President and the Senate the power to "increase" or "expand" Congress's constitutional powers. But that circular argument simply ignores the Necessary and Proper Clause, whose very "nature" is to "empower[] Congress to enact laws in effectuation of * * * enumerated powers that are not within its authority to enact in isolation," *Gonzales v. Raich*, 545 U.S. 1, 39 (2005) (Scalia, J., concurring in the judgment), in order to enable the "beneficial execution" of the enumerated powers, *McCulloch v. Maryland*, 4 Wheat. 316, 415 (1819), and thus ensure that the federal government is not "incompetent to its great objects," *id.* at 418.

Amici also argue that their novel conception of congressional power is compelled by the Constitution's text. They read the Necessary and Proper Clause, in conjunction with the Treaty Clause, Art. II, § 2, cl. 2, to give Congress the authority to carry into execution only the *making* of treaties, not their implementation.

Even on this implausible theory, legislation designed to ensure compliance with treaty obligations would be necessary and proper, because the Nation's ability to make treaties would be severely compromised if the President were unable to assure treaty partners that the national government has the power to enforce its promises.

Moreover, the logic of *amici*'s approach would radically constrict the scope of Congress's authority to carry into execution all of the federal government's other enumerated powers, as well.

Finally, *amici* argue that *Holland* cannot be squared with Justice Black's admonition in *Reid* v. *Covert*, 354 U.S. 1, 16 (1957) (plurality opinion), that "no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution." As Justice Black explained, however, that principle is perfectly consistent with, not contrary to, the Court's holding in *Holland*.

ARGUMENT

I. ALTHOUGH CONGRESS'S AUTHORITY TO IMPLEMENT A TREATY IS NOT UNLIMITED, THE STATUTE HERE IS NECESSARY AND PROPER UNDER *MISSOURI* v. *HOLLAND* BECAUSE IT CLOSELY TRACKS A TREATY OBLIGATION.

This case shares a critical feature with *Missouri* v. *Holland*: Congress has enacted a criminal prohibition that carefully tracks a treaty provision committing the Nation to prohibit specific conduct.

The treaty in *Holland* obligated the parties to establish certain "close seasons" during which hunting

of specified migratory birds would be prohibited. Convention for the Protection of Migratory Birds, U.S.-U.K., Aug. 16, 1916, 39 Stat. 1702-04 (1916). The implementing legislation, in turn, made it unlawful to hunt those birds "included in the terms of the convention," except during designated periods when hunting would be "compatible with the terms of the convention." Migratory Bird Treaty Act, ch. 128, §§ 2, 3, 8, 40 Stat. 755-56 (1918).

The statutory provisions at issue in this case likewise are "coextensive," Pet. App. 28-29 n.15, with the provisions of the CWC obligating the United States to prohibit categorically the "use" of "chemical weapons" within the United States. Compare 18 U.S.C. §§ 229(a)(1), 229F(1), (7), (8), with CWC arts. VII(1)(a), I(1)(b), II(1), (2), (9).

Holland squarely holds that where a treaty is valid, and where (as in *Holland* and here) the implementing language closely tracks the applicable language of the treaty itself, "there can be no dispute about the validity of the statute under Article I, Section 8, as a necessary and proper means to execute the powers of the Government." 252 U.S. at 432. This is so, Justice Holmes explained for the Court, even if Congress would not have had the authority to enact the statute in the absence of the treaty. *Id.* at 433.

To be sure, "[t]he validity of [a] treaty does not guarantee the validity of actions taken to implement it." Pet. Br. 17. The legislature may not, for example, point to a valid treaty as justification for legislation grossly disproportionate to what is needed to satisfy the Nation's obligations or the conditions that enable the United States to reap the benefits of its side of the bargain. Such overreach would raise suspicion that Congress was using alleged treaty-

implementation as a "mere artifice," *United States* v. *Comstock*, 130 S. Ct. 1949, 1967 (2010) (Kennedy, J., concurring), to achieve domestic ends not otherwise within its powers, rather than for the maintenance of mutually beneficial international relations. The Necessary and Proper Clause is not a license for such self-evidently pretextual legislation. Nor does *Holland* suggest otherwise.

Noting that a statute cannot be so "wildly 'out of proportion to'" the treaty "'that it cannot be understood as' a meaningful, let alone constitutional, effort to implement it," Pet. Br. 58 (quoting *City of Boerne*, 521 U.S. at 532), petitioner queries whether the result in *Holland* would have been the same had Congress prohibited the killing of "all birds," rather than only the migratory birds identified in the treaty. Pet. Br. 29. The answer is not obvious, because it is well-established that Congress may go beyond what is "indispensably necessary to give effect to a specified power," *Fisher v. United States*, 2 Cranch 358, 396 (1805), and may, in particular, enact reasonable prophylactic legislation in order to deal with practical difficulties of implementation.[3]

Here, however, the Court does not confront a statute that goes beyond the treaty's language, let alone one that veers far, and dubiously, beyond the scope of the treaty obligation. Because Section 229(a)(1) is a narrowly tailored means—indeed, the most direct, natural manner—of implementing the CWC treaty obligation, this Court need not "pile inference upon inference," *United States* v. *Lopez*, 514

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[3] See, *e.g.*, *Raich*, 545 U.S. at 22; *Ruppert* v. *Caffey*, 251 U.S. 264, 297-300 (1920); *United States* v. *Coombs*, 12 Pet. 72, 81-83 (1838).

U.S. 549, 567 (1995), in order to conclude that the statute is genuinely and reasonably designed to ensure the United States' compliance with the CWC.

Plainly, Congress did not enact Section 229(a)(1) as a "pretext" for "the accomplishment of objects not entrusted to the [federal] government." *McCulloch*, 4 Wheat. at 423. And petitioner does not suggest otherwise.

Petitioner argues that facially valid legislation implementing a valid treaty should nevertheless be deemed unconstitutional "as applied" in cases where a court determines that the particular conduct at issue—although encompassed by the treaty—lacks a sufficient "nexus to a matter of national or international importance." Pet. Br. 29. As the government explains, U.S. Br. 49-52, there is no warrant in history or logic to introduce such an unmanageable case-by-case test, which would potentially put the United States in breach of its international obligations.

Furthermore, petitioner's as-applied argument appears to be premised on an assumption that certain domestic matters are somehow presumptively outside the domain of genuine matters of "international importance." The well-being of persons in other nations, however, has long been a central foreign policy concern of many nations, including the United States, for manifest economic, diplomatic, security, and humanitarian reasons. See*, e.g.*, *Agency for Int'l Development* v. *Alliance for Open Society Int'l*, 133 S. Ct. 2321, 2324 (2013) (describing "comprehensive" U.S. strategy to combat the spread of HIV/AIDS around the world). Indeed, petitioner herself appears to recognize that purely domestic uses of toxic chemicals can be of genuine "international importance," since she concedes that § 229(a)(1) would be constitu-

tional as applied to cases in which such domestic use "threatens widespread injury," Pet. Br. 47, or "induce[s] fear in a civilian population," *id.* at 59.

In sum, Section 229(a)(1) is facially valid implementing legislation, and the Court should decline petitioner's invitation to create a novel, judicially-managed as-applied exception that would threaten to undermine the Nation's treaty commitments. Cf. *Raich*, 545 U.S. at 26-33.

II. THERE IS NO REASON FOR THE COURT TO CONSIDER OVERRULING *HOLLAND*'S NECESSARY AND PROPER HOLDING.

In contrast to petitioner, *see* Pet. Br. 35, 57, the Cato *amici* argue that the Necessary and Proper Clause does not give Congress *any* authority to pass laws to implement valid treaties, and that the Court therefore should overrule *Holland*. *Amici* offer no sound reason the Court should take that radical step.

A. *Holland* Confirmed Longstanding Historical Practice and Authority.

On *amici*'s telling, this Court's holding in *Holland* concerning Congress's power to implement treaties does not deserve the deference of *stare decisis* because it consists of a "conclusory sentence," shorn of any "reasoning [or] citation." Cato Br. 4; see also Pet. Br. 28 ("only * * * an afterthought").

The Court's treatment of the question was succinct, however, because the issue was clearly settled. The only substantial controversy at the time of *Holland* concerned the scope of the President's power to make treaties—the principal topic of Justice Holmes's opinion. Congress's power to enact legislation to implement a valid treaty, by contrast, had

been widely accepted since the founding, and this Court had unanimously affirmed it in 1901.

1. Early Understandings.

Under the Articles of Confederation, the Union had to rely upon the states to implement its international treaty commitments, with disastrous results. "The imbecility of our Government even forbids [foreign nations] to treat with us," Hamilton lamented. "Our ambassadors abroad are the mere pageants of mimic sovereignty." *The Federalist* No. 15, at 107 (C. Rossiter ed. 1961); see also U.S. Br. 30-32; David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 Mich. L. Rev. 1075, 1131 (2000). To allow such a state of affairs to continue would "sap the sovereignty of the Nation and render it contemptible in the sight of all other nations. The anomaly of a sovereignty with power to promise but none to perform could not endure." 1 George Sutherland, CONSTITUTIONAL POWER AND WORLD AFFAIRS 159 (1919).

One of the principal goals of the new Constitution was therefore to ensure that the new nation would be fully capable of making good on its international commitments. See generally David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. Rev. 932 (2010).

In the first decades after the founding, the Nation's promises were enforced primarily through self-executing treaties, which operated without legislation to establish judicially enforceable federal norms, including in areas that Congress could not have reg-

ulated under its Article I powers—a proposition neither petitioner nor *amici* contest. These treaties frequently intruded into areas at the core of the states' police powers.[4]

It therefore stands to reason that the national government could accomplish the same result through legislation implementing a valid treaty. After all, if the President and Senate by treaty *alone* can directly regulate subjects falling outside the scope of Congress' enumerated powers, then surely the Constitution does not prohibit the President and Senate from including the House of Representatives—the most representative branch—as an additional check against treaty-based intrusions on state prerogatives.

Not surprisingly, that was the common understanding from the founding. As early as the great debate over the Jay Treaty in 1796, and repeatedly thereafter, members of Congress who opposed the idea that treaties can be self-executing pointed to the Necessary and Proper Clause as proof that the Constitution contemplated congressional involvement in the implementation of treaties. See Jean Galbraith, *Congress's Treaty-Implementing Power In Historical Practice*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2275355 (June 2013), at 18-26.

The assumption that Congress could exercise this authority even when the treaty dealt with an issue outside Congress's enumerated powers was reflected in the high-profile congressional debate involving the Jonathan Robbins affair in 1799-1800.

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[4] See generally Golove, *supra*, 98 Mich. L. Rev. at 1115-27, 1157-93, 1212-17.

President Adams deemed Article 27 of the Jay Treaty self-executing and, with the aid of a federal judge, extradited Robbins, who claimed to be a U.S. citizen, to Great Britain. See *United States* v. *Robins* [*sic*], 27 F. Cas. 825 (D.S.C. 1799) (No. 16-175).

Republicans fiercely criticized Adams for acting in the absence of implementing legislation creating an extradition process, 10 Annals of Cong. 614-15 (1800) (remarks of Rep. Marshall, summarizing Republican position), and even introduced a bill to implement the treaty's extradition article, *id*. at 511 (remarks of Rep. Livingston); see also *id*. at 654-55, 691 (describing debate). Notably, this occurred notwithstanding the Republicans' assertion in the virtually simultaneous debate over the Alien and Sedition Acts that Congress's enumerated powers did *not* authorize legislation for the deportation of "friendly" aliens, much less U.S. citizens. See Report on the Virginia Resolutions at the Session of 1799–1800 (J. Madison), *in* 4 Jonathan Elliot, THE DEBATES IN THE SEVERAL STATE CONVENTIONS 546, 554-59 (1836). Despite the absence of an Article I enumerated power over the subject, members of Congress on both sides of the Robbins debate assumed Congress's authority to enact extradition legislation that would implement a valid treaty.

*2. Pre-*Holland *Practice and Precedent.*

As time went on, the need for implementing legislation arose in connection with a number of important treaties. Proponents and opponents alike concurred that, even when there was no other source of congressional authority, the Necessary and Proper Clause empowered Congress to enact such laws where the treaty provisions themselves were valid.

a. *Federal Legislation to Criminalize Violence Against Aliens.*

The most extensive treatment of the issue came in response to a pattern of mob violence against resident aliens entitled to protection under various treaties. Although state laws prohibited such violence, the states regularly failed to indict, prosecute or convict malefactors, provoking a series of diplomatic conflicts with our treaty partners. See William Howard Taft, THE UNITED STATES AND PEACE 40-89 (1914).

This Court had held in *United States* v. *Harris*, 106 U.S. 629 (1883), that Congress lacked the power to enact a statute providing federal penalties for private acts of racial violence. In 1886, however, a circuit court specifically relied upon Congress's Necessary and Proper Clause power to implement valid treaties in order to uphold a conviction under that statute for crimes against treaty-protected Chinese residents. *In re Baldwin*, 27 F. 187, 188-91 (D. Cal. 1886).

In *Baldwin* v. *Franks*, 120 U.S. 678 (1887), this Court reversed the judgment on the ground that the application in question could not be severed from the facially invalid statute. The Court was at pains, however, to explain that Congress was not powerless to address the problem in light of the treaty with China: "That the United States have power under the Constitution to provide for the punishment of those who are guilty of depriving Chinese subjects of any of the rights, privileges, immunities, or exemptions guaranteed to them by this treaty we do not doubt." *Id.* at 683.

Encouraged by the Court's unambiguous signal in *Baldwin*, Presidents from Benjamin Harrison to William Taft repeatedly urged Congress to adopt legislation to prohibit violence against treaty-protected aliens, to bring to an end increasingly serious diplomatic embarrassments.

In the extensive legislative debates that followed, opponents raised an array of constitutional and policy-based objections, including, in some cases, doubts about the constitutionality of the treaties themselves. They also inveighed that the legislation "proposes to take away from the States the exclusive and sole jurisdiction which they have, as States and colonies, for two hundred and fifty years exercised over crimes and criminals within their jurisdiction, and to divide it partly with the Federal Government." 23 Cong. Rec. 4606 (1892) (remarks of Sen. Turpie).

All sides agreed, however, that Congress was empowered to pass laws necessary to implement valid treaty commitments. See, *e.g.*, *id.* at 4558 (remarks of principal proponent Sen. Morgan) (noting, immediately after denying any other congressional power over the subject, that the treaty power "gives unquestionable power to Congress to do those things which are necessary to be done to carry into execution those treaties with foreign governments which may be executed and ratified in conformity with the Constitution of the United States"); *id.* at 4554 (remarks of Sen. Vilas) (opponent); see also *id.* at 4557 (remarks of Sen. Davis) (proponent); *id.* at 4607 (remarks of Sen. Hiscock) (proponent); *id.* at 4552 (remarks of Sen. Palmer) (opponent); *id.* at 4605 (remarks of Sen. Turpie) (opponent); S. Rep. 392, 56th Cong., 1st Sess., at 4 (1900).

Despite this agreement on Congress's treaty-implementing power, opposition to adoption of a federal anti-lynching law, even if applicable only to treaty-protected aliens, prevented Congress from acting.

b. *Federal Trademark Legislation.*

In the *Trade-mark Cases*, 100 U.S. 82 (1879), this Court held that the Intellectual Property Clause, Art. I, § 8, cl. 8, did not authorize the 1870 Trademark Act. The Court virtually invited Congress, however, to adopt legislation to implement the growing number of trademark treaties the President and Senate had concluded: "In what we have here said we wish to be understood as leaving untouched the whole question of the treaty-making power over trade-marks, and of the duty of Congress to pass any laws necessary to carry treaties into effect." *Id.* at 99.

Congress soon took up the Court's suggestion. The House Judiciary Committee recommended trademark legislation specifically tailored to implement treaties, despite its view that Congress otherwise lacked the power to enact such laws:

> [W]hile we think Congress cannot so legislate with regard to trade-marks under the power "to regulate commerce with foreign nations, and among the several States and with the Indian tribes," * * * trade-marks, in commerce with foreign nations and with the Indian tribes, can be protected under the treaty-making power. * * * If [treaties] need legislative aid, Congress can give it under its power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers

> vested by the Constitution in the Government of the United States, or in any department of officer thereof."

H.R. Rep. No. 561, 46th Cong., 2d Sess., at 6 (1880) (emphasis and internal citations omitted).

Although state common law already protected trademarks, see *ibid*., proponents stressed the need for federal legislation because of "the importance of maintaining not only every treaty obligation of the United States, but of doing so in such manner as to keep the confidence of the world." 10 Cong. Rec. 2703-04 (1880) (remarks of Rep. Hammond); see also, *e.g., id*. at 2806 (remarks of Rep. Lapham).

Congress enacted the legislation in 1881, Act of Mar. 3, 1881, ch. 138, 21 Stat. 502, and the law had its intended effect: Whereas no nation had entered into a trademark treaty with the United States in the two years since the Court's ruling in the *Trademark Cases*, the new law reassured foreign powers, four of which quickly concluded new agreements with the United States. See Zvi S. Rosen, *In Search of the Trade-Mark Cases: The Nascent Treaty Power and the Turbulent Origins of Federal Trademark Law*, 83 St. John's L. Rev. 827, 888-89 (2009).

c. *Extradition Legislation and* Neely.

None of Congress' enumerated powers in terms supports a general power to extradite. See, *e.g.*, *In re Kaine*, 14 How. 103, 136 (1852) (Nelson, J., dissenting on other grounds). Until well into the Twentieth Century, therefore, Congress avoided adopting extradition legislation—except in implementation of treaty commitments.

Early extradition treaties were self-executing. See *In re Metzger*, 5 How. 176, 188-89 (1847). When self-execution proved an inadequate basis to achieve efficient compliance, however, Congress acted to implement the treaties through supplemental legislation. See Samuel T. Spear, THE LAW OF EXTRADITION, INTERNATIONAL AND INTER-STATE 69 (1879).

The first such statute expressly provided that the duty to extradite was limited to "cases in which there now exists, or hereafter may exist, any treaty or convention for extradition between the government of the United States and any foreign government." Act of Aug. 12, 1848, ch. 167, § 1, 9 Stat. 302. See also pages 11-12, *supra* (discussing proposed legislation in connection with the Robbins Affair). By 1879, the leading treatise on extradition unequivocally affirmed that although Congress had no independent power to provide for extradition, the Necessary and Proper Clause provided authority for extradition legislation to implement treaties. See Spear, *supra*, at 7, 13.

A case challenging the constitutionality of an extradition statute prompted this Court, in *Neely* v. *Henkel*, 180 U.S. 109 (1901), to confirm unequivocally Congress's power to enact necessary and proper legislation to implement any valid treaty stipulation.

The Treaty of Paris, which ended the Spanish-American War, required the United States to assume "the obligations that may under international law result from the fact of its occupation [of Cuba], for the protection of life and property." Treaty of Peace Between the United States of America and the Kingdom of Spain, Art. I, 30 Stat. 1754, 1755. One year later, Congress amended the 1848 extradition act to provide that whenever a person was accused of speci-

fied offenses in territory occupied by the United States and thereafter fled to the United States, that person would be subject to extradition. Act of June 6, 1900, ch. 793, 31 Stat. 656.

Neely, seeking to avoid extradition to Cuba, challenged the constitutionality of this statute. Even though the Treaty of Paris did not in terms require the extradition legislation, Justice Harlan, writing for a unanimous Court, held that the statute was a necessary and proper means of implementing the treaty:

> The power of Congress to make all laws necessary and proper for carrying into execution as well the powers enumerated in § 8 of article I of the Constitution as all others vested in the government of the United States, or in any department or the officers thereof, includes the power to enact such legislation as is appropriate to give efficacy to *any stipulations which it is competent for the President by and with the advice and consent of the Senate to insert in a treaty with a foreign power*. What legislation by Congress could be more appropriate for the protection of life and property in Cuba, while occupied and controlled by the United States [as provided in the Treaty of Paris], than legislation securing the return to that island, to be tried by its constituted authorities, of those who, having committed crimes there, fled to this country to escape arrest, trial, and punishment?

180 U.S. at 121-22 (emphasis added). The Court explained that it was irrelevant whether any other Article I authority supported the law, for it was "quite

sufficient in this case to adjudge, as we now do, that it was competent for Congress, by legislation, to enforce or give efficacy to the provisions of the treaty made by the United States and Spain with respect to the island of Cuba." *Id*. at 122.

3. The Views of Constitutional Authorities

Reflecting this history, leading constitutional authorities—before *Holland*— agreed that the Necessary and Proper Clause empowers Congress to enact legislation implementing treaty obligations, without regard to whether that legislation is authorized by another Article I power.[5]

In addition to Professor Corwin's seminal, comprehensive, treatment, see note 5, *supra*, particularly notable were the views of two soon-to-be Supreme Court Justices—William Howard Taft and George Sutherland.

Former President Taft, writing before his appointment as Chief Justice, focused at length on the ongoing controversy over federal legislation to criminalize violence against treaty-protected aliens. Stressing the "'pusillanimous position'" of the federal government, which, having entered into treaty commitments, was forced to excuse its non-performance by claiming that state breaches were outside "'our control,'" Taft, *supra*, at 68, Taft specifically rejected the argument that such implementing legislation

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[5] See, *e.g.*, Sutherland, *supra*, at 153-55, 164-65; Taft, *supra*, at 67-68, 74-83; Edward Corwin, NATIONAL SUPREMACY—TREATY POWER V. STATE POWER 274-95 (1913); 2 Charles Henry Butler, THE TREATY-MAKING POWER OF THE UNITED STATES § 390, at 139-44 (1902); Chandler P. Anderson, *Extent and Limitations of the Treaty-Making Power under the Constitution*, 1 Am. J. Int'l L. 636, 661-63 (1907).

"would be an invasion of the police power of the States," *id.* at 74. "It needs no straining of logic," he explained, "but only the use of the reasoning pursued by the Supreme Court in hundreds of similar cases, to deduce the power of Congress under [the Necessary and Proper] clause to enact legislation to carry out and execute * * * an agreement by the United States to protect aliens from lawless violence." *Id.* at 81.

Similarly, two years before *Holland* and four years before his appointment to the Court, Sutherland wrote:

> The necessity of supplementary action to carry into operation treaty provisions which are not made self-executing, has the effect of authorizing Congress to legislate upon many matters which would be beyond its power in the absence of a treaty. In such case the authority is not derived from, nor is it limited by, the enumerated subjects of legislation; but it arises from [the Necessary and Proper Clause]. The power exercised in any such case is as strictly constitutional as in the case of the specifically enumerated powers, but occasion for legislative action in this field has no limits except those which bound the treaty-making power itself. The treaty-making power being one of those "vested by the Constitution in the government of the United States," the authority of Congress to pass all laws to carry it into execution is conferred by the co-efficient clause in precise and definite words.

Sutherland, *supra*, at 153-54.

By the time the *Holland* case arrived at this Court, then, the Necessary and Proper question was virtually uncontroverted.[6] That explains why the lower courts considering the Migratory Bird Act thought the question warranted at most a single sentence,[7] and why the government likewise properly treated it as a settled issue before this Court: "[T]here can scarcely be a serious contention that Congress may not enact legislation to put into effect the provisions of any treaty which the President, with the advice and consent of the Senate, may lawfully negotiate, regardless of whether the subject matter is one within or without the general legislative powers of Congress."[8]

B. *Holland*'s Holding Does Not Empower The President And The Senate To "Expand" Or "Increase" Congress's Constitutional Authority.

Notwithstanding this longstanding consensus reflected in *Holland*, the Cato *amici* repeatedly insist that *Holland* was wrong because it allegedly affords

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[6] *Amici* ignore all of this pre-*Holland* authority. They cite only one ostensible source in support of the contrary view (Cato Br. 11-12)—Henry St. George Tucker, LIMITATIONS ON THE TREATY-MAKING POWER UNDER THE CONSTITUTION OF THE UNITED STATES § 113, at 130 (1915). But even that less prominent source, written by an inveterate critic of a strong treaty power, acknowledged that if a treaty were valid, then it "might well be admitted" that the Necessary and Proper Clause would authorize Congress to enact implementing legislation otherwise outside its enumerated powers. *Id.* § 116, at 132.

[7] See, *e.g.*, *United States* v. *Samples*, 258 F. 479, 482 (W.D. Mo. 1919), aff'd *sub nom. Holland*, 252 U.S. 416; *United States* v. *Thompson*, 258 F. 257, 268 (E.D. Ark. 1919).

[8] Appellee Br. 11-13, *Holland*, 252 U.S. 416.

the President and the Senate the power to "increase" or "expand" Congress's constitutional powers merely by ratifying a treaty, thereby circumventing the Article V amendment process. See, *e.g.*, Cato Br. at i, 3, 4, 5, 10, 12, 18, 23, 26, 28, 31 ("increase"); *id.* at 4, 6, 7, 11, 14, 16, 30 ("expand").

But no one argues that a treaty can add to the constitutional powers of Congress or circumvent the constitutional amendment process. The question, instead, is whether an authority set forth in the Constitution itself—the Necessary and Proper Clause—grants Congress the power to implement valid treaties. Surely, if Article I included an express power "to implement treaties," no one would suggest that the making of a treaty "increased" Congress's constitutional powers or circumvented the amendment process. The same is true even though the Constitution confers the implementing power via the general Necessary and Proper Clause rather than singling out treaty implementation specialized mention.

Moreover, it is the very "nature of the Necessary and Proper Clause" to "empower[] Congress to enact laws in effectuation of * * * enumerated powers *that are not within its authority to enact in isolation*," *Raich*, 545 U.S. at 39 (Scalia, J., concurring in the judgment) (emphasis added). This is not only true with respect to the treaty power, but also each of Congress's enumerated powers.

After Congress declares war, for example, it may enact legislation to ensure the effectiveness of the military campaign. Nor is Congress's power to enact Necessary and Proper legislation is not "limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently the power to guard against the immediate renewal of the conflict,

and to remedy the evils which have arisen from its rise and progress." *Stewart* v. *Kahn*, 11 Wall. 493, 507 (1870).

For example, this Court has upheld Congress's authority to toll limitations periods for *state-law* civil and criminal cases during wartime, *ibid.*, and to impose *post-bellum* rent control, *Woods* v. *Cloyd W. Miller Co.*, 333 U.S. 138 (1948).

Perhaps most strikingly, after the armistice with Germany at the close of the First World War, Congress banned the sale of distilled spirits, and then banned the manufacture and sale of all liquors containing as much as one-half of one percent alcohol, principally to "increase efficiency of production in the critical days during the period of demobilization, and help to husband the supply of grains and cereals depleted by the war effort." *Woods*, 333 U.S. at 142. The Court approved each of these measures as valid Necessary and Proper legislation, ancillary to Congress's exercise of its war powers, notwithstanding their deep intrusion into areas ordinarily reserved to the states' police powers. *Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146 (1919); *Ruppert* v. *Caffey*, 251 U.S. 264 (1920).

The same dynamic occurs whenever Congress exercises one of its Article I authorities. Congress often enacts additional measures reasonably designed to ensure the effectiveness of its regulatory scheme, even though such ancillary legislation is not otherwise authorized by any of its enumerated powers. The United States Code is replete with such Necessary and Proper legislation. Well-known examples that this Court has specifically sanctioned include:

- Congress exercises its enumerated powers to tax, spend and borrow, and then incorporates a bank as an efficient means of ensuring their "beneficial execution." *McCulloch*, 4 Wheat. at 415.
- Congress passes laws regulating interstate commerce, and then also regulates "intrastate activities that are not themselves part of interstate commerce" in order "to make a regulation of interstate commerce effective." *Raich*, 545 U.S. at 34-35 (Scalia, J., concurring in the judgment).[9]
- Congress establishes "inferior" federal courts, art. I, § 8, cl. 9, and then affords such courts supplemental jurisdiction over related state claims, and then requires *state courts* to toll the limitations period on such state claims to avoid prejudicing federal claimants. *Jinks* v. *Richland County*, 538 U.S. 456 (2003).
- Congress promulgates regulatory standards and then—to promote more rigorous compliance—establishes hundreds of corresponding federal crimes, most of which could not have been enacted pursuant to an enumerated power standing alone. See *McCulloch*, 4 Wheat. at 416; *Comstock*, 130 S. Ct. at 1949, 1957-58 (citing numerous cases); see also *United States* v. *Kebodeaux*, 133 S. Ct. 2496, 2503 (2013) (civil commitment).

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[9] See also *id.* at 34-38 (citing cases); *id.* at 22 (majority opinion) (Congress could prohibit the intrastate possession and cultivation of marijuana as a necessary and proper means of enforcing its primary objective of suppressing the interstate market).

In these and many other cases, Congress's exercise of an enumerated power does not, as *amici* suggest, "increase" or "expand" Congress's constitutional authority. Instead, it serves as the basis of, and "is bound up with," *Sabri* v. *United States*, 541 U.S. 600, 608 (2004), the exercise of *another* enumerated authority—the Necessary and Proper Clause, which ensures the "beneficial execution," *McCulloch*, 4 Wheat. at 415, of the enumerated power. As Justice Scalia recently explained respecting the relationship between the Commerce and Necessary and Proper powers: "[W]here Congress has the authority to enact a regulation of interstate commerce, 'it *possesses* every power needed to make that regulation effective.'" *Raich*, 545 U.S. at 36 (Scalia, J., concurring) (emphasis added) (quoting *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110, 118-19 (1942)).

The same is true with respect to a valid treaty. When the President and the Senate exercise their enumerated power to make a treaty on behalf of the United States, they do not "expand" Congress's article I powers, for Congress already "possesses every power needed," *ibid.* (internal quotation marks omitted), to make that treaty effective. As Professor Corwin explained seven years before *Holland*,

> the treaty-power cannot purport to amend the Constitution by adding to the list of Congress' enumerated powers, but having acted, the consequence will often be that it has provided Congress with an opportunity to enact measures which independently of a treaty Congress could not pass at all; and the only question * * * will be whether they are 'necessary and proper' measures for the carrying of the treaty in question into operation.

Corwin, *supra* note 5, at 292.[10]

C. *Amici*'s Textual Argument Is Implausible And Ahistorical.

Eighteen pages into their argument, *amici* finally discuss the Necessary and Proper Clause itself—only to argue that it is inapposite, because it does not afford Congress any authority to enact legislation to implement valid treaties. Cato Br. at 22-25.

This counterintuitive conclusion is based on *amici*'s idiosyncratic reading of one constitutional verb. The Necessary and Proper Clause, they note, author-

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[10] *Amici* also devote a section of their brief to the supposed "paradox[]" that, under *Holland*, if the President or a treaty partner were to terminate a treaty, that would effectively "render" the implementing legislation unconstitutional. Cato Br. 14-16. But there is no paradox at all. Such a statute, consistent with obvious congressional intent, simply ceases operation when the treaty terminates—*i.e.*, when the predicate for the statute expires. It would in this respect be analogous to a law making "needful" regulations in a United States territory, see Art. IV, sec. 3, cl. 2, which ceases to operate when that territory is admitted as a State. See *Escanaba & Lake Michigan Transp. Co.* v. *City of Chicago* 107 U.S. 678, 688-89 (1883); see also *Chastleton Corp.* v. *Sinclair*, 264 U.S. 543, 548 (1924) (a "law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed"). And if it were impossible to construe a statute to cease operation when the source of its authority runs dry, the statute would simply cease to be valid—something that would hardly be "strange" or paradoxical" (Cato Br. 15). See*, e.g.*, *United States* v. *Carolene Prods. Co.*, 304 U.S. 144, 153 (1938) ("the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist"); *Staub* v. *City of Baxley*, 355 U.S. 313, 330 (1958) (a law "may be valid at one time and not another").

izes Congress to carry into execution the "Powers" that the Constitution vests in the federal government or in one or more of its branches. They then observe that the Treaty Clause vests the President with the power, subject to Senate consent, "to *make*," but not in terms "to *implement*," treaties.

On *amici*'s view, once a treaty is "made," and the United States is committed to its obligations, the Necessary and Proper Clause drops out of the picture. So, for example, Congress may pass laws "necessary and proper" to fund the travel expenses of treaty negotiators, but it has no Necessary and Proper authority to adopt legislation to implement treaty commitments.

This argument is deeply flawed. To begin, even if it were the case, as *amici* insist, that the Necessary and Proper Clause only empowered Congress to adopt laws facilitating the actual "making" of treaties, laws implementing treaty stipulations would easily satisfy that test. Any nation will be reluctant to enter into treaty relations with another unless the latter provides assurance that it can enforce compliance with its side of the bargain—assurance that comes by demonstrating, and regularly exercising, a capacity to make good on its promises. If Congress were disabled from exercising such a power, the Nation's ability to make treaties with foreign partners would be significantly compromised. Indeed, that was the painful lesson the founders drew from their experience under the Articles of Confederation. See pages 9-10, *supra*.[11]

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[11] *Amici* assume the only federal "power" the legislation might "carry[] into Execution" is the Article II power to "make Treaties." It is at least arguable, however, that the Constitution im-

More fundamentally, *amici*'s mode of constitutional construction would have radical and untenable implications not only in the context of treaties, but also for Congress's exercise of its enumerated powers. After all, the "foregoing powers" in Article I, to which the Necessary and Proper Clause refers, are simply authorities for Congress to *enact laws* of a particular sort. The power to "regulate" commerce, Article I, § 8, cl. 3, for example, is merely the power to enact legislation to that end; and the powers to "coin Money" and to "maintain a Navy," *id.* cls. 5, 13, are merely powers to make laws *providing for* the coining of money and the maintenance of the Navy. See *The Federalist* No. 33, at 202 (Hamilton) (C. Rossiter ed. 1961) ("What is the power of laying and collecting taxes, but a *legislative power*, or a power of *making laws* to lay and collect taxes?"). Thus, each of the particular enumerated powers simply confers upon Congress (and the President) the authority to make laws, just as the Treaty Clause confers on the President and Senate the power to "make" treaties.

Under the logic of *amici*'s reading, then, the Necessary and Proper Clause would only authorize Congress to pass legislation to "carry into execution" the formal process of congressional deliberation and voting: Congress could fund the travel expenses of

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plicitly vests in the United States the power to fulfill its treaty obligations. Cf. *Chae Chan Ping* v. *United States*, 130 U.S. 581, 609 (1889) (recognizing "incident[s] of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the constitution"). If so, the Necessary and Proper Clause confers upon Congress the authority to carry that power into execution as one of the "Powers vested by this Constitution in the Government of the United States." See generally John Mikhail, The Necessary and Proper Clauses, ___ Geo. L.J. ___ (forthcoming 2014).

members to and from the Capitol to debate and vote on a bill to regulate commerce or to declare war—but its Necessary and Proper authority would expire there and then, since the "foregoing *powers*" of Congress will have been fully executed.

Not surprisingly, this Court has never endorsed such a cramped understanding of the Necessary and Proper power. Instead, from the beginning, it has construed the Clause to provide Congress "with ample means" for the execution of its enumerated powers, *McCulloch*, 4 Wheat. at 408—means that necessarily extend beyond those that would facilitate the simple act of making either a law or treaty. It was, after all, the intention "of those who gave these [enumerated] powers[] to insure, so far as human prudence could insure, their *beneficial* execution," *id.* at 415 (emphasis added), so that the federal government is not "incompetent to its great objects," *id.* at 418; accord *Comstock*, 130 S. Ct. at 1956.

An early example, invoked by Chief Justice Marshall in *McCulloch*, illustrates the point. Congress's power "To establish Post Offices and post Roads," Art. I, § 8, cl. 7, "is executed by the single act of *making* the establishment," *McCulloch*, 4 Wheat. at 417 (emphasis added), something Congress accomplished in enacting the first postal law. See Act of Feb. 20, 1792, ch. 7, §§ 1, 3, 1 Stat. 232-34. Yet the Second Congress did not stop there: It also adopted measures prohibiting interference with the delivery of the mails, *id.* §§ 5, 16, 17, 1 Stat. at 234, 236-37—measures that were, as Chief Justice Marshall observed, fully justified because "essential to the beneficial exercise of the [postal establishment] power." *McCulloch*, 4 Wheat. at 417; see also *Comstock*, 130 S. Ct. at 1977 (Thomas, J., dissenting).

On *amici*'s view, however, the Second Congress, *pace McCulloch*, should have rested content with the legislation "establish[ing]" the post offices and post roads—and had no choice but to rely upon the states to punish theft of the mails.

Such a reading of the constitutional text is so implausible as to be self-refuting. And it is even more implausible in the context of the treaty power, given the central role that treaty compliance played in the creation of the Constitution. *Amici*'s approach supposes that the founders chose to leave the federal government dependent upon the states to implement many treaty obligations. But that approach would undermine one of the central reasons for the creation of the Constitution itself, turning on its head the central lesson the founders drew from their experience under the Articles of Confederation. See pages 9-10, *supra*.

D. Holland Is Not a Doctrinal "Anomaly."

Relying primarily on Justice Black's statement for a plurality of the Court in *Reid* v. *Covert* that "no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution," 354 U.S. 1, 16 (1957) (plurality opinion), *amici* argue that *Holland* is a "doctrinal anomaly." Cato Br. 19-21; see also Pet. Br. 26-27, 33-34.

As *amici* put it, "*Reid* is right, and *Holland* is wrong." Cato Br. at 21. But this is a false dichotomy, for, as Justice Black rightly explained in *Reid*, "there is nothing in [*Holland*] which is contrary to the position taken here." 354 U.S. at 18.

In *Reid*, the Court held that a federal statute could not authorize trial by court-martial of civilian

dependents of members of the armed forces serving overseas, because such a trial would violate the jury trial rights protected by Article III and the Fifth and Sixth Amendments. In his plurality opinion, Justice Black explained that even if such trials were contemplated by international agreements, that fact would not salvage the statute, because both treaties and "laws enacted pursuant to them" must "comply with the provisions of the Constitution." 354 U.S. at 16. "The prohibitions of the Constitution were designed to apply to all branches of the National Government," wrote Justice Black, "and they cannot be nullified by the Executive or by the Executive and the Senate combined." *Id.* at 17.

As *Reid* suggests, the Constitution contains many "restraints" that categorically limit the federal government. Thus for example, the government may not punish speech critical of the government (*New York Times Co.* v. *Sullivan*, 376 U.S. 254, 276 (1964)), or court-martial the spouses of service members (*Reid*)—and it cannot do so no matter what the purported source of constitutional authority might be. Such categorical restraints include restrictions derived from the Bill of Rights and other specific textual prohibitions; but they also include certain structural constraints, such as the separation of powers and the system of federalism.

Thus, for example, no matter the source of authority, Congress cannot require the Supreme Court to issue "advisory" opinions revisable by the political branches, see *Hayburn's Case*, 2 Dall. 409 (1792); nor can the federal government abrogate the right of a state under the Guarantee Clause, art. IV, sec. 4, or

violate the "equal footing" doctrine, see *Coyle* v. *Smith*, 221 U.S. 559 (1911).[12]

These generally applicable restraints apply not only to congressional legislation, but also to treaties. See *The Cherokee Tobacco*, 11 Wall. 616, 620 (1870) (a treaty "cannot * * * be held valid if it be in violation of [the Constitution]"). Thus, the President and the Senate are constitutionally prohibited from entering into either a self-executing treaty that effects such an unconstitutional rule itself, or a treaty obliging Congress to enact laws that would transgress such a restraint.

Amici have not identified any respect in which the holding in *Holland* permits the federal government to violate, either by treaty or by treaty-implementing legislation, such a generally applicable restraint. Their principal claim is that "a treaty cannot empower Congress to exceed its enumerated powers and violate the Tenth Amendment." Cato Br. 21. But as we have explained, to say that legislation implementing a valid treaty "exceeds" Congress's enumerated powers is simply to ignore one of those very enumerated powers—the authority to enact legislation Necessary and Proper to implement such a treaty. See also U.S. Br. 46, 53.

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[12] Some federalism principles apply to most, but not all, sources of federal power. For example, although Congress cannot use its commerce authority to abrogate state sovereign immunity, *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44 (1996), it can do so pursuant to its bankruptcy power, see *Central Virginia Community Coll.* v. *Katz*, 546 U.S. 356 (2006), and its enforcement power under the Fourteenth Amendment, see *Seminole Tribe*, 517 U.S. at 59. This case does not require the Court to decide on which side of the line the treaty power would fall with respect to such a restraint.

Amici also point to this Court's statement in *de Geofroy* v. *Riggs,* 133 U.S. 258, 267 (1890), that a treaty cannot promise "a change in the character of the government, or in that of one of the states." Cato Br. 20. The *de Geofroy* dictum, however, concerns a purported limit on the treaty power—not on Congress's power to implement a valid treaty. In any event, even as applied to treaties, the dictum is unremarkable, and perfectly consistent with *Holland*—which is why Justice Black relied upon it in *Reid* even as he was reaffirming *Holland*, 354 U.S. at 17-18.

A treaty cannot, for example, change the "character" of the federal government by requiring federal courts to issue advisory opinions, or by providing that the treaty itself will be deemed ratified upon a simple majority vote of the Senate. Nor can it change the "character" of a state by dictating where its state capital will be, see *Coyle*, or by insisting that its legislature shall be unicameral. Neither the treaty nor the statute in this case, however, has any such impermissible operation.[13]

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[13] *Amici* also cite a statement in *Mayor of New Orleans* v. *United States*, 10 Pet. 662, 736 (1836), that "Congress cannot, by legislation, enlarge the federal jurisdiction, nor can it be enlarged under the treaty-making power." Cato Br. 21. That case, however, had nothing to do with Congress's Necessary and Proper power to implement valid treaty obligations. Indeed, the case did not involve a statute at all. The Court merely held that the real estate in question (a quay) was not part of the public lands transferred in fee to the United States by a self-executing treaty of cession (the Louisiana Purchase) and that, therefore, once Louisiana was admitted to the Union, the United States did not have authority—the "jurisdiction" to which Justice McLean referred—to prevent the City of New Orleans from conveying the quay. In the course of its opinion, the Court af-

Finally, *amici* and petitioner suggest that treaty-implementation statutes must be subject to constraints that specifically apply to statutes implementing Congress's Commerce Clause authority. Cato Br. 20; Pet. Br. 40-41 (citing this Court's decisions in *United States* v. *Lopez*, 514 U.S. 549 (1995), and *United States* v. *Morrison*, 529 U.S. 598 (2000)). But that suggestion confuses the sorts of generally applicable restraints Justice Black referred to in *Reid*—some of which might even be reflected in the scope of an enumerated power—with limitations that are unique to a particular source of federal power.

For example, whether it is acting pursuant to its war, commerce, treaty, or necessary and proper authority, the federal Government cannot enact non-uniform bankruptcy regulations, see *Railway Labor Execs. Ass'n* v. *Gibbons*, 455 U.S. 457, 468-69 (1982), any more than it can punish criticism of the government or prescribe where a state capital will be. The limits this Court has announced with respect to the scope of the Commerce Clause, by contrast—*e.g.*, that Congress can only use that authority to regulate noneconomic, criminal activity when the statute includes a jurisdictional "commerce" element (*Lopez*,

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firmed that although a treaty of cession transfers sovereignty over the ceded lands, the new sovereign does not accede to the prerogatives the ceding power enjoyed under its own constitutional regime. As the Court explained less cryptically in *Lessee of Pollard* v. *Hagan*, 3 How. 212, 225 (1845): "It cannot be admitted that the King of Spain could, by treaty or otherwise, impart to the United States any of his royal prerogatives; and much less can it be admitted that they have capacity to receive or power to exercise them. Every nation acquiring territory, by treaty or otherwise, must hold it subject to the constitution and laws of its own government, and not according to those of the government ceding it." See also Corwin, *supra*, at 290-92.

514 U.S. at 561), or when such regulation is an "essential part of a larger * * * regulatory scheme [that] could be undercut unless the intrastate activity were regulated" (*ibid.*)—apply exclusively to the Commerce Clause; they do not restrict what the federal government can do in exercising any of its other powers. Thus, in appropriate cases, Congress can regulate noneconomic, criminal activity, even in traditional areas of state regulation, and even without a jurisdictional "commerce" element, in implementation of its war, postal, or bankruptcy powers. So, too, can it do so to implement the treaty power, without in any respect contravening the principle affirmed in *Reid*.

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Far from being an "anomaly," then, *Holland's* Necessary and Proper Clause holding reflects one of the central purposes for the creation of the Constitution itself and the consistent course of American history, practice, and law, long before *Holland* and ever since.

CONCLUSION

If the Court concludes that petitioner's conduct was covered by the Chemical Weapons Convention, the Court should affirm the judgment of the court of appeals.

Respectfully submitted.

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